

LISTENING TO INDIGENOUS VOICES: WHAT THE UN DECLARATION  
ON THE RIGHTS OF INDIGENOUS PEOPLES MEANS FOR U.S. TRIBES

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*We, the Indigenous Peoples, walk to the future in the footprints of our ancestors.*

*From the smallest to the largest living being, from the four directions, from the air, the land, and the mountains, the Creator has placed us, the Indigenous Peoples, upon our Mother the Earth.*

*The footprints of our ancestors are permanently etched upon the land of our peoples.*

*We, the Indigenous Peoples, maintain our inherent rights to self-determination.*

*We have always had the right to decide our own forms of government, to use our own laws to raise and educate our children, to our own cultural identity without interference.*

*We continue to maintain our rights as peoples despite the centuries of deprivation, assimilation, and genocide.*

*We maintain our inalienable rights to our lands and our territories, to all our resources – above and below – and to our waters. We assert our ongoing responsibility to pass these on to the future generations.*

*We cannot be removed from our lands. We, the Indigenous Peoples, are connected by the circle of life to our lands and environments.*

*We, the Indigenous Peoples, walk to the future in the footprints of our ancestors.<sup>1</sup>*

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<sup>1</sup> Kari-Oca Declaration and the Indigenous Peoples Earth Charter, Preamble, May 30, 1992, [http://www.idrc.ca/en/ev-30141-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-30141-201-1-DO_TOPIC.html).

## INTRODUCTION

On September 13, 2007, the 61st Session of the United Nations General Assembly voted to approve the Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>2</sup> In a historic turning point, the Declaration affirmed that the world's Indigenous Peoples are "equal to all other peoples" and that "all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind."<sup>3</sup> While the Declaration is significant because it establishes a minimum standard of human rights for the world's Indigenous Peoples, even more importantly it recognizes a fundamental right to survival, dignity, and well-being for some of the world's most vulnerable populations.<sup>4</sup> Not only does the Declaration identify the right of Indigenous Peoples to maintain their cultural distinctiveness without being subject to discrimination by the world's nation-states<sup>5</sup>, it also provides support for the economic, social, and cultural development of Indigenous Peoples worldwide.<sup>6</sup> Equally significant is its recognition of both the individual and collective rights of Indigenous Peoples. Although the Declaration was approved by an overwhelming majority, the United States, Canada, Australia, and New Zealand voted against it.<sup>7</sup> Not surprisingly, these are also the countries that have the most significant Indigenous populations.

Despite the fact that the Declaration is not legally binding on all the Member States of the United Nations, it is vitally important for its revolutionary recognition of Indigenous Peoples' right to self-determination.<sup>8</sup> Although a number of international instruments have focused on Indigenous Peoples,<sup>9</sup> the Declaration is unique for the degree to

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<sup>2</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereafter Declaration].

<sup>3</sup> *See id.* pmbl.

<sup>4</sup> Ban Ki-moon, United Nations Secretary-General, Remarks on International Day of the World's Indigenous People (Aug. 9, 2009), [http://www.un.org/en/events/indigenous\\_2009/sgmessage.shtml](http://www.un.org/en/events/indigenous_2009/sgmessage.shtml).

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See* United Nations Permanent Forum on Indigenous Issues, United Nations Declaration on Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/en/declaration.html>. The Declaration was adopted by an overwhelming majority: 144 states voted in favor of it, 4 voted against it, and 11 nations – Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine – abstained.

<sup>8</sup> G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 591 (2009).

<sup>9</sup> Craig Mokhiber, Officer in Charge, New York Office of the High Commissioner for Human Rights, Declaration is a Historic Document, Out of a Historic Process, Panel Presentation, Indigenous Peoples Caucus, <http://www.ipcaucus.net/Mokhiber.html> (last visited

which, from its inception, the voices of Indigenous Peoples were included in defining and framing solutions to the problems they face.<sup>10</sup> The Declaration is important to the Indigenous world community because it both reflects and sets forth the principles, values, and aspirations of the primary stakeholders.<sup>11</sup> It is impossible to overstate the importance of the role of these stakeholders in the creation and ultimate approval of the Declaration by 144 states in the United Nations. By participating in the creation of the Declaration, Indigenous Peoples ensured the document is not wholly positive law, an extraordinary feat.<sup>12</sup> Prior to the Declaration, Indigenous Peoples had no formal input in the creation of human rights ideals that were meant to affect them. Jeremy Firestone, et al., noted in a 2004 law review article that:

Not only did Indigenous people not participate in the development of international legal norms, but international law is reflective and constitutive of norms which were imposed, typically by force, upon them . . . International law is the product of states and as such reflects the core values and interests of states, rather than Indigenous Peoples against whom it has been employed to effect their subordination.<sup>13</sup>

As such, approval of the Declaration was a momentous change in the way

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Mar. 15, 2010). Mr. Mokhiber states:

[T]he rights contained in the Declaration are not new. There are no new rights in the Declaration from our perspective. They are rights that have been codified by the member states of this organization in countless treaties and have existed for the entire life of this organization since the adoption of the universal declaration of HR. But they are rights that have been violated – if we are to be frank, with impunity – vis-a-vis Indigenous Peoples for as long as these rights have existed. So the Declaration does something that is very useful. It helps us to clarify what are the normative implications and the operational requirements of the existing catalogue of human rights standards that have been adopted by the UN over the years. This clarification occurs in a way that is ‘situation-specific,’ explaining how these pre-existing rights apply to the very particular case of Indigenous Peoples around the world. *Id.*

<sup>10</sup> Susan J. Ferrell, Keynote Address, Visiting Professor Dr. Erica-Irene A. Daes, Sixth Annual Tribal Sovereignty Symposium: *Defending Indigenous Peoples’ Heritage and Autonomy: The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 14 ST. THOMAS L. REV. 259, 261 (2001).

<sup>11</sup> Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*, 45 IDAHO L. REV. 509, 511 (2009).

<sup>12</sup> *See id.*

<sup>13</sup> Jeremy Firestone, Jonathan Lilley, & Isabel Torres de Noronha, *Cultural Diversity, Human Rights and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT’L L. REV. 219, 240-41 (2004).

the world community views the rights of Indigenous Peoples.<sup>14</sup>

However, the continued failure of the United States and Canada to support the Declaration is a significant outstanding concern. In April 2009, Australia's government reversed its original vote opposing the Declaration and formally endorsed it.<sup>15</sup> A year later, in April 2010, the government of New Zealand followed suit and issued a statement announcing that it supports the Declaration.<sup>16</sup> In doing so, Australia and New Zealand have set the moral standard for the two existing no-vote states to follow. Six days after Australia endorsed the Declaration, Canada's Parliament officially urged its government to endorse the Declaration as well.<sup>17</sup> Unfortunately, the Canadian government still refuses to do so. Meanwhile, the position of the Obama administration remains unclear. According to Ambassador Susan E. Rice, the U.S. Permanent Representative to the United Nations, although it has been over two and a half years since the UN approved the Declaration, whether the United States will ultimately endorse it is "under review."<sup>18</sup> It is particularly disturbing that rather than setting an example for the treatment of Indigenous Peoples, the remaining two nations continue to resist adoption of the Declaration's minimal human rights standards, while simultaneously holding themselves up as torchbearers of democratic ideals.

What the Declaration will mean for Indian nations in the United States is unclear. The United States has long acknowledged that it has a unique relationship with Indian tribes and has formally recognized that tribal governments and tribal people have inherent powers of self-government.<sup>19</sup>

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<sup>14</sup> Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539 (2009) (Describing the Declaration, the author looks at main reasons why the world's human rights experts should "take notice" of the Declaration. Mr. Coulter asserts that the Declaration is important because it is the only "major human rights instrument" to have been adopted in many years and that many experts did not believe it was possible to complete a document with the "political and moral force" inherent in the Declaration. He also underscores the importance of the legal elements contained in the document that have never been included in any human rights instrument before.).

<sup>15</sup> Media Release, Australia Human Rights Commission, United We Stand – Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia (Apr. 3, 2009), available at <http://www.hreoc.gov.au/SocialJustice/declaration/index.html>.

<sup>16</sup> Pita Sharples, Supporting UN Declaration Restores NZ's Mana, Apr. 20, 2010, <http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>.

<sup>17</sup> Vive la Canada, U.N. Declaration on the Rights of Indigenous Peoples: Canadian Parliament Calls for Implementation of Critical Universal Human Rights Instrument, Apr. 9, 2009, <http://www.vivelecanada.ca/article/235929873-house-of-commons-calls-for-implementation-of-declaration>.

<sup>18</sup> Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the UN Permanent Forum on Indigenous Issues, Apr. 20, 2010, <http://usun.state.gov/briefing/statements/2010/140600.htm>.

<sup>19</sup> U.N. GAOR, 107th and 108th mtg. U.N. Doc. GA/10612 (Sept. 13, 2007), available at

Still, Indigenous Peoples of the United States undoubtedly have a stake in the U.S. government's ultimate endorsement of the Declaration.<sup>20</sup> Many First People of the United States had a critical voice in the long and arduous process that culminated in the creation and adoption of the U.N. Declaration.<sup>21</sup> The centuries of conflict, subjugation, forced assimilation, and genocide of tribal people in the United States require that the human rights of the Indigenous Peoples of this country are not only recognized, but also implemented by the United States government. By endorsing and implementing the Declaration, the United States would be making a formal commitment to meeting those minimal standards articulated by the world community.

Given the United States' current uncertain position, Tribes face a series of questions. What can Tribes do to achieve support for the Declaration's principles? Should they continue to work towards endorsement and implementation of the Declaration at home? Should they refocus their energy on the U.S. adoption of the Declaration on the Rights of Indigenous Peoples in the Organization of American States? Should Tribes work instead with state and local governments to build a common language with respect to the rights of Tribes and First Peoples of the United States?

This article will explore some of these considerations. Part I will provide a historical context for the Declaration by surveying the

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<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. Even when explaining its no-vote on the Declaration, Robert Hagen, U.S. Advisor on the Declaration on the Rights of Indigenous Peoples to the United Nations, acknowledged:

Under United States domestic law, the Government recognized Indian tribes as political entities with inherent powers of self-government as first peoples. In its legal system, the federal Government had a government-to-government relationship with Indian tribes. In that domestic context, that meant promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, economic activities, and land and resources management. *Id.*

<sup>20</sup> Gale Courey Toensing, *NCAI Endorses U.N. Declaration on the Rights of Indigenous Peoples*, INDIAN COUNTRY TODAY, Nov. 14, 2008, available at <http://www.indiancountrytoday.com/global/undeclaration/34424644.html>. The National Congress of American Indians unanimously adopted a resolution to endorse the Declaration during its annual meeting in October, 2008. The resolution recognized that the UN Declaration on the Rights of Indigenous Peoples "reinforces the respect and protection of full self-determination rights by and on behalf of U.S. Tribal Nations as well as the protection of tribal lands and treaties as a matter of international law and policy and is therefore in the vital interests of all U.S. Tribal Nations." *Id.*

<sup>21</sup> United Nations Permanent Forum on Indigenous Issues, About UNPFII and A Brief History of Indigenous Peoples and the International System, <http://www.un.org/esa/socdev/unpfii/en/history.html> (last visited Mar. 15, 2010).

international recognition of the concept of “Indigenous” rights that led to the adoption of the Declaration. Part II will discuss the positions taken by each no-vote state and the reasoning employed by these states in support of those positions. Part III will focus on how U.S. Tribes might turn the Declaration into a living document in spite of the United States’ continued resistance to do so.

#### I. HISTORY OF THE DECLARATION – THE LONG AND WINDING ROAD

*But our essential message to the world is a basic call to consciousness. The destruction of the Native cultures and people is the same process which has destroyed and is destroying life on this planet. The technologies and social systems which have destroyed the animal and plant life are also destroying the Native people. And that process is Western Civilization.*

*We know that there are many people in the world who can quickly grasp the intent of our message. But experience has taught us that there are few who are willing to seek out a method for moving toward any real change. But, if there is to be a future for all beings on this planet, we must begin to seek the avenues of change.*

*The processes of colonialism and imperialism which have affected the Hau de no sau nee are but a microcosm of the processes affecting the world. The system of reservations employed against our people is a microcosm of the system of exploitation used against the whole world. Since the time of Marco Polo, the West has been refining a process that mystified the peoples of the Earth.<sup>22</sup>*

##### A. *The International Indigenous Peoples’ Movement*

As early as the 1920s, tribal people began appealing to international forums to achieve redress for the harms done to them by other nations.<sup>23</sup>

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<sup>22</sup> Stuart Patterson, *A Basic Call to Consciousness*, Tuscarora Nation, Haudenosaunee, The Hau de no sau nee Address to the Western World, Geneva, Switzerland, Autumn 1997, Akwesasne Notes, Mohawk Nation, Via Roseveltown, NY. <http://www.dialoguebetweenations.com/dd/InternationalActors.htm> (last visited Mar. 15, 2010).

<sup>23</sup> Robert G. Koch, *George P. Decker & Chief Deskaheh*, CROOKED LAKE REV. (Sept. 1992), available at [http://www.crookedlakereview.com/articles/34\\_66/54sept1992/54koch.html](http://www.crookedlakereview.com/articles/34_66/54sept1992/54koch.html).

(Describing efforts of Chief Deskaheh of Iroquois Nation and his attempt to be heard at the meeting of the League of Nations in Geneva in 1923, historian Lawrence Hauptman writes:

The enduring legacy of Deskaheh . . . [w]as not in what he did, but in the way he attempted to change non-Indians’ policy. His words, metaphors, and tactics are still emulated by Iroquois leadership in their determined effort to conserve and

These intermittent appeals to world organizations continued with no appreciable response from the world community until the establishment of the United Nations in 1945.<sup>24</sup> Although Indigenous Peoples were not heard directly by world organizations at this time, the U.N. considered the plight of Indigenous People under the broader umbrella of general human rights work.<sup>25</sup> Minority rights concerns in general, such as slavery, servitude and forced labor, made their way into a number of human rights instruments over the course of several decades.<sup>26</sup> However, human rights issues affecting Indigenous populations did not emerge as a particular focus in the U.N. until 1970 when the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) suggested a study specifically to address discrimination against Indigenous populations.<sup>27</sup> The Sub-Commission ultimately appointed a Special Rapporteur, José R. Martínez Cobo, to study issues of discrimination against Indigenous Peoples.<sup>28</sup> The report that Special Rapporteur Cobo subsequently presented to the Sub-Commission (Cobo Report) is viewed as a “milestone” in U.N. consideration of Indigenous human rights issues.<sup>29</sup> The Cobo Report took over a decade to compile and was submitted over a period of three years from 1981-1984.<sup>30</sup> This report ultimately led to the creation of the Working Group on Indigenous Populations (Working Group) in 1982.<sup>31</sup>

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protect their existence. Iroquois delegates of the league in 1977 and after have retraced Deskaheh's path to Geneva, Switzerland. Under Iroquois-issued passports, they have appealed to the United Nations on behalf of all native peoples, or have taken part in international convocations . . . in their activist determination to publicize their grievances against both the United States and Canadian governments.). *Id.*

<sup>24</sup> G.A. Res. 50/157, ¶ 4, U.N. Doc. A/RES/50/157 (Dec. 21, 1995).

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* The Working Group is a subsidiary organ of the Sub-Commission and was comprised of five members, representing each geographical world region. Mr. Martínez Cobo's report was extremely significant in that it urged both national and international measures be taken to eliminate discrimination against the world's Indigenous Peoples and further address a host of issues critical to their survival. The Cobo Report addressed a penumbra of human rights pertaining to Indigenous Peoples including:

[A] definition of indigenous peoples, the role of intergovernmental and non-governmental organizations, the elimination of discrimination, and basic human rights principles, as well as special areas of action in fields such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, and equality in the



At nearly the same time as the Cobo Report, Indigenous political organizations such as the American Indian Movement (AIM) began to emerge on the international scene.<sup>32</sup> After failed United States federal policies that diminished the condition of Tribal nations and Tribal people, AIM demanded that the voice of Tribal people be heard. AIM turned to the international community and international law to find a means of redress.<sup>33</sup> Shortly after AIM's inception, other international Indigenous groups began to form<sup>34</sup> and articulate their concerns to a wider world community. In 1982, with the establishment of the United Nation's Working Group on Indigenous Populations, Indigenous groups and non-governmental organizations were finally allowed to speak at the Working Group's sessions in Geneva.<sup>35</sup> After nearly 500 years of being ignored in international forums, Indigenous groups were finally being heard.

From its inception, the Working Group generated tremendous interest. As many as 700 representatives ranging from government observers and Indigenous representatives to NGOs and academics attended the sessions regularly, making it "one of the largest United Nations forums in the field of human rights."<sup>36</sup> Though not authorized to hear specific allegations of human rights abuses, the Working Group's mandate was "facilitating and encouraging dialogue between governments and indigenous peoples."<sup>37</sup> In addition, the Working Group was charged with two specific tasks: to "review national developments" that promoted the "human rights and fundamental freedoms of indigenous peoples," and to "develop international standards concerning the rights of indigenous peoples."<sup>38</sup> The task to develop international standards ultimately became the Working Group's focus.<sup>39</sup> It provided Indigenous representatives from all over the world,

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administration of justice. *Id.*

<sup>32</sup> Laura Waterman Wittstock & Elaine J. Salinas, American Indian Movement, A Brief History of the American Indian Movement, <http://www.aimovement.org/ggc/history.html> (last visited Mar. 15, 2010). The American Indian Movement was founded in an attempt to correct those federal policies that had done much to erode the "culture, language, and history" of Native Nations in the US.

<sup>33</sup> Coulter, *supra* note 14, at 543.

<sup>34</sup> Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1153 (2008). The International Treaty Council is an organization of Indigenous People from North, Central, and South America (along with Caribbean and Pacific Islanders). Their goal is to work in international forums, such as the UN, toward the recognition and protection of sovereignty, self-determination and human rights for Indigenous People.

<sup>35</sup> Fact Sheet, *infra* note 47.

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

including U.S. Tribal representatives and Tribal citizens, the opportunity to advocate for issues that were important to their communities.<sup>40</sup> The work on the draft of the Declaration (Draft) began in the Working Group in 1985 and lasted until 1993 when the Draft was submitted to the Sub-Commission.<sup>41</sup>

*B. The First Decade and Draft Declaration*

*[A] number of state governments still refuse to recognize our collective and individual rights as peoples. Our rights are inseparable from our cultures, way of life and our relationship to our lands and our territories. We are peoples with the same rights as all peoples. To deny this is to deny who we are. We are no longer merely objects of international law, we are subjects of international law.*<sup>42</sup>

*We demand to be heard and to be taken into account, that our rights be included in the constitutions of countries, therefore we call to the General Assembly of the United Nations to reflect on the present consideration, that this will not be left as mere expectations. We need, rather, to take action. These are the wishes and feelings of Indigenous Peoples . . . .*<sup>43</sup>

Although Indigenous Peoples have called for recognition in international forums for decades in the hope of increasing the world's awareness of issues concerning them, it was not until 1990 that the United Nations General Assembly finally did heed their call. The General Assembly proclaimed that 1993 would be the "International Year of the World's Indigenous People" (the Year).<sup>44</sup> The central focus of the Year was to develop new partnerships between Indigenous groups and states as well as strengthen existing partnerships.<sup>45</sup> In a historic moment for Indigenous Peoples and the world community, Indigenous leaders spoke for the first time directly from the podium at the General Assembly on December 10, 1992.<sup>46</sup>

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<sup>40</sup> G.A. Res. 50/157, *supra* note 23, ¶ 3, Coulter, *supra* note 14, at 578.

<sup>41</sup> See G.A. Res. 50/157, *supra* note 23.

<sup>42</sup> Mary Simon, Keynote Address, Speech to the United Nations General Assembly, Inuk, Nunavik, Canada, Dialogue Between Nations, Politics of Inclusion (Dec. 10, 1992), <http://www.dialoguebetweenations.com/ddd/InternationalActors.htm>.

<sup>43</sup> Noeli Pocaerra, Presentation on the Inauguration of the International Year of Indigenous People, (Dec. 10, 1992), <http://www.dialoguebetweenations.com/ddd/NoeliPocaerra.htm>.

<sup>44</sup> G.A. Res. 50/157, *supra* note 24.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* Haudenosaunee Faithkeeper, Chief Oren Lyons, Address at the United Nations Organization opening of "The Year of the Indigenous Peoples" (1993) at the United Nations in New York City (Dec. 10, 1992), available at [http://www.ratical.org/many\\_worlds](http://www.ratical.org/many_worlds)

That same year, hundreds of Indigenous representatives attended the Second World Conference on Human Rights in Vienna where they addressed the plenary session.<sup>47</sup> Recommendations for an international decade of Indigenous Peoples and the establishment of a permanent forum for Indigenous Peoples grew out of this conference.<sup>48</sup> Six months after the World Conference in Vienna, the General Assembly established the International Decade of the World's Indigenous People (the First Decade),<sup>49</sup> which notably encouraged Indigenous Peoples worldwide to express the urgent need for Indigenous human rights protection.<sup>50</sup>

The goal of the First Decade was to “strengthen international cooperation for the solution of problems faced by Indigenous people” in a number of prescribed areas.<sup>51</sup> The General Assembly report acknowledged that, on the cusp of the new millennium, Indigenous Peoples continued to be the poorest and most marginalized people on earth. Furthermore, the General Assembly stressed that it was incumbent on the world community to establish a framework for addressing the most pressing areas of concern,<sup>52</sup> including human rights, the environment, health, culture, and education. The U.N. ultimately established a permanent forum on Indigenous issues in 1995 that included governmental and Indigenous representatives.<sup>53</sup>

To address the areas of concern highlighted by the report, the Assembly designed a “programme of activities for the Decade” which included developing mandates for existing U.N. agencies, in addition to other international communities and groups.<sup>54</sup> The Assembly's list of objectives included educating Indigenous and non-Indigenous people about human

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/6Nations/OLatUNin92.html.

<sup>47</sup> Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples, para. “World Conference on Human Rights,” available at <http://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf> (last visited Mar. 15, 2010). The second World Conference was held in Vienna in June 1993. The Vienna conference called on the international community to make a commitment to the “economic, social and cultural well-being” of Indigenous people and, further, asked states to “take positive steps” to ensure that their country “ensure respect for all human rights and fundamental freedom of Indigenous people . . .” *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* The International Decade of the World's Indigenous People (1995-2004) was established by UN Res. 48/163 on Dec. 21, 1993.

<sup>50</sup> IWGIA, Strategy for the 2d Decade on Indigenous Peoples, <http://www.iwgia.org/sw617.asp> (follow “Strategy Papers” hyperlink; then follow “Strategy for the 2nd Decade on Indigenous Peoples” hyperlink) (last visited Mar. 15, 2010).

<sup>51</sup> G.A. Res. 50/157, *supra* note 24.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (“[A] workshop was held in June 1995 in Copenhagen. Participants included 21 representatives of Governments, 21 delegates from Indigenous Peoples and 2 independent experts. The issues discussed were the scope of a permanent forum . . .”).

<sup>54</sup> *See id.*

rights protections in conjunction with the United Nations Decade for Human Rights Education.<sup>55</sup> Additional core objectives included providing protection and support for Indigenous Peoples and strengthening their cultural identities, values, and traditions<sup>56</sup> while working within existing political state organizations.

As important as these events were towards establishing an Indigenous human rights platform, they have invited deserved criticism because Indigenous representatives were given a mere “three to five” minutes to express specific concerns affecting their respective communities.<sup>57</sup> The very short time allotted Indigenous representatives is in stark contrast to the ten to fifteen minutes allotted state representatives speaking in “state-centered” forums.<sup>58</sup> In spite of this obvious inequity, Indigenous organizations used the forums to interact with their colleagues and develop strategies,<sup>59</sup> while also making progress advancing the interests of Indigenous Peoples during the First Decade. However, it is telling that while two-thirds of the Indigenous representatives believed progress was made as a result of the work done in that ten-year period, forty-four percent indicated they saw no local improvements in those ten years.<sup>60</sup>

#### 1. The Draft Declaration

Work on the Draft Declaration began shortly after the establishment of the Working Group in 1982. The first draft was sent to the Sub-Commission six years later in 1988.<sup>61</sup> It is estimated that more than 400 Indigenous delegations<sup>62</sup> from all over the world made significant and substantive contributions to the text during the drafting process.<sup>63</sup> Dr. Erica-Irene A.

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<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> Jeff Cortassel, *Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade (1995-2004)*, Hum. Rts. Q. 137, 142 (2007) (critiquing effectiveness of Indigenous Rights “networking” during the UN’s First International Decade and positing that the process of mainstreaming Indigenous rights issues in “state-centered” forums gives “illusion of inclusion” into the UN system).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 160 (citing a survey conducted by the UN Office of the High Commissioner on Human Rights).

<sup>61</sup> John Beidelschies, *The Impact of the United Nations Declaration on the Rights of Indigenous Peoples on Wisconsin Tribes*, 26 WIS. INT’L L. J. 479, 481 (2008).

<sup>62</sup> Cortassel, *supra* note 57, at 150.

<sup>63</sup> Dr. Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations Draft Declaration on The Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 494 (1999). Throughout the drafting process, the Working Group arranged for meetings of Indigenous representatives and further assisted by ensuring translations services

Daes, Chairperson and Rapporteur of the United Nations Working Group on Indigenous Populations, has described the efforts of the Working Group to arrange for a number of support mechanisms that facilitated Indigenous participation in the process.<sup>64</sup> The ultimate result was a process that supported and encouraged an open “democratic procedure” with “broad and unified Indigenous input.”<sup>65</sup> According to Dr. Daes, no other human rights document included the depth of input from “its intended beneficiaries” as did the Draft.<sup>66</sup>

The Commission on Human Rights began its work on the Draft in 1994 and over the next twelve years worked on revisions of the text until finally submitting it to the Human Rights Council, which then adopted it in 2006.<sup>67</sup> The Draft contained nineteen preambular provisions and forty-five articles<sup>68</sup> reflecting the “fundamental principles of equality and non-discrimination,” and unambiguously recognize the right of Indigenous People to self-determination and to a cultural and collective identity.<sup>69</sup> In addition, the Draft provides specific responsibilities of states and the international community regarding implementation of those rights.<sup>70</sup>

While there is no doubt that the Draft was a remarkable achievement, it was not without its opponents. Its strongest critics opposed key language in the text that defined Indigenous Peoples as “peoples” who were entitled to all the rights associated with “self-determination” because they were concerned that the use of such terms might entitle Indigenous Peoples to a right of secession.<sup>71</sup> Other criticism focused on the recognition, for the first time, of the collective rights of Indigenous Peoples to “land, culture, education, language, and institutions of government.”<sup>72</sup> At issue in particular were Articles 2, 3, 19, 31, and 38 of the Draft, dealing with self-determination, and Articles 25 and 30, dealing with land and resource

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were available so that Indigenous groups could meet, consult and engage in consensus building on draft provisions.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> Beidelschies, *supra* note 61, at 496.

<sup>68</sup> Draft Declaration on The Rights of Indigenous Peoples, 1994, *available at* <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/e.cn.4.sub.2.res.1994.45.en?op=endocument> [hereafter Draft].

<sup>69</sup> Daes, *supra* note 63, at 495.

<sup>70</sup> *See id.*

<sup>71</sup> Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J INT’L & COMP L. 385, 394-95 (2004) (As Professor Graham explains, critics of this language cite to these provisions in spite of fact that nothing in Draft either authorizes or encourages such action).

<sup>72</sup> *See id.*

issues.<sup>73</sup> Article 3 of the Draft states that Indigenous Peoples have a right to self-determination and as such, may freely determine their political status, as well as their economic, social, and cultural development.<sup>74</sup> This language remained an issue for Australia, New Zealand, and the United States throughout the Working Group's work on the Draft during the 10th Session in Geneva in 2004.<sup>75</sup>

## 2. Lessons Learned from the First Decade and Developing Strategies for the Second

The Second International Decade of the World's Indigenous Peoples (Second Decade) was declared by the Assembly in December 2004.<sup>76</sup> One of the principal goals for the Second Decade was developing international cooperation and problem-solving mechanisms that specifically address the on-going issues Indigenous Peoples face.<sup>77</sup> The work that began in the First Decade brought with it the hope that their governments would embrace a new partnership between Indigenous Peoples and their States.<sup>78</sup>

However, it did not take long to learn that, in spite of the principles and programs articulated in the goals set forth in the First Decade, there continued to be reluctance on the part of both regional and national governments to translate the goals into any meaningful commitments in their home states.<sup>79</sup> Nevertheless, the First Decade had a positive outcome in two critical respects. First, Indigenous Peoples gained invaluable experience in using U.N. mechanisms to bring attention to on-going human rights violations on their own behalf.<sup>80</sup> As a result, Indigenous Peoples became "experts in standard-setting" and promoting their human rights within the U.N. framework.<sup>81</sup> Second, the U.N. Permanent Forum on Indigenous

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<sup>73</sup> Draft, *supra* note 68.

<sup>74</sup> Graham, *supra* note 71.

<sup>75</sup> Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, 10th Session (final week), Plenary session – Debate on self-determination: Article 3, Geneva, Switz., (Nov. 29-Dec. 3, 2004).

<sup>76</sup> U.N. Permanent Forum on Indigenous Issues (UNPFII), International Work Group on Indigenous Affairs, The Second International Decade of the World's Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/en/second.html> (last visited Mar. 15, 2010) (The Second Decade was adopted by the UN General Assembly as resolution (59/174) and officially commenced on Jan. 1, 2005).

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* In reviewing the outcomes of the first Decade, IWGIA's report on strategies for the second Decade found that as Indigenous Peoples found their voice in the UN systems, they simultaneously began to build Indigenous networks that in turn began to create strategies for

Issues (Permanent Forum) was established early in the First Decade.<sup>82</sup>

The Permanent Forum became the key focus of Indigenous Peoples for the remainder of the First Decade and yielded a number of insights as they learned how to move issues through the forum process.<sup>83</sup> Prior to its establishment, the primary mechanism of the U.N. used by Indigenous Peoples was the Working Group.<sup>84</sup> In addition to the Working Group's mandate to support and encourage dialogue between governments and Indigenous Peoples,<sup>85</sup> the Working Group was charged with reviewing issues that arose with respect to human rights and fundamental freedoms of Indigenous People, analyzing these issues, and then reporting its conclusions to the Sub-Commission.<sup>86</sup> It was also charged with keeping abreast of any changes in international human rights standards pertaining to Indigenous Peoples.<sup>87</sup>

The International Working Group for Indigenous Affairs (IWGIA),<sup>88</sup> an Indigenous organization that works to promote Indigenous Peoples' right to self-determination, cultural integrity and right to development, outlined its aims for the Second Decade of Indigenous Peoples by highlighting First Decade goals that were never reached,<sup>89</sup> such as producing a declaration on the rights of Indigenous Peoples. NGOs like IWGIA reaffirmed this as a primary goal moving into the Second Decade. Thus, IWGIA developed a set of strategies and activities to support production of a declaration on the rights of Indigenous Peoples.<sup>90</sup> IWGIA's stated objective was to ensure that the document that was eventually adopted by the U.N. would continue to be

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developing expertise and bringing important issues to the fore in UN as well as at other international events.

<sup>82</sup> *See id.*

<sup>83</sup> *See* IWGIA, The Working Group on Indigenous Populations, <http://www.iwgia.org/sw8632.asp> (last visited Mar. 15, 2010).

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

<sup>88</sup> The Indigenous Working Group for Indigenous Affairs is an Indigenous organization that works to promote Indigenous Peoples' right to self-determination, cultural integrity and right to development. IWGIA works within a wide range of areas including publication, human rights, lobbying, advocacy, and research.

<sup>89</sup> Second International Decade of the World's Indigenous People, G.A. Res. 59/174, U.N. Doc. A/RES/59/174 (Dec. 20, 2004).

<sup>90</sup> *See* IWGIA, Strategy Papers, <http://www.iwgia.org/sw17731.asp> (follow link for "Strategy for the 2nd Decade on Indigenous Peoples"). IWGIA established additional goals for the Second Decade focused on the relationships between Indigenous Peoples and the states, and developing more concrete agreements between the parties, using the Second Decade to concentrate on issues of land, political, and cultural rights, and to address the issue of the landless Indigenous poor in urban areas in developing nations.

relevant to Indigenous Peoples around the world<sup>91</sup> through on-going consideration of the diversity of Indigenous Peoples and their unique social, political, and economic needs.<sup>92</sup> While some Indigenous populations had constitutional or legal rights to be represented in legislative bodies at the local or national level,<sup>93</sup> not all Indigenous populations were taking advantage of the structures already in place that would provide them a critical voice at the table.<sup>94</sup> IWGIA strove to take advantage of the opportunity to participate in the process where this right was already recognized, and to create it where it was not.<sup>95</sup>

### 3. The Declaration

*[T]he important and historic standing-setting process that started in the period following the first session of the Commission was still continuing, and it remained an unfinished task for the indigenous peoples of the world and for the United Nations, as they still did not have the legal instruments needed to protect their basic rights and freedoms. A strong declaration was urgently needed to protect the health and well-being of the world's indigenous peoples. Correcting the wrongs of the past and securing justice for indigenous peoples could be achieved if a strong declaration was achieved soon.*<sup>96</sup>

The journey to the Declaration's eventual adoption in September 2007 began sixty years earlier with the ratification of the Universal Declaration of Human Rights (UDHR). That extraordinary document espoused the "inherent dignity and equality of all human beings,"<sup>97</sup> and was the first international instrument to articulate a set of universally applicable individual rights.<sup>98</sup> It did not, however, specifically recognize Indigenous Peoples or define a set of collective rights, such as rights to land or rights to

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<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *Id.* at 7.

<sup>95</sup> *See id.*

<sup>96</sup> Statement by Secretary-General's Representative on Internally Displaced Persons Addresses Commission on Human Rights, Darwin Hill, Seneca Nation, Haudenosaunee Confederacy, Indian Law Resource Centre, Commission Starts Debate on Specific Groups and Individuals after Concluding Discussion on Child Rights and Indigenous Issues (Apr. 11 2005), available at <http://www.dialoguebetweennations.com/ddd/InternationalActors.htm>.

<sup>97</sup> UNHCR, Secretary-General Ban Ki-moon, Message on the Occasion of the 60th Anniversary of The Declaration of Human Rights (Dec. 10, 2007), available at <http://www.ohchr.org/EN/UDHR/Pages/60UDHRSGStatement.aspx>.

<sup>98</sup> *See generally*, Universal Declaration on Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d. Sess., 1st plen. Mtg., U.N. Doc. A/8 10 (Dec. 12, 1948).



culture.<sup>99</sup> The world community has since recognized these collective rights as critical to the survival of many of the world's Indigenous Peoples. Nonetheless, the UDHR was an important first step, paving the way for protection of these rights as later instruments were created.<sup>100</sup>

The Declaration on the Rights of Indigenous Peoples is a reflection of the principles and foundations of existing international human rights law and affirms those rights specifically for Indigenous Peoples.<sup>101</sup> Before its passage, no international human rights standards were created specifically for Indigenous Peoples.<sup>102</sup> Although all international human rights laws are meant to be interpreted and applied equally to all people throughout the world, including Indigenous Peoples, the Declaration unequivocally restates this proposition: "Indigenous Peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international law."<sup>103</sup>

Since the Declaration's adoption, most agree that now the challenge is implementation.<sup>104</sup> However, recent arguments have been made that even without formal implementation, it is already becoming customary international law.<sup>105</sup> For instance, in its October 18, 2007, decision in *Maya Villages of Santa Cruz and Conejo v. the Attorney General of Belize*, the Supreme Court of Belize affirmed the traditional land and resource rights of the Maya, reasoning that particularly in light of the fact that Belize voted for the adoption of the Declaration, the Belize government could not disregard

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<sup>99</sup> *See id.*

<sup>100</sup> Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT'L LEGAL STUD. 205, 208 (1999).

<sup>101</sup> U.N. Office of the High Comm'r for Hum. Rts., Hum. Rts. Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, ¶ a/HRC/9/9 (Aug. 5, 2008) (prepared by S. James Anaya).

<sup>102</sup> *See generally* S. James Anaya, INDIGENOUS IN INTERNATIONAL LAW 49-72 (2d ed. 2004) (chapter on Developments Within the Modern Era of Human Rights). Since the 1980's there has been an emerging body of international law that has paid particular attention to Indigenous Peoples. Specifically, the International Covenant on Civil and Political Rights (ICCPR), which creates a right to cultural integrity and the right to land and resources for Indigenous Peoples. The Committee on the elimination of Racial Discrimination (CERD) adopted specific recommendations and obligations with regard to the protection of Indigenous cultural identity, language, and economic and social development.

<sup>103</sup> Universal Declaration, G.A. Res. 217A, *supra* note 100.

<sup>104</sup> Victoria Tauli-Corpuz, Paper of the UNPFII Chair, Paper presented at the Indigenous Peoples Summit in Ainu Mosir Hokkaido, Japan, (July 1-4, 2008), *available at* [http://www.tebtebba.org/index.php?option=com\\_content&view=article&id=22:the-challenges-of-implementing-the-un-declaration-on-the-rights-of-Indigenous-peoples-&catid=50:unpfii](http://www.tebtebba.org/index.php?option=com_content&view=article&id=22:the-challenges-of-implementing-the-un-declaration-on-the-rights-of-Indigenous-peoples-&catid=50:unpfii).

<sup>105</sup> *See id.*

these rights.<sup>106</sup> Certainly there are those who reject the notion that Tribal nations can or should use customary international law to support domestic positions, however, the emerging body of law makes a clear statement to the no-vote states and provides a compelling standard in cases where Indigenous Peoples' rights are at stake.

## II. THE DECLARATION AND NO-VOTE STATES

### A. Australia and the Declaration

*Some may question the practicality of the decision by the Australian government today in supporting the Declaration. The fact of the existence of human rights standards is not the source of Indigenous disadvantage. Human rights do not dispossess Indigenous Peoples, they do not marginalise them, they do not cause their poverty, and they do not cause the gaps in life expectancy and life outcomes. It is the denial of rights that is a large contributor to these things. The value of human rights is not in their existence; it is in their implementation. That is the challenge for the world with this Declaration. The standards are set. It is up to us to meet them.*<sup>107</sup>

*As Aboriginal and Torres Strait Islander people we have to learn what that means and how to act as 'peoples' and not individuals. The national representative body now assumes a new importance and its establishment and operations will be put to the test by communities who have struggled long and hard to survive to get to this stage. Over the coming weeks and months we are going to hear a lot being said about relations between government and communities. It is a time to listen, learn and contribute.*<sup>108</sup>

When the 61st General Assembly of the United Nations convened on September 13, 2007 to vote on the Declaration, there was recognition that its final adoption was the culmination of nearly 25 years of "contentious

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<sup>106</sup> *Id.* (citing *Maya Vill. of Santa Cruz v. Att'y Gen. of Belize* (Sup. Ct. Belize Oct. 18, 2007) (unreported), available at [https://www.law.arizona.edu/Depts/iplp/advocacy/maya\\_belize/documents/ClaimsNos171and172of2007.pdf](https://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf)).

<sup>107</sup> Michael Dodson, Pacific community nominated member and Forum rapporteur, United Nations Permanent Forum on Indigenous Issues, Mural Hall – Parliament House, Canberra, Apr. 3, 2009, available at [http://www.un.org/esa/socdev/unpfii/documents/Australia\\_endorsement\\_U.N.DRIP\\_Michael\\_Dodson\\_statement.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_endorsement_U.N.DRIP_Michael_Dodson_statement.pdf).

<sup>108</sup> Les Malezer, Chairperson, The Foundation for Aboriginal and Islander Research Action on the Announcement of Australia's Support of the UN Declaration on the Rights of Indigenous Peoples, Apr. 6, 2009, available at <http://www.dialoguebetweenations.com/LesMalezer.pdf>.

negotiations.”<sup>109</sup> Perhaps the most hotly contested negotiations centered on rights to the protection of land and resources of Indigenous populations.<sup>110</sup> Prior to the vote, permanent representatives of Australia, New Zealand, Canada and the United States were given an opportunity to state before the Assembly why they would not support the text of the Declaration.<sup>111</sup>

In explaining Australia’s no-vote, Ambassador Robert Hill expressed disappointment that Australia, among others, had been denied an opportunity to negotiate on the final draft of the Declaration.<sup>112</sup> He therefore felt that the resulting draft fell short of a workable standard,<sup>113</sup> underscoring the concern with key provisions and references in the text. In particular, provisions referring to Indigenous populations’ right to self-determination; compensation for land and resources; and the requirement of free, prior, and informed consent were objectionable to Australia.<sup>114</sup> Not surprisingly, Australia’s objections closely mirrored those made by New Zealand and Canada. These states, along with the United States, shared similar colonial histories and structures, and feared that they had the most to lose through adoption of the Declaration.

In spite of Australia’s original opposition, with the election of a new government in 2007 there came a change in position regarding the Declaration.<sup>115</sup> In a remarkable statement made by Jenny Macklin, MP, and Minister for Families, Housing, Community Services and Indigenous Affairs, to the House of Parliament in April 2009, Australia reversed its

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<sup>109</sup> U.N. Doc, GA/10612, *supra* note 19, at 1.

<sup>110</sup> *See id.*

<sup>111</sup> *Id.* at 5.

<sup>112</sup> Hon. Robert Hill Ambassador and Permanent Representative of Australia to the United Nations, Remarks in Explanation of His No-vote (Sept. 13, 2007), *available at* [http://www.australiaun.org/unny/GA\\_070913.html](http://www.australiaun.org/unny/GA_070913.html). Ambassador Hill contended that had they had an opportunity to meet with the UN Membership that this would have resulted in an improved document and one that would have resulted in consensus.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* Additional objections were made to the provision in the Declaration that dealt with intellectual property, third-party rights, and customary law. With respect to intellectual property rights, which New Zealand also noted as objectionable but chose not to elaborate on, Australia’s position was that it:

Does not support the inclusion in the text of intellectual property rights for Indigenous Peoples. Australia extends protection to Indigenous cultural heritage, traditional knowledge and traditional cultural expressions to the extent that it is consistent with Australian and international intellectual property law. However, Australia will not provide *sui generis* intellectual property rights for Indigenous communities as envisaged in this Declaration. *Id.*

<sup>115</sup> Prime Minister John Howard (Mar. 1996-Dec. 2007) replaced by Prime Minister Kevin Rudd (Dec. 2007-present).

earlier decision to oppose the Declaration.<sup>116</sup> In this statement, the Australian government acknowledged the importance of the Declaration and affirmed its representation of the aspirations of all Indigenous Peoples.<sup>117</sup> It underscored the importance of the Declaration by acknowledging the effort made by governments and Indigenous Peoples to work together in order to create a document that “recognizes the legitimate entitlement of Indigenous people to all human rights – based on principles of equality, partnership, good faith and mutual benefit.”<sup>118</sup>

Australia’s endorsement of the Declaration was welcomed by the U.N. for its “crucial importance” in strengthening international consensus on Indigenous Peoples’ rights worldwide.<sup>119</sup> The Australian government’s commitment to work internationally to strengthen and promote human rights *vis-à-vis* Indigenous Peoples is equally important. The Australian government also made a commitment to honor and celebrate Indigenous Australians’ contributions and to support Indigenous leadership and representation in Australian national affairs.<sup>120</sup> The Australian Human Rights Commission heralded their national government’s change of position, recognizing that “[w]hile substantial challenges remain for Aboriginal and Torres Strait Islander Peoples in Australia, support for the Declaration can unleash Australia’s potential to be a world leader on how it engages with its Indigenous Peoples.”<sup>121</sup>

While the government of Australia has clearly made an important step toward improving the lives of its Indigenous Peoples by supporting the Declaration, more can and should be done to advance human rights there.<sup>122</sup> Special Rapporteur James Anaya made a number of important observations and recommendations to the Australian government following his visit in August 2009. In particular, he recommended strengthening existing

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<sup>116</sup> Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009), [http://www.un.org/esa/socdev/unpfii/documents/Australia\\_official\\_statement\\_endorsement\\_UNDRIP.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf).

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> U.N. News Service, Experts Hail Australia’s backing on UN Declaration of Indigenous Peoples’ Rights, U.N. (Apr. 3, 2009), <http://www.un.org/apps/news/printnewsAr.asp?nid=30382>.

<sup>120</sup> *See id.*

<sup>121</sup> Press Release, Austl. Human Rights Comm’n, United We Stand: Support for United Nations Indigenous Rights Declaration (Apr. 3, 2009), *available at* [http://www.hreoc.gov.au/about/media/media\\_releases/2009/21\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html).

<sup>122</sup> *See generally*, James Anaya, U.N. High Commissioner for Human Rights, Statement on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Aug. 27, 2009) *available at* <http://www.unhcr.ch/Hurricane/Hurricane.nsf/f161d566b36240f8802566100031b4c0/313713727c084992c125761f00443d60?OpenDocument>.

programs implemented by the government to “close the gap” in social and economic advantages and, perhaps more importantly, coordinating these programs to support already existing Indigenous programs.<sup>123</sup> Additionally, Mr. Anaya raised concerns about the Northern Territory Emergency Response infringing on basic rights of Indigenous Peoples.<sup>124</sup> In Mr. Anaya’s view, this program should be reformed to comply with U.N. conventions to which Australia is already a party, as well as made compatible with the Declaration itself.<sup>125</sup> He proposed that the government work more closely, in “real partnership,” with the Indigenous Peoples of Australia to create more “culturally appropriate” mechanisms that address their most difficult issues.<sup>126</sup>

When Australia’s change of position on the Declaration, it renewed supporters’ hopes that the remaining hold-out states of New Zealand, Canada, and the United States, would reconsider their opposition as well. While New Zealand has changed its position, it remains important to consider the positions of these countries in the two and a half years following adoption of the Declaration by the United Nations. It is equally important to assess what Indigenous Peoples and other supporters of the Declaration in these countries have done to pressure their governments into changing their respective positions.

#### *B. New Zealand and the Declaration*

*New Zealand was one of only four states that voted against the Declaration on the Rights of Indigenous Peoples in September 2007. 143 voted for and 11 abstained. At the same time, walk into the Ministry of Foreign Affairs and Trade and you will be struck by the Maori art on the walls and that the only book on the coffee table celebrates Maori carving. And, the brochure for New Zealand’s candidature for the Human Rights Council includes a nice photo of an old koro in a cloak, and the comment that Indigenous rights are integral to the New Zealand identity. The hypocrisy jars.*<sup>127</sup>

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<sup>123</sup> See generally, James Anaya, U.N. High Commissioner for Human Rights, Statement on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Aug. 27, 2009) available at [http://www.unhcr.ch/Hurricane/Hurricane.nsf/f161d566\\_b36240f8802566100031b4c0/313713727c084992c125761f00443d60?OpenDocument](http://www.unhcr.ch/Hurricane/Hurricane.nsf/f161d566_b36240f8802566100031b4c0/313713727c084992c125761f00443d60?OpenDocument).

<sup>124</sup> See Northern Territory Emergency Response: The Intervention, Creative Spirits, <http://www.creativespirits.info/aboriginalculture/politics/northern-territory-intervention.html> (last visited Mar. 15, 2010).

<sup>125</sup> See generally, Anaya, *supra* note 102.

<sup>126</sup> See *id.*

<sup>127</sup> Claire Charters, Ngati Whakaeue, Nga Puhi, Ngati Tuwharetoa and Tainui, *Current Human Rights Issues and Future Challenges for Human Rights and New Zealand: A Maori Perspective*, NZCPL & NZ Institute of International Affairs, Celebrating 60 years of the Universal Declaration of Human Rights Conference, Dec. 11, 2008.

While Australia's shift in position on the Declaration was lauded by the international community and Indigenous People worldwide, New Zealand has only recently followed its lead. When New Zealand explained its original no-vote on the Declaration to the U.N. General Assembly, it asserted not only that it believed that the rights of Indigenous Peoples were of "profound importance" but also that New Zealand had, in fact, already implemented a majority of the standards articulated in the Declaration.<sup>128</sup> Specifically, New Zealand pointed to the Treaty of Waitangi<sup>129</sup> as the country's "founding document," and described its centrality in New Zealand's legal and constitutional arrangements.<sup>130</sup> In spite of New Zealand's professed support for Indigenous rights, its reasons for rejecting the Declaration rested on the language of several specific articles.<sup>131</sup> In particular, New Zealand addressed Article 26 (right to lands and resources), Article 28 (right to redress for lands already taken), Article 19 (right to informed consent), and Article 32 (right of veto).<sup>132</sup>

Preambular provisions of the Declaration provide guidance on the obligations of states in accordance with the U.N. Charter<sup>133</sup> and set the tone for its substantive articles.<sup>134</sup> Specifically, the preambular provisions describe concerns over the historic dispossession of lands and territories of Indigenous Peoples and acknowledge that control over developments that affect their lands and resources will strengthen their cultures and

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<sup>128</sup> Rosemary Banks, N. Z. Permanent Representative to the U.N., Explanation of No-vote, Sept. 13, 2007, <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php>.

<sup>129</sup> Treaty of Waitangi 1840, N.Z. History Online, <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text>. (last visited Mar. 15, 2010).

<sup>130</sup> Banks, *supra* note 128.

<sup>131</sup> *See id.*

<sup>132</sup> *See* (noting other provisions in the text that New Zealand had trouble reconciling with, but chose not to include them in their remarks to the General Assembly on the day).

<sup>133</sup> *See* Declaration, *supra* note 3, ¶ 9-10 61/295, ¶ 9-10, A/RES/61/295 (Sept. 13, 2007) (citing specific preambular paragraphs concerning land rights:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.). *Id.*

<sup>134</sup> Claire Charters, *The Rights of Indigenous Peoples*, N.Z.L.R. 335-37, (Oct. 2006) (responding to New Zealand's objections to the Declaration).

traditions.<sup>135</sup>

Article 26 of the Declaration states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>136</sup>

New Zealand has taken the position that it would be impossible to implement Article 26 because the entire country would essentially fall under the article's scope.<sup>137</sup> The government contended that Article 26 required the state to formally recognize lands that are now owned and occupied by "other citizens" and further, that this does not actually comport with the traditional land use of New Zealand's Indigenous Peoples.<sup>138</sup> Additionally, the government expressed concern that Article 26 essentially provided the Indigenous population of New Zealand with rights not conferred on other citizens of the state.<sup>139</sup>

New Zealand's complaint with respect to Article 28 was that it, too, was s "unworkable" and that there was an existing domestic framework for resolving issues of compensation.<sup>140</sup> Article 28 addresses issues of redress and just compensation for lands traditionally held by Indigenous Peoples:

1. Indigenous Peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories

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<sup>135</sup> Declaration, *supra* note 2, ¶ 9-12.

<sup>136</sup> *Id.* art. 26.

<sup>137</sup> Banks, *supra* note 128.

<sup>138</sup> *See id.* (describing those "other citizens" as both Indigenous and non-Indigenous).

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.<sup>141</sup>

New Zealand's argument not only explicitly addressed the text, but it also expressed concern that the Declaration did not take into account the land that is now "legitimately" owned by others, and the possibility of numerous and perhaps "overlapping" claims by Indigenous Peoples.<sup>142</sup> Additionally, New Zealand argued that there is no way to compensate its Indigenous population for the "entire country."<sup>143</sup>

Lastly, New Zealand argued that Articles 19 and 32(2) create a "different class of citizenship" by allowing Indigenous Peoples a "right of veto" that other citizens do not have.<sup>144</sup> Article 19 provides:

1. States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>145</sup>

Article 32(2) specifically states:

2. States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>146</sup>

New Zealand asserted that these articles would, in effect, trump preexisting democratic legislative processes in which Maori are already full and active participants.<sup>147</sup> The government was also careful to point out that pursuant to the principles of the Treaty of Waitangi, institutional safeguards for consultation were already a part of the state's resource management law.<sup>148</sup>

When New Zealand opposed the Declaration in September 2007, some critics emphasized that contrary to the New Zealand government's stated position of longtime support for Indigenous Peoples' rights, they have in fact

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<sup>141</sup> Declaration, *supra* note 2, art. 28.

<sup>142</sup> See Banks, *supra* note 128 (arguing much the same as New Zealand's opposition to the text of Article 26).

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> Declaration, *supra* note 2, art. 19.

<sup>146</sup> *Id.* at art. 32(2).

<sup>147</sup> See Banks, *supra* note 128.

<sup>148</sup> See *id.*



consistently opposed them.<sup>149</sup> These critics argue that the New Zealand government spoke out against the Declaration when it was still in the drafting stage, and that its attempts to change the language of the text prior to the presentation before the General Assembly are evidence of this opposition.<sup>150</sup> Critics of the government's position have also argued that the assertion that the principal articles of "central concern" are "discriminatory in the New Zealand context" reveals New Zealand's refusal to consider the Declaration as a whole.<sup>151</sup> These critics refer to Article 46 of the Declaration which, rather than conferring special rights on a few, actually protects the rights of all, thereby illustrating how New Zealand's approach leads to a "misrepresentation of the Declaration as a whole."<sup>152</sup> Others have asserted that New Zealand's underlying political impetus for opposing the Declaration is to undermine the broader international Indigenous rights movement so that it can move international Indigenous rights law closer to its own domestic laws and policy.<sup>153</sup>

Australia's change of position on the Declaration increased the momentum of Indigenous groups and human rights advocates to encourage New Zealand, as well as Canada and the United States, to do the same. A number of human rights advocates and Indigenous representatives continued

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<sup>149</sup> Act Now to Support the United Nations Declaration on the Rights of Indigenous Peoples, CONVERGE (Dec. 2008), <http://www.converge.org.nz/pma/dec1108.htm> (last visited Mar. 15, 2010).

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.* The language of Article 46 states:

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

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

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

Declaration, *supra* note 2, at art. 46.

<sup>153</sup> Charters, *supra* note 134, at 337.

to pressure the New Zealand government to follow Australia's lead and support the Declaration. In April 2009, Peace Movement Aotearoa<sup>154</sup> sent a petition to the New Zealand Foreign Affairs, Defense and Trade Select Committee calling on the government to support the Declaration.<sup>155</sup> In May 2009, the U.N. Human Rights Council recommended that New Zealand move forward to come into compliance with its international legal obligations.<sup>156</sup> Among the recommendations were that New Zealand support the Declaration and ratify ILO Convention 169, which recognizes Indigenous Peoples' right to lands and territories.<sup>157</sup> When the government of New Zealand recognized its support for the Declaration in April 2010, it acknowledged "the aspirational spirit of the Declaration" and reaffirmed its commitment to its Indigenous Peoples.<sup>158</sup>

### C. Canada and the Declaration

*On behalf of Indigenous Peoples of the world, we are writing to ask your Government to assist in the vital objective of adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly before the end of the year, as recommended by the Human Rights Council. We respectfully urge you to vote in favour of the adoption of the Declaration when it arises at the General Assembly.*

*An affirmative vote by your government would be consistent with the solemn commitment of the UN and member States of promoting human rights, as one of the three pillars of the international order. Furthermore, as nation state members of the UN, your Government's recognition of the rights of Indigenous Peoples advances the Human Rights Council's work to promote and encourage respect for human rights and fundamental freedoms for all, including the world's Indigenous Peoples.*<sup>159</sup>

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<sup>154</sup> Peace Movement Aotearoa is New Zealand's national networking organization for people interested in peace and related issues.

<sup>155</sup> U.N. Declaration on the Rights of Indigenous Peoples, Petition update and questions about N.Z. government's position, CONVERGE (Apr. 2, 2009), <http://www.converge.org.nz/pma/dec0409.htm>.

<sup>156</sup> U.N. Human Rights Council Report, N.Z. HUM. RTS. COMM'N (May 7, 2009), [http://www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/11-May-2009\\_13-46-07\\_Human\\_Rights\\_Council\\_UPR\\_May09.html](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/11-May-2009_13-46-07_Human_Rights_Council_UPR_May09.html).

<sup>157</sup> *See id.*

<sup>158</sup> John Key, National Government to Support UN Rights Declaration (Apr. 20, 2010), <http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>.

<sup>159</sup> Open Letter from the Union of British Columbia Indian Chiefs to all U.N. Permanent Missions (Oct. 30, 2006), available at <http://www.ipcaucus.net/UBCIC.html> (supporting the U.N. Declaration on the Rights of Indigenous People). The Union of British Columbia Indian Chiefs is an NGO in Special Consultative Status with the Economic and Social Council of the

Canada, through its Constitution Act of 1982 (Act),<sup>160</sup> recognizes three separate and distinct cultural and political Indigenous groups.<sup>161</sup> They are identified in the Act as: the First Nations, who are referred to as “Indians”; the Metis, people of mixed Aboriginal and European descent; and the Inuit.<sup>162</sup> Recent census figures report that more than 1.1 million Canadians refer to themselves as Indigenous.<sup>163</sup> The updated census figures were released mere weeks after the Declaration was approved by the U.N. In spite of the fact that Canada has such a significant Indigenous population, it too voted against the passage of the Declaration.<sup>164</sup> Immediately after the U.N. vote, the Assembly of First Nations (Assembly) urged Canada to honor its commitments as a member of the U.N. Human Rights Council by supporting the Declaration.<sup>165</sup> The Assembly encourages Indigenous Peoples of Canada to assert their rights under existing treaties, particularly those recognized by the Canadian Constitution, and the First Nations of Canada to be proactive in applying provisions of the Declaration in their own systems of self-governance.<sup>166</sup>

Canada explained its no-vote to the General Assembly in similar terms to Australia and New Zealand. Canada asserted that in spite of its long-standing commitment to human rights, and to Indigenous human rights in particular, it could not support the text of the Declaration in its final form.<sup>167</sup> Like Australia and New Zealand, who addressed the General Assembly immediately before Canada, Canada’s decision to oppose the Declaration focused on the provisions of the text addressing land and resources, informed consent, and intellectual property.<sup>168</sup>

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United Nations.

<sup>160</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* Ch. 11 (U.K.).

<sup>161</sup> Assembly of First Nations-Fact Sheet, First Nations Populations, <http://www.afn.ca/article.asp?id=2918> (last visited Mar. 15, 2010).

<sup>162</sup> *Id.* (citing DIAND’S 2005-2006 Report on Plans and Priorities). There are 52 First Nations registered in Canada and live in over 610 separate communities in both urban and rural setting. The Inuit live primarily in Arctic Canada.

<sup>163</sup> Mike De Souza, *Aboriginal Population Passes the One-Million Mark*, CANWEST NEWS SERVICE, Jan. 15, 2008, <http://www.nationalpost.com/story.html?id=239366>.

<sup>164</sup> Declaration, *supra* note 2.

<sup>165</sup> Assembly of First Nations, *The United Nations Declaration on the Rights of Indigenous Peoples: What it says and what it means for the First Nations of Canada*, <http://www.afn.ca/misc/U.N.-flyer.pdf>.

<sup>166</sup> *Id.* at 2.

<sup>167</sup> Statement by Hon. John McNee, Ambassador to Canada, Explanation of his No-Vote to the General Assembly (Sept. 13, 2007), *available at* <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>168</sup> *See id.* Although Canada focused its comments on Art. 26, 19 and 32(2) they also referred to additional concerns over military issues and the need to balance the rights and

With respect to the lands and resources provision, Canada's position was that the text was "overly broad" and impossible to interpret concisely.<sup>169</sup> The government's position was that Canada's constitution already did much to protect existing treaty rights, and that they were working domestically to improve the aboriginal land claims process.<sup>170</sup> Meanwhile, Canada stated that the provision on "free, prior and informed consent" was completely incompatible with the existing parliamentary system.<sup>171</sup> The Canadian government interpreted the text of the informed consent provisions to mean that no state could act on legislation pertaining to Indigenous Peoples without first obtaining Indigenous Peoples' consent.<sup>172</sup> However, similar to the position argued by the New Zealand government, the Canadian government took issues with the informed consent provisions requiring "good faith consultation" rather than a "right of veto over the State."<sup>173</sup>

While Canada's no-vote on the Declaration was disappointing, it did not surprise First Nations and other supporters of the Declaration. Since the election of a conservative government in 2006, Canada had aligned with the three other no-vote states in opposition to the Declaration.<sup>174</sup> The Canadian government took this position in spite of the fact that the Standing Committee on the Rights of Indigenous Affairs and Northern Development, as well as the House Committee on Aboriginal Affairs, had voted in favor of its adoption and had urged the government to change its position.<sup>175</sup> Although the new government ultimately disclosed the list of articles it wanted rewritten, supporters of the Declaration argue the government never explained its change of position on the Declaration.<sup>176</sup> Furthermore, there was intense criticism of the conservative government's unwillingness to

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obligations of Indigenous Peoples with those of third parties.

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> Peace Movement Aotearoa, Action Alert, Support the United Nations on the Rights of Indigenous Peoples (Dec. 2008), <http://www.converge.org.nz/pma/dec1108.htm>.

<sup>174</sup> Public Statement, Indigenous Peoples Caucus, Conservative Government Increasingly Isolated in its Unprincipled Opposition to Vital Human Rights Instrument, (Nov. 1, 2006), available at [http://www.ipcaucus.net/Canada\\_orgs.html](http://www.ipcaucus.net/Canada_orgs.html).

<sup>175</sup> Press Release, Indigenous Peoples Caucus, Canada's Parliamentary Committee Supports Adoption of Declaration, [http://www.ipcaucus.net/Canada\\_parl.html](http://www.ipcaucus.net/Canada_parl.html) (last visited Mar. 15, 2010). In a vote of seven for and three against, the committee's resolution stated: "That the Standing Committee of Aboriginal Affairs and Northern Development adopt the resolution that the Conservative Government should immediately pledge their support for the United Nations Declaration on the Rights of Indigenous Peoples; that this be adopted as a report of this committee, that chair present the report to the house."

<sup>176</sup> Press Release, Indigenous Peoples Caucus, *supra* note 175.

work or consult with Indigenous Peoples to resolve the outstanding issues.<sup>177</sup> Some blame the reversal of Canada's position, at least in part, on lobbying efforts made by former Australian Prime Minister John Howard.<sup>178</sup> In fact, the Australian government admitted that its Office of Indigenous Policy was involved in urging both New Zealand and Canada to become "joint forces" in opposition to the Declaration.<sup>179</sup>

Canada's explanation for the reversal was that, although it had supported the Declaration in principle and had worked for a number of years alongside other supporters on the text, the Declaration in its final form did not meet the objectives it had worked so hard to promote.<sup>180</sup> Specifically, Canada contended its goal was to create a document that would "promote and protect the rights and freedoms of every Indigenous person, as well as recognize the collective rights of Indigenous Peoples around the world."<sup>181</sup> In its view, however, the final draft did not meet those goals because the language regarding recognition of lands, territories and resources was "overly broad, unclear, and open to interpretation."<sup>182</sup> The Canadian government construed those provisions as supporting Indigenous land claims that the government claimed had already been resolved "lawfully in the past."<sup>183</sup>

Indigenous groups in Canada and around the world reacted strongly immediately following Canada's no-vote.<sup>184</sup> Many of these groups reiterated Canada's obligation under the U.N. Charter to uphold human rights for all people.<sup>185</sup> The International Service for Human Rights condemned Canada's rejection of the Declaration and said Canada's "domestic political agendas had taken precedence over the protection of

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<sup>177</sup> See generally, Government Refuse Support of UN Declaration on Indigenous Rights, <http://www.thefreelibrary.com/Government+refuse+support+of+UN+Declaration+on+Indigenous...-a0180528597> (last visited Mar. 15, 2010).

<sup>178</sup> Press Release, Indigenous Peoples Caucus, Australian Prime Minister Lobbied for Canada to Oppose Indigenous Rights, <http://www.ipcaucus.net/aust+parl.html> (last visited Mar. 15, 2010).

<sup>179</sup> See *id.*

<sup>180</sup> Indian and Northern Canada Affairs, Update Paper: *United Nations Declaration on the Rights of Indigenous Peoples*, Jan. 10, 2008, <http://www.ainc-inac.gc.ca/ap/ia/pubs/updir/updir-eng.asp>.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* The Canadian opposition was specifically to the text in Art. 26.

<sup>183</sup> See *id.*

<sup>184</sup> Joint Statement by Assembly of First Nations, Amnesty International Canada, Canadian Friends Service Committee (Quakers), Inuit Circumpolar Council (Canada), Inuit Tapiriit Kanatami, KAIROS, Native Women's Association of Canada, *U.N. Declaration on Rights of Indigenous Peoples: Canadians Should Embrace New Human Rights Instrument*, Feb. 6, 2008.

<sup>185</sup> See *id.*

human rights.”<sup>186</sup> An equally strong response came from over 100 Canadian legal scholars, barristers, and solicitors who stated in an open letter submitted to the government that “misleading claims” were made by the government to support and justify its position on the Declaration.<sup>187</sup> They further commented that “no credible legal rationale has been provided to substantiate these extraordinary and erroneous claims” made by the government who asserted the Declaration is “incompatible with Canada’s Constitution and the Canadian Charter of Rights and Freedoms.”<sup>188</sup> The letter also noted that the Declaration provides “some of the most comprehensive balancing provisions that exist in any international human rights instrument” and that “[t]he Declaration provides a principled framework that promotes a vision of Justice and Reconciliation.”<sup>189</sup>

In April 2008, the Canadian Parliament endorsed the Declaration and strongly urged the government to implement the human rights standards affirmed in the Declaration.<sup>190</sup> During the debate over the resolution, the conservative government clung to its position that somehow the Declaration would undermine existing Canadian treaties with its Indigenous Peoples, regardless of language in the Declaration to the contrary.<sup>191</sup> In February 2009, Canada was criticized in a report issued by the Human Rights Council’s Universal Periodic Review.<sup>192</sup> The report reviewed the human rights obligations of Canada and “raised a number of issues pertaining to the human rights situation in the country.”<sup>193</sup> Although the working group for the period review praised Canada for taking some legislative measures to protect its Aboriginal population, a number of delegates made specific recommendations that Canada “re-consider its position” and endorse the

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<sup>186</sup> Wizbit in Issues, Canada and the United Nations Declaration on the Rights of Indigenous Peoples, Mar. 6, 2009, <http://socyberty.com/issues/canada-and-the-united-nations-declaration-on-the-rights-of-Indigenous-peoples/>.

<sup>187</sup> Open letter, Signed by Professor Jennie Abell, Director Institute Women’s Studies, University of Ottawa, et. al, *Canada Needs to Implement this New Human Rights Instrument*, May 1, 2008, [http://thestar.blogs.com/decoder/files/UNDecl-Expertsign-onSTATEMENT\\_FINAL-May108.doc](http://thestar.blogs.com/decoder/files/UNDecl-Expertsign-onSTATEMENT_FINAL-May108.doc).

<sup>188</sup> *See id.*

<sup>189</sup> *See id.*

<sup>190</sup> Canadian Union of Public Employees-Ontario, House Of Commons Calls for Implementation of U.N. Declaration, Apr. 9, 2008, [http://www.cupe.on.ca/aux\\_file.php?aux\\_file\\_id=1011](http://www.cupe.on.ca/aux_file.php?aux_file_id=1011).

<sup>191</sup> *See id.*

<sup>192</sup> Office of the High Commission for Human Rights, Human Rights Council Periodic Review, Feb. 3, 2009, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights3February2009am.aspx>.

<sup>193</sup> *See id.* The Universal period review working Group reviewing Canada for this report consisted of 45 council members and observers.

Declaration.<sup>194</sup> Additionally, it called upon Canada to do more to settle Indigenous land claims and protect the rights of Indigenous Peoples, particularly in the areas of economic development, reconciliation, and self-governance.<sup>195</sup> The period review also specifically called upon Canada to address discrimination against Indigenous women.<sup>196</sup> In response to the U.N. Summary of the 50 submissions it received, Alex Neve of Amnesty International Canada called Canada's record for dealing with its Indigenous Peoples "a real disgrace and a source of national shame."<sup>197</sup>

*D. The U.S. and the Declaration*

*[T]his historic vote was more than 30 years in the making and is the result of many long, and at times difficult, years of negotiations between Indigenous Peoples and states. The passage of the Declaration today acknowledges the individual and collective human rights of the world's Indigenous Peoples. It gives us hope that the dark days of colonization and forced assimilation are behind us.*

*I am disappointed that the United States did not step forward today to be a leader in the international movement to affirm the rights of Indigenous Peoples. The self-governance, cultural and spiritual rights of Native Americans are recognized in hundreds of treaties . . . the U.S. Constitution, and countless federal laws. The document passed today reinforces those rights and I believe the United States will come to see the wisdom of the Declaration in time.*<sup>198</sup>

The same year that the General Assembly voted to adopt the Declaration, the U.S. Census Bureau reported that over two million people in the U.S. (excluding Alaska) identified themselves as Native American.<sup>199</sup>

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<sup>194</sup> See *id.* Other issues raised by the working group called on Canada to ratify ILO 169 and not limit the development of Indigenous rights.

<sup>195</sup> See *id.*

<sup>196</sup> See *id.* The working group made specific recommendation to consider specific legislation with respect to domestic violence broadly but also to "properly investigate cases of the death of Indigenous women."

<sup>197</sup> National Union of Public and General Employees, *Canada Slammed During Human Rights Review*, Jan. 13, 2009, <http://www.nupge.ca/print/776>.

<sup>198</sup> Joe A. Garcia, President, National Congress of American Indians, Remarks on the occasion of the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly, Sept. 13, 2007, available at [http://www.ncai.org/News-Archive.18.0.html?&no\\_cache=1](http://www.ncai.org/News-Archive.18.0.html?&no_cache=1) (follow "September – 2007" under "ARCHIVE"; then follow "United Nations General Assembly Adopts Historic Declaration on the Rights of Indigenous Peoples" hyperlink).

<sup>199</sup> INDIGENOUS WORK GROUP FOR INTERNATIONAL AFFAIRS, THE INDIGENOUS WORLD

An additional four million people identified themselves as Native American and another ethnic background.<sup>200</sup> The percentage of Indigenous Peoples in the United States currently stands at 1.4% of the total population.<sup>201</sup> Just as important as the total percentage of people who self-identify as Native American is the number of Tribal Nations recognized by the federal government, which currently stands at 564.<sup>202</sup> U.S. Tribes have a long history of using the federal courts for redress on issues affecting them, but increasingly their rights and powers of self-governance have been diminished by these very same courts.<sup>203</sup> At the same time that federal courts have become less supportive of Tribes, both Congress and the Executive Branch have also become less responsive to their needs.<sup>204</sup> As a result, Tribes have had to look beyond their domestic governmental bodies in order to find support for issues that affect them. As Robert T. Coulter, Executive Director of the Indian Law Resource Center contends:

International work by Indian nations and tribes can be an important part of a total, multi-faceted, long-term strategy for protecting Indian governments and Indian lands and resources. It is often observed that international law is rarely enforceable in the courts of the United States, and it is true that we cannot usually expect to win domestic court decisions by relying only on international law. The politics of international law, however, have palpable force that is meaningful to governments, and the normative moral value of international human rights law can be a major building block in the emerging jurisprudence of Indigenous Peoples' rights.<sup>205</sup>

The United States had minimal involvement with the text of the Draft

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YEARBOOK 2008 66 (2008), <http://www.iwgia.org/sw162.asp> (follow link to "The Indigenous World Yearbook 2008").

<sup>200</sup> *See id.*

<sup>201</sup> *See id.*

<sup>202</sup> U.S. Department of Interior (DOI), Bureau of Indian Affairs (BIA), Overview, <http://www.bia.gov/bia> (last visited Mar. 15, 2010). According to the most recent update by the U.S. Department of Interior, there are currently 564 federally recognized tribes. Federally recognized tribes have "a unique legal and political relationship with Indian tribes and Alaska Native entities as provided by the Constitution of the United States, treaties, court decisions and Federal statutes." The DOI describes their "service population" as 1.9 million American Indian and Alaska Natives which differs from the U.S. Census Bureau figures from 2007. The 2008 Federal Register still refers to 562 "Indian Entities Recognized and Eligible" to receive services from the federal government. Although the Bureau of Indian Affairs' role has changed in the last thirty years with an increase focus on "Indian self-governance and self-determination," the BIA continues to provide assistance to Tribes for a broad range of services.

<sup>203</sup> Coulter, *supra* note 14, at 573.

<sup>204</sup> *See id.*

<sup>205</sup> *See id.* at 573-74.



when it was in the Working Group, but submitted comments when the Draft went to the Human Rights Council Working Group in 1996.<sup>206</sup> In its preliminary statement, the United States made specific reference to several articles in the Draft, citing “fundamental issues” with key provisions in the text, including the reference to the term “Indigenous Peoples” and the implied collective rights suggested by this term.<sup>207</sup> The issue of collective rights, coupled with the right to self-determination and, as some argued, the right of “independent statehood,” troubled the United States.<sup>208</sup> However, as Dean Suagee notes in his article on human rights and Indigenous Peoples, this view is contradictory to the United States’ own historical relationship with Tribal Nations, which has long recognized Tribes as “distinct, self-governing communities.”<sup>209</sup>

In June 2006, the Human Rights Council met for the very first time and ultimately voted to adopt the Draft. The vote was 30 in favor, 2 opposed, and a subsequent recommendation that the General Assembly adopt the Draft.<sup>210</sup> Although the U.S., Australia and New Zealand were not members of the Human Rights Council, they continued to oppose the Draft’s adoption, which raised concerns by supporters that they would put pressure on other countries to vote in opposition after the Draft was sent to the General Assembly.<sup>211</sup> As previously mentioned, Canada changed its position on the Draft after the election of the Harper administration<sup>212</sup> and ultimately voted against it, along with the Russian Federation.<sup>213</sup> The U.S., Australia, and New Zealand issued a joint statement following the vote stating that the Indigenous demands for self-determination were “inconsistent with international law” and that those demands “ignore the contemporary realities . . . by appearing to require the recognition of rights to lands now lawfully owned by other citizens.”<sup>214</sup>

The U.S. opposed the Declaration from its early stages, and its final

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<sup>206</sup> Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion*, 21 AM. INDIAN. L. REV. 365, 374-75 (1997).

<sup>207</sup> *See id.* at 377-79.

<sup>208</sup> *See id.* at 376-77.

<sup>209</sup> *Id.*

<sup>210</sup> Public Center for Participatory Democracy, Human Rights Council Adopts Text for Rights of Indigenous Peoples (June 29, 2006), <http://www.pcpd.org.nz/ddrip/>.

<sup>211</sup> Unrepresented Nations and Peoples Organizations, Draft U.N. Declaration on the Rights of Indigenous Peoples a Vital Turning Point in International Human Rights (Aug. 10, 2006), <http://www.unpo.org/content/view/5104/236/>.

<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> Haider Rizvi, Inter Press Service News Agency, U.N. & Indigenous Rights Campaign, Rights: U.S., Australia, New Zealand Reject Indigenous Declaration (June 9, 2006), [http://twm.co.nz/indig\\_rights.html](http://twm.co.nz/indig_rights.html).

vote on September 13, 2007 was no surprise to those who closely followed the progression of the Draft. The U.S. explained its no-vote on the Declaration based on the fact that it, along with other states, was left out of the negotiations on the final draft.<sup>215</sup> The U.S. asserted the final draft lacked transparency and was confusing, thereby risking conflicting interpretations.<sup>216</sup> As a result, the U.S. contended that the provisions of the Declaration were impossible to implement.<sup>217</sup> Although the U.S. voted against the Declaration, it took pains to underscore that it would continue to promote Indigenous Peoples' rights domestically.<sup>218</sup> In addition to the general concerns that the text was fundamentally flawed and unworkable, the U.S. specifically cited the provisions addressing self-determination, lands and resources, redress, and collective rights.<sup>219</sup> These provisions mirror those parts of the text the other no-vote states had asserted were unworkable.<sup>220</sup>

Fundamentally, the U.S. rejected any possibility that the Declaration could "become international law" and contended that the Declaration "does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceeding."<sup>221</sup> The U.S. cited Articles 3 and 26 as being particularly problematic. In particular, Article 3 states, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . ."

The U.S. position is that Article 3's language is a reproduction of the language of Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>222</sup> The U.S. contends that under the legal obligations of Article 1 of each of these instruments, Indigenous people do not have the

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<sup>215</sup> Press Release #204(07), U.S. Mission to the U.N., Explanation of vote by Robert Hagen, U.S., Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, (Sept. 13, 2007), *available at* [http://www.treatycouncil.org/PDFs/US\\_DRIP.pdf](http://www.treatycouncil.org/PDFs/US_DRIP.pdf). The U.S. also complained that, although they had worked on the Declaration for eleven years that the final draft was adopted in a fractured vote because the Human Rights Council failed to convene the parties to work on the language of the final draft.

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.* While the U.S. made specific mention of this provision, they also expressed written concern regarding the purported ambiguity in the provision regarding the repatriation of human remains.

<sup>220</sup> *See generally*, Comments Made to the General Assembly, Sept. 13, 2007 in advance of the vote, made by Australia, New Zealand and Canada, *available at* <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

<sup>221</sup> *See id.*; Press Release #204(07), U.S. Mission to the U.N., *supra* note 215.

<sup>222</sup> *See id.*

right to independence or self-government within the nation-state.<sup>223</sup> According to the U.S., the Working Group's mandate was to redefine "self-government" within a nation-state. Furthermore, the U.S. stated that the identical language and intent articulated in Article 1 could cause instability and confusion.<sup>224</sup> With respect to Article 26, the U.S. argued essentially the exact same points as New Zealand and Canada; that is, that Article 26 requires "recognition of indigenous rights to lands without regard to other legal rights" that currently exist, and would, therefore be impossible to implement.<sup>225</sup> The provision on collective rights was another sticking point for the U.S., which raised concerns that this provides human rights to one group that are denied to others.<sup>226</sup>

Almost immediately after the Declaration was adopted, a number of Indian rights organizations applauded its passage in spite of the fact that the U.S. voted against it. In November 2008, at its 65th Annual Conference, the National Congress of American Indians (NCAI) endorsed the Declaration and subsequently passed its own resolution supporting it.<sup>227</sup> NCAI's resolution recognizes the Declaration, underscores its principles, and asserts that the Declaration "reinforces the respect and protection of full self-determination rights by and on behalf of the U.S. Tribal Nations as well as the protection of tribal lands and treaties as a matter of international law and policy and is therefore in the vital interest of all U.S. Tribal Nations."<sup>228</sup> NCAI further called upon the United States federal and state governments to endorse the Declaration, resolving to send its resolution to every governor and state legislature in the country for their endorsement.<sup>229</sup> NCAI urged state and local governments to support, through their legislation, memorials

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<sup>223</sup> *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> Gail Courey Toesing, *Coulter Urges Action at Organization of American States*, INDIAN COUNTRY TODAY, Nov. 14, 2008, <http://www.indiancountrytoday.com/national/28389924.html>. The NCAI has been actively engaged in responding to issues affecting Indian Nations and Indian people since it was founded in 1944. Originally its work involved responding to the termination and assimilation policies of the United States government. Its goal was to support tribal unity and cooperation in order to protect treaty rights and to support tribal sovereignty. It also works to inform the both the public and Congress on the rights of American Indians and Alaska Natives. It currently has over 250 member tribes. NCAI describes its goal as securing "for ourselves and our descendants the rights and benefits to which we are entitled; to enlighten the public toward the better understanding of the Indian people; to preserve rights under Indian treaties or agreements with the United States; and to promote the common welfare of the American Indians and Alaska Natives." *Id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

supporting the Declaration and to send those endorsements to Congress.<sup>230</sup>

There has been hope among Indian Nations and other supporters of the Declaration that with the election of President Obama, the U.S. might change its position and endorse the Declaration. Although the second anniversary of the Declaration was in September 2009, no such endorsement has occurred. A number of Indigenous organizations have called for its adoption without further delay, citing “critical situations” facing Indigenous Peoples of the U.S. and around the world.<sup>231</sup> The International Indian Treaty Council expressed its concern with the “implementation gap” of those countries that endorsed the Declaration, with reference to the massacre of Indigenous Peoples of Peru.<sup>232</sup>

In addition to the calls from international organizations urging endorsement by the U.S. government, Tribal Nations in the U.S. are also seeking support for the Declaration. A recent resolution of the Navajo Nation Council formally called on the Obama Administration to “sign on to the Declaration without delay” and to “stand firm with its commitment” to protect and preserve holy and sacred sites of Indigenous Peoples of the United States.<sup>233</sup> This was in response to the federal government’s approval of “clearing, grading, and the use of reclaimed sewer water to make snow” on one of the four sacred mountains of the Navajo people.<sup>234</sup> Clearly, in spite of the fact that the U.S. asserts that it supports the rights of its Indigenous Peoples domestically, federal court decisions like this do much to undermine its credibility on this issue.

To date, the state of Maine and the cities of Phoenix and Berkeley have shown their support and solidarity with Indigenous Peoples by endorsing the Declaration. Maine set the precedent for other states to follow when, on April 15, 2009, its General Assembly passed a resolution in support of the Declaration.<sup>235</sup> The resolution, passed unanimously by both houses,

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<sup>230</sup> *See id.*

<sup>231</sup> Press Release, Andrea Carmen, Executive Director-International Treaty Council, The United Nations Declaration on the Rights of Indigenous Peoples: Now It’s Time for Implementation (Sept. 13, 2009), *available at* <http://freepeltiernow.blogspot.com/2009/09/un-declaration-on-rights-of-Indigenous.html>.

<sup>232</sup> *See id.*

<sup>233</sup> Resolution of the Navajo Council, 21st Navajo Nation Council-Third Year 2009, An Action Relating to An Emergency; Affirming the Navajo Nation’s opposition to the desecration of Dook’o’oosliid and urging the participation of the administration of President Obama to fulfill President Obama’s commitments and the United States’ obligation to the Navajo Nation and First Americans, *available at* <http://www.indigenousaction.org/wp-content/uploads/2009/04/CAP-16-09.pdf>.

<sup>234</sup> *See id.*

<sup>235</sup> Gail Courey Toensing, *Maine Endorses U.N. Declaration on the Rights of Indigenous Peoples*, INDIAN COUNTRY TODAY, <http://www.indiancountrytoday.com/national/28389924.html>

affirmed those “standards needed to protect Indigenous Peoples” and further asserted the rights of Indigenous Peoples “to remain distinct and to pursue their own visions of economic and social development.”<sup>236</sup> Donna Loring, the Penobscot Indian Nation’s Tribal representative to the Maine legislature, submitted the resolution to the house; Donald Soctomah, a Passamaquoddy Tribal representative, co-sponsored it.<sup>237</sup>

In advance of the U.N. Permanent Forum on Indigenous Issues meeting that was to be held in May 2009, the Berkeley City Council voted to send a letter to Susan Rice, Ambassador to the United Nations, recognizing and endorsing the Declaration.<sup>238</sup> The city of Phoenix also endorsed the Declaration in a similar resolution.<sup>239</sup> In addition to recent support of the Declaration by state and local governments, NGOs such as the International Indian Treaty Council have called on other Indigenous organizations, Tribes, and national organizations to continue to adopt the language of the Declaration in tribal codes, position statements, and court decisions.<sup>240</sup> Taking affirmative steps to put the principles and language of the Declaration into existing Tribal legal systems is an important move forward in creating a “groundswell” of support for its ultimate endorsement by the U.S. and the other remaining no-vote states.<sup>241</sup>

### III. THE AMERICAN DECLARATION

*President Obama has an opportunity to send the world a message about American justice.*

*He can add America’s name to the Declaration on the Rights of Indigenous Peoples before the Organization of American States. This is a historic effort by all countries in the Americas to recognize and declare that human rights belong to Indigenous Peoples, both as individuals and as communities, nations, or tribes. Negotiations over the draft American Declaration in the Organization of American States have reached a critical point. All the countries of the Americas must now exert the political will to finalize and adopt the American Declaration. Last year, the United States refused to*

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<sup>236</sup> *See id.*

<sup>237</sup> *See id.*

<sup>238</sup> Recommendation to the Honorable Mayor and Members of the City Council, City of Berkeley from Councilmember, Kriss Worthington calling for the recognition and endorsement of the United Nations Declaration on the Rights of Indigenous Peoples and to send a letter to the US Ambassador to the U.N., Susan Rice (May 19, 2009) (letter to the Honorable Susan Rice, was dated May 28, 2009).

<sup>239</sup> *See* Press Release, Andrea Carmen, *supra* note 231.

<sup>240</sup> *See id.*

<sup>241</sup> *See id.*

*actively negotiate. This must change, and each of us can help make that happen.*

*We live in an era of self-determination, yet Congress still claims the power to do what it wants – confiscate our native lands in violation of the Constitution, strip our jurisdiction, exploit our natural resources and refuse to honor its treaty obligations. Many of our nations and communities face a daunting set of social and economic challenges, as well as violation of treaty and human rights on a daily basis. Our northern tribes and Native Alaska villages see their very existence threatened as climate change undermines their subsistence lifestyles.*

*The adoption of a strong American Declaration would be a tremendous step toward ending the appalling treaty and human rights violations that are so often inflicted on our Indian and Alaska Native tribes and communities. The declaration states the commitment by these countries to the rights of Indian peoples – our right to exist as distinct cultures, our right to govern our own affairs, our right to own and use our lands, and our right to be free from discrimination.*<sup>242</sup>

Although the U.S. and Canada continue to oppose the Declaration, there are some Indigenous rights groups that believe it is more likely that these two no-vote states might be convinced to support the American Declaration on the Rights of Indigenous Peoples (American Declaration). The American Declaration was proposed in 1989 when the Organization of American States (OAS) resolved to develop an instrument that would consider the issues of Indigenous rights in the Americas.<sup>243</sup> The proposed draft instrument was originally supposed to be adopted by the OAS General Assembly in 1992, in order to coincide with the “500-year anniversary of the conquest of America.”<sup>244</sup> Remarkably, from its inception the drafting process sought no input from Indigenous communities.<sup>245</sup> OAS member states chose instead to consult only with social science experts, such as anthropologists.<sup>246</sup> The OAS firmly resisted pressure to include Indigenous

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<sup>242</sup> Wilma Mankiller: *Obama’s Opportunity: Add America’s Name to the Declaration*, INDIAN COUNTRY TODAY, Mar. 20, 2009, <http://www.indiancountrytoday.com/opinion/41586817.html>.

<sup>243</sup> See Indian Law Resource Center, Stage One: Preliminary Developments Based on Text Approved by the Inter-American Commission on Human Rights, <http://www.indianlaw.org/en/projects/ihr/oas/draft/stage1> (describing the process of exclusion of Indigenous representation by OAS member states from 1989 to 2003).

<sup>244</sup> See *id.*

<sup>245</sup> *Id.*

<sup>246</sup> See Indian Law Resource Center, *supra* note 243.

voices; only after years of contentious negotiations on this issue were Indigenous organizations and NGOs finally allowed to participate in the process.<sup>247</sup> Significantly, the U.S. and Canada worked in tandem with Antigua and Barbados, agreeing to provide several seats in their respective delegations to Indigenous representatives in OAS member meetings on the American Declaration.<sup>248</sup> Full participation of Indigenous representatives and NGOs was not allowed until 2003, marking the “first time in history” that OAS extended participation beyond member states.<sup>249</sup>

Currently, the American Declaration is in the third stage of drafting final textual revisions. In June 2008, the General Assembly reaffirmed the adoption of the American Declaration as a priority and renewed the mandate to continue to hold meetings to negotiate the text.<sup>250</sup> In its current form, the American Declaration contains 39 articles and applies to all the Indigenous Peoples of the Americas.<sup>251</sup> It is divided into six sections and establishes fundamental human rights, recognizing the crucial collective rights, rights to cultural identity, rights to organize and to participate in the political process of the state, as well as social, economic and cultural rights.<sup>252</sup> The American Declaration also recognizes Indigenous forms of organization and furthermore acknowledges Indigenous knowledge systems and spirituality.<sup>253</sup> The American Declaration is important because it has been drafted to meet the needs of Indigenous Peoples specifically in the Americas, whereas the Declaration is a much broader statement of rights.<sup>254</sup>

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<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

<sup>249</sup> *See id.*

<sup>250</sup> U.N. General Assembly, Draft American Declaration on the Rights of Indigenous Peoples, AG/RES. 2368 (XXXVIII-0/08), available at [http://www.treatycouncil.org/PDFs/Work%20Plan%20of%20WG%20on%20Draft%20Am%20Decl%20\(Original\)%209.08.pdf](http://www.treatycouncil.org/PDFs/Work%20Plan%20of%20WG%20on%20Draft%20Am%20Decl%20(Original)%209.08.pdf).

<sup>251</sup> Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Record of the Current Status of the Draft Declaration on the Rights of Indigenous Peoples, Eleventh Meeting of Negotiations in the Quest for Points of Consensus, held by the Working Group, U.S., Wash., D.C. Apr. 14-18, 2008), available at [http://www.oas.org/dil/GT-DADIN-doc\\_357-08\\_rev1\\_eng.pdf](http://www.oas.org/dil/GT-DADIN-doc_357-08_rev1_eng.pdf).

<sup>252</sup> *See id.*

<sup>253</sup> Draft American Declaration Articles 9 and 13. Article 9 requires: “The States shall recognize fully the juridical personality of the Indigenous Peoples, respecting Indigenous forms of organization and promoting the full exercise of the rights recognized in this Declaration.” Article 13(1) states: “Indigenous peoples have the right to preserve, use, develop, revitalize, and transmit to future generations their own histories, languages, oral traditions, philosophies, systems of knowledge, writing, and literature; and to designate and maintain their own names for their communities, individuals, and places.”

<sup>254</sup> Gale Courey Toensing, *Draft American Declaration on the Rights of Indigenous Peoples Moves Forward*, INDIAN COUNTRY TODAY, Jan. 9, 2009, <http://www.indiancountrytoday.com/internal?st=print&id=37351714&path=/global/undeclaration> (commenting on Dec. 2008 meeting of the OAS Working Group which is involved in making revisions on the final

Leonardo Crippa, a staff attorney at the Indian Law Resource Center, believes that the American Declaration has the potential of being “more effective on the ground” than the Declaration because it provides “standards for the administration of justice,” with the OAS as an international forum to hear cases.<sup>255</sup>

The final step in the process is for the OAS Working Group to submit the draft to the OAS General Assembly so it can vote on its adoption by the American Member States. There is optimism that this can be accomplished sometime in 2010, but at the time of this writing no date has been set for a final vote.<sup>256</sup>

#### CONCLUSION

For the 370 million Indigenous Peoples of this earth, there is no question that the Declaration signifies that their struggle to be heard has been worth the effort. The fact that the Declaration is an aspirational document and does not carry with it the force of international law should not undermine its importance as a moral framework for Indigenous human rights.

The ultimate value of the Declaration lies in its implementation.<sup>257</sup> The rewards of effective implementation benefit more than just Indigenous Peoples, they benefit the entire world community. The Declaration is a framework through which two parties, whose relations have long been characterized by misunderstanding and injustice, can begin to engage in a meaningful and fruitful dialogue that can be beneficial to both parties. In order to move from entrenched and mutually exclusive views regarding the issues dividing Indigenous Peoples and the states in which they live, achieving common ground is a necessity.

The Indigenous Peoples of the world maintain no illusions that this is a process by which all their former lands or resources will be returned. It is too late for that. In fact, monetary compensation is often not the main goal of Indigenous Peoples or their representatives when dealing with their colonizer states. Protection and respect for their cultural, spiritual, and social norms and beliefs is much more valuable than any monetary compensation. A simple recognition that a great injustice was done, along

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<sup>255</sup> *See id.* The Indian Law Resource Center has been participated in the development of the American Declaration since 1989.

<sup>256</sup> *See id.*

<sup>257</sup> Victoria Tauli-Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues, Remarks on the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples, UN Press Release, New York (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/Declaration\\_ip\\_vtc.doc](http://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_vtc.doc).



with a real commitment to respect Indigenous Peoples, their cultures, and their sacred sites, would go a long way towards finally healing the wounds of hundreds of years of colonization and exploitation. By supporting the Declaration's adoption, Member States begin the process of engaging in constructive dialogue with Indigenous Peoples. Hopefully, this will lead to improved relationships between parties with differing cultural worldviews.

The fact that Australia, New Zealand, Canada and the U.S. voted against the adoption of the Declaration, and have yet to deviate from that position, should not diminish or undermine the historic commitment the world community has made to its Indigenous citizens. The specious arguments made by the no-vote states say more about the states in question, and their historic and often shameful relations with their Indigenous inhabitants, than they are willing to admit. Their arguments against adoption are a repetition of the same rhetoric designed to camouflage the fact that they actually fear the implications of true reconciliation. These implications go to the very heart of these countries' foundation myths, and perhaps adoption of the Declaration by the no-vote states is perceived by those countries as admission of guilt of past wrongdoing. The remarkably similar statements of opposition by the no-vote states suggest they worked together to construct an argument against the Declaration's adoption. This is despite the fact – or perhaps because – these three states have the highest percentages of Indigenous inhabitants living within their borders. What is needed is a paradigm shift. Nations with a greater number of Indigenous inhabitants have the most to gain through the adoption of a declaration designed to protect these citizens and shift relations between the stakeholders towards a positive direction.

The U.S.'s assertion that it will work domestically to address human rights issues is undermined by the realities on the ground. U.S. Tribes continue to be the poorest and most marginalized communities in the country.<sup>258</sup> U.S. Tribes suffer from the highest unemployment, poverty, teen suicide,<sup>259</sup> and infant mortality rates of any population in the U.S.<sup>260</sup> Native American women are more likely than any other ethnic group in the United States to be murdered or sexually assaulted by a stranger.<sup>261</sup> These daily

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<sup>258</sup> Native American Indian Housing Council, Indian Housing Fact Sheet, <http://www.naihc.net/news/index.asp?bid=6316> (last visited Feb. 1, 2010).

<sup>259</sup> Richard H. Carmona, Surgeon General, U.S. Dept. of Health & Human Services, Testimony on Suicide Prevention Among Native American Youth (June 15, 2005), *available at* <http://www.hhs.gov/asl/testify/t050615.html>.

<sup>260</sup> U.S. Dept. of Health & Human Services, Office of Minority Health, Infant Mortality/SIDS Data Statistics, <http://www.omhrc.gov/templates/browse.aspx?lvl=3&lvlid=469> (last visited Mar. 15, 2010).

<sup>261</sup> Jim Lobe & Inter Press Service, Congress Moves to Protect Native Women from Assaults (July 26, 2007), <http://www.truthout.org/article/congress-moves-protect-native->

infringements of basic human rights and human dignity speak louder than attestations of the U.S. government that it intends to work domestically to address inequalities in the treatment of its Indigenous population. Moreover, the inequality of First Peoples in the U.S. is largely invisible to most Americans; most Americans are unaware of these statistics and their human costs. Despite promises made during election campaigns and General Assembly speeches, the national conversation that needs to take place on these issues has not been initiated, and the U.S. missed an opportunity to do so when it voted against the Declaration. A first step toward remedying this situation would be a change in the U.S. government's position. Although the U.S. asserted to the General Assembly in September 2007 that it would resolve these issues domestically, it is fair to ask what has been done by the United States to begin the process of eradicating these historic inequalities. Has there been any improvement for Tribal Nations and Tribal citizens since the U.S. spoke at the General Assembly two years ago?

The remaining no-vote states should endorse the Declaration as a concrete statement of intent to allow all parties involved to move forward. In the absence of this event, however, Tribes should not just wait for the U.S. to prove its intent. Tribal Nations should consider how they might incorporate the language of the Declaration into their Tribal constitutions and Tribal codes, as well as strengthen their positions by holding principles espoused in the Declaration as the minimum threshold when dealing with federal, state, and local governments over such issues.

The adoption of the Declaration by 144 nations was a remarkable acknowledgment by the world community that 500 years after first contact, indigenous peoples of the world still need protection from colonizers. Not only do they need this protection, they are entitled to it as citizens of this Earth.