

Indigenous Peoples and Nations Coalition and Koani Foundation International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

September 15, Monday 2014

The Indigenous Peoples and Nations Coalition¹ (IPNC) and the Koani Foundation² submit this Universal Periodic Review (UPR) Shadow Report on the situation of Alaska and Hawaii to the Office of the High Commissioner for Human Rights for the Compilation and the Summary for the UPR examination of the human rights record of the United States of America. Alaska and Hawaii are each a state of peoples recognized under the law of nations and international law as nations. We both assert our right to claim self-determination and self-governance, to peacefully oppose foreign occupation, the destruction of our cultural heritage and looting of our territory and natural resources.

The Kingdom of Hawaii is a fully recognized sovereign independent State with international treaties of trade, commerce and friendship with many States of the world, including the United States of America³. The Kingdom was illegally invaded by the United States of America in 1893, without a declaration of war or any sign of hostilities and in clear violation of the Constitution of the United States of America⁴. United States President Grover Cleveland declared in his 1893 address to Congress that the U.S. had acted unlawfully and after negotiations with Queen Lili'uokalani, the United States agreed to assist in restoring of the lawful Hawaiian Kingdom Government⁵. No restoration ever took place. Instead, the U.S. acted to further subsume the Hawaiian Kingdom by unilaterally and unlawfully making Hawaii into a "U.S. territory" and eventually, into a federal state.

The vast territorial expanse of Alaska is occupied and owned by the Alaska Native Nations having had first contact, trade and discourse with the subjects of Tsarist Russia and after that with citizens of the United States of America and of many European Nations in the 19th century. In the famous Ukase of 1821, Alexander I of Russia under pressure from the Russian Merchants, attempted to claim Alaska declaring that the foreign United States merchants and all others can no longer trade directly with the Alaska Native Nations, only through the Russian forts and settlements. United States Secretary of State John Quincy Adams, on behalf of United States President James Monroe, denied to the Monarchy of Russia in diplomatic communications that it had acquired the Territory stating that it belonged to the 'independent tribes inhabiting an independent territory'⁶ using Vattel and his treatise Law of Nations. This denial set the

¹ Indigenous Peoples and Nations Coalition (IPNC) is a grassroots Indigenous Organization from Alaska with Partners from North and South America, the Pacific and Australia. It is supported in Alaska via AITC resolution 2005-10 to promote the human rights and international legal and political status of Alaska.

² The Koani Foundation is an organization dedicated to the Kanaka Hawai'i Maoli (native Hawaiians) with multi-ethnic supporters originally enlisted by founder John Butch Kekahu, III to promote unity through education and capacity building. The Mission is to achieve a Free Hawai'i through education and unification of our people.

³ Treaty of Friendship signed at Washington December 20, 1849 and after ratification by both legislatures and States, it entered into force on August 24, 1850.

⁴ Article 1, Section 8, Clause 11 To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

⁵ Submission of Koani Foundation and IPNC to the 75th session of CERD, August 14, 2009.

⁶ Senate Document Number 384 of the 18th Congress, 2d Session, 1824 entitled Confidential incorporated with the Russian empire. *** That on the supposition that the natives of the country should be found under the jurisdiction of Russia, the United States would have only to abandon their merchants to the penalties incurred by those who carry on a contraband trade in a foreign jurisdiction; that if, on the contrary, the natives ought to be regarded as independent tribes, Russia could not prohibit foreigners from

Indigenous Peoples and Nations Coalition and Koani Foundation International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

stage for recognition of the sovereign independent status that resulted in Alaska being listed under General Assembly resolution 66 (I) in 1946 as a Non-Self-Governing Territory. Hawaii was also listed as a Non-Self-Governing Territory. Hawaii and Alaska therefore have the right to invoke Article I of the Charter of the United Nations due to their status and in the light of numerous other violations of the Charter by the United States. International law applies, in particular the law of occupation of foreign territories and peoples.

Violations of the Constitution of the United States of America and the UN Charter

The United States of America denied to Alaska and Hawaii the basic tenets in the Declaration of Independence, a document noted by a member of the Human Rights Committee as historical as the principles are some of the underpinnings of the Universal Declaration of Human Rights and the United Nations Charter. The IPNC and the Koani Foundation asserts that these principles are not applied to Alaska and Hawaii, as holders of original sovereign title are not deemed "created equal" in American jurisprudence or in the American application of law to foreign nations.

President Thomas Jefferson stated after the Louisiana Purchase in 1803 that it was necessary to approve a new Article of the Constitution of the United States of America, since the Constitution has made no provision for incorporating foreign nations into the Union or for holding foreign territory⁷. Article IV, Section 3, clause 2 of the Constitution did not provide for enlargement, as Congress only had the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States⁸. The question arises as to whether or not the uniformity principle under Article I, Section 8, clause 1 of the Constitution applies to territories that are not "States" of the United States, whether they are annexed and the people of the territory are citizens of the United States or of the territories. It was already determined in *Loughborough v. Blake* 5 Wheat. 317 (U.S. 1820) that a territory ceded or acquired and not yet incorporated into the United States does not fall within the uniformity principle. The incorporation principle was born out of *dicta* or editorial opinions by Justices of the Supreme Court who noticed a gap in the Constitution and placed in the opinion without any constitutional basis⁹. Thus in the *Downes v. Bidwell* 182 U.S. 244 (1901) regarding a case on Puerto Rico, the Justices slipped the 1867 Treaty of Cession of Alaska from Russia to United States and unilaterally determined as a result Alaska was incorporated into United States of America. This insertion was essentially unconstitutional, since amendments to the Constitution cannot be made from the bench of the Supreme Court, but require Congressional and State approval.. Not only did the United States authorities fail to receive consent for annexation from the Tribes, they themselves had recognized the Tribes as having sovereignty over the

trading with them unless in contraband of war and in time of war; in which case she can herself put in execution the prohibition on the open sea. From these facts, incontestably proved by historical documents, an irresistible conclusion follows, which agrees with the declaration of Russia, in 1790; and it ought to appear definitive that she had no right to claim, either under the title of discovery or of possession, on the continent east or south of Behring's Strait, about the 60th degree north latitude. *** The conclusion which must necessarily result from these facts does not appear to establish that the territory in question has been legitimately incorporated within the Russian empire

⁷ 14 George Washington Law Review page 354-355, 1945-46

⁸ Ibid. Page 354

⁹ 26 The Georgetown Law Journal 1938 *Tax Uniformity and Incorporated Territories* at page 345

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

Territory when they denied Russia and asserted our independence¹⁰. Besides many other violations of international law and general principles of law, the United States violates its own Constitution and traditions when it imposes taxation without representation and consent of the governed in Alaska and Hawaii.

When the United States of America placed us on the list of Non-Self-Governing Territories in 1946 under General Assembly resolution 66 (I), Alaska and Hawaii, although still in the realm of the law of nations, placed us squarely in the plane of the Charter of the United Nations and international law. As we already were recognized outside the Constitution and domestic law, the newly adopted rules of international law for the United Nations decolonization process now applied. When interpreting international obligations, Ian Brownlie explains that, "A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law." Articles 1, 2, 55, 56, 73 and 74 of the United Nations Charter and the decolonization factors and principles apply without prejudice to the proper agents and authorities of situations of Alaska and Hawaii.

Thus the United States of America cannot rely solely on the obsolete *dicta* of its courts, when it was bad law and wrong from the outset.

Violations of the Charter of the United Nations

In document E/2008/43 and E/C.19/2008/13, the Economic and Social Council report of the United Nations Permanent Forum on Indigenous Issues in paragraph 54 stated that, "The Permanent Forum expresses its concern for the human rights of indigenous peoples in Non-Self-Governing Territories in the Pacific region and calls on the United Nations Human Rights Council to designate a Special Rapporteur on the situation of indigenous peoples of those territories." Paragraph 55 further stated that, "The Permanent Forum invites the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples to examine and report on the situation of the human rights of indigenous peoples in Non-Self-Governing Territories of the Pacific region, and urges relevant States to cooperate with the Special Rapporteur for that purpose."

In document E/CN.4/Sub.2/1998/16 on the Sixteenth session of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes reported in paragraph 57 that, "Indigenous representatives from Hawaii said that their people had the worst educational results in the United States of America. Despite the successful Hawaiian Language Immersion Education programme, curriculum development and adequate instructional facilities were still needed as was State support. In addition, representatives of the indigenous peoples of Alaska reported that United Nations resolutions on non-self-governing territories aiming at the educational advancement and the promotion and protection of the rights of indigenous peoples, participation and development had not yet been fully implemented. Other indigenous representatives from the same area denounced the collusion between the Government and Christian missions that had had adverse effects on indigenous communities in terms of loss of identity which, in turn, had engendered alcoholism, an increase in the suicide rate and

¹⁰ See section II of the Shadow Report of the Indigenous Peoples and Nations Coalition to the 86th and 87th session of the Human Rights Committee in 2006

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

other serious social problems. It was recommended that action be taken to avoid the disappearance of indigenous cultures around the world." Again, the representative of the United States of America attempted to report on the unilaterally domesticated procedure that violated the Constitution of the United States of America and its international treaty obligations, refusing to administer their international obligations to Alaska and Hawaii.

According to the seventeenth session of the Working Group on Indigenous Populations in document E/CN.4/Sub.2/1999/19 the Chairperson-Rapporteur Ms. Erica-Irene A. Daes reported in paragraph 45 that, "Indigenous representatives from Alaska informed the Working Group about the attempts of the native people of Alaska to preserve their subsistence lifestyle. The special right of natives to continue to hunt and fish was one of the most controversial issues in Alaska today. In this respect, reference was also made to the need for sustainable fishing practices in the Bering Sea."

According to the seventeenth session of the Working Group on Indigenous Populations in document E/CN.4/Sub.2/1999/19 the Chairperson-Rapporteur Ms. Erica-Irene A. Daes reported in paragraph 51 that, "Indigenous representatives from Hawaii said that the Government had denied the right of native Hawaiians to self-determination. Ceded land should be returned to native Hawaiians to ensure follow-up to the 1993 "Apology Bill", in which the Government admitted complicity in the illegal overthrow of the Kingdom of Hawaii. Hawaiians should be able to participate actively in the settlement of land disputes with the Government." Paragraph 110 of the same report stated that, "The indigenous representative of Ka Lahui Hawai'i stated that the health statistics of native Hawaiians were the worst in the United States, especially heart disease, cancer and diabetes. He noted, for example, that 66 per cent of all diabetes cases in Hawaii affected native Hawaiians although they make up only 20 per cent of the total population. He stated that these facts had not been considered in the Native Hawaiian Health Care Improvement Act, which had not brought about any significant improvement in health statistics." Further, paragraph 139 reported that, "Representatives from Hawaii expressed their gratitude and made specific reference to the "Apology Bill" adopted by the Congress of the United States in 1993, and to the conclusion of the report stating that the case of Hawaii could be re-entered on the list of Non-Self-Governing Territories of the United Nations.

In paragraph 39 the same report, the United States of America attempted to explain the "unique legal relationship" by attempting to unilaterally domesticate the violations of the international legal and political status of the Kingdom of Hawaii based on the illegal overthrow of the Hawaiian Kingdom and its unilateral annexation in 1959 that did not apply the United Nations procedure for annexing foreign territory and furthermore violated the Constitution of the United States of America.

The final working paper entitled "Indigenous Peoples and their relationship to land" in UN document E/CN.4/Sub.2/2001/21 of 11 June 2001, the Special Rapporteur Mrs. Erica-Irene A. Daes reported that the United States of America coined "aboriginal title" invoked the doctrine of "discovery" on the premise that Indigenous Peoples had to give up their territory and sovereignty for the Christian religion since the colonizers' were saving our souls and that the savages had to adhere to the superior genius of the European civilization. In paragraph 31 of Ms. Daes' report she states that "a discovering

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

State of lands previously unknown to it, an inchoate title that could be perfected through effective occupation within a reasonable time. The doctrine, as it has come to be applied by States with little or no support in international law, gives to the 'discovering' colonial power free title to indigenous lands subject only to indigenous use and occupancy, sometimes referred to as aboriginal title. The United States of America applied extinguishment policies by importing the 1823 *Johnson v. McIntosh* case (8 Wheat. 543) via the 1955 *Tee-Hit-Ton v. United States* (348 U.S. 272).

In 1952 the United Nations General Assembly adopted resolution 644 (VII) on 10 December to examine all discriminatory law and policy and to abolish it in the administration of Non-Self-Governing Territories. Paragraph 44 of the Land Rights Report stated that: "In this case the Supreme Court decided that the United States may (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation, this despite the fact that the United States Constitution explicitly provides that the Government may not take property without due process of law and just compensation. The Supreme Court found that property held by aboriginal title, as most Indian land is, is not entitled to the constitutional protection that is accorded all other property. The racially discriminatory nature of the *Tee-Hit-Ton* decision can be seen in the opinion, an extract of which follows:

"No case in this court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.

"... Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."

The legal doctrine created by this case continues to be the governing law on this matter in the United States today. The racially discriminatory character of the decision has not prevented this doctrine from being freely used by the courts and by the United States Congress in legislation, even in recent years. Indeed the Congress relied on this doctrine in 1971 when it extinguished all the land rights and claims of practically every one of the 226 indigenous nations and tribes in Alaska by adopting the Alaska Native Claims Settlement Act. The Act provided for transferring the land to profit-making corporations that were required to be created by the indigenous peoples and for paying a sum of money to each native corporation - a sum far less than the value of the land. The Alaska native tribes themselves were paid nothing. The remaining lands of the territory that belonged to the tribes, or that had been claimed by them, were turned over to the State of Alaska and the United States. The Alaska native tribes never consented to the legislation."

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

United Nations General Assembly resolution 1469 (XIV) of 12 December 1959 removed Alaska and Hawaii from the list of non-self governing territories without the participation and consent of the proper agents and authorities in Alaska and Hawaii. The denial of proper United Nations supervision and monitoring that was afforded other situations such as Tunisia, Morocco and Indonesia and numerous other non-self-governing territory examples did not occur. The information presented by the United States to the United Nations was deliberately inaccurate and intended to circumvent the obligations imposed on the United States under article 73 of the Charter. This enabled the direct denial of the right to self-determination on grounds of racial discrimination to the peoples of Alaska and Hawaii. This false and misleading process was clearly fraud.

It should be remembered that resolutions adopted by the General Assembly are not infallible; General Assembly resolution 3379 (XXX), adopted in 1975, was rescinded by GA Resolution 46/86 in 1991¹¹.

Thus, according to the *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* in E/CN.4/Sub.2/1999/20 of 22 June 1999, the Special Rapporteur Miguel Alfonso Martínez stated in paragraph 163 that, " By virtue of the so-called Apology Bill enacted by the Congress of the United States (P.L. 103-150, of 1993), among other reasons, the situation of the indigenous Hawaiians takes on a special complexion now. The Apology Bill recognizes that the overthrow of the Hawaiian monarchy in 1898 was unlawful. By the same token, the 1897 treaty of annexation between the United States and Hawaii appears as an unequal treaty that could be declared invalid on those grounds, according to the international law of the time." The Special Rapporteur concludes in paragraph 164 that, " It follows that the case of Hawaii could be re-entered on the list of non-self-governing territories of the United Nations and resubmitted to the bodies of the Organization competent in the field of decolonization."

In this light, it stands to reason that both Alaska and Hawaii must be re-enlisted with a full examination of the circumstances regarding their removal from the list of non-self-governing territories.

The other relevant supporting principles, observations and recommendations of the Special Rapporteur Professor Miguel Alfonso Martínez that support the arguments presented in this paper and our claims in Alaska and Hawaii include:

Paragraph 257. Regarding the question of whether or not indigenous peoples can be considered as nations - in the sense of contemporary international law - in the context of countries where some indigenous peoples have been formally recognized as such (by non-indigenous nations at the beginning of their contacts or at a later stage) through international legal instruments, such as treaties, and other peoples/nations have not, the Special Rapporteur believes it is pertinent to distinguish between those two situations, although the final analysis may lead to the same conclusion.

Paragraph 269. He believes that the content of article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...") was already a rule of international law at the time when the process

¹¹ See the Letter to CERD dated 27 August 2009 during the 75th session of CERD from the Indigenous Peoples and Nations Coalition on the infallibility of GA resolutions.

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

leading to the disenfranchisement and dispossession of indigenous peoples' sovereign attributes was under way, despite treaties to the contrary concluded with them in their capacity as recognized subjects of international law.

Paragraph 270. This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in the light of international law.

Paragraph 271. The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.

Paragraph 272. The legal reasoning supporting the above conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void. This is a notion that has been deeply ingrained in the conceptual development, positive normativity and consistent jurisprudence of both municipal and international law since Roman Law was at its zenith more than five centuries ago, when modern European colonization began.

Paragraph 273. As a result of his research, the Special Rapporteur has ample proof that indigenous peoples/nations who have entertained treaty relationships with non-indigenous settlers and their continuators strongly argue that those instruments not only continue to be valid and applicable to their situation today but are a key element for their survival as distinct peoples. All those consulted - either directly in mass meetings with them or in their responses to the Special Rapporteur's questionnaire, or by direct or written testimony - have clearly indicated their conviction that they indeed remain bound by the provisions of the instruments that their ancestors, or they themselves, concluded with the non-indigenous peoples.

Paragraph 279. On the other hand, the unilateral termination of a treaty or of any other international legally binding instrument, or the non-fulfilment of the obligations contained in its provisions, has been and continues to be unacceptable behaviour according to both the Law of Nations and more modern international law. The same can be said with respect to the breaching of treaty provisions. All these actions determine the international responsibility of the State involved. Many nations went to war over this type of conduct by other parties to mutually agree upon compacts during the period (from the sixteenth to the late nineteenth century) when the colonial expansion of the European settlers and their successors was at its peak.

It is also observed by the United Nations system that, " It should be noted, however, that so long as a territory is not actually independent, the General Assembly considers that it has the right to reopen the question of the territory's status at any time. Thus, although France ceased transmitting information on New Caledonia in 1947, the General Assembly decided on 2 December 1986 that New Caledonia was a non-self-governing

Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights

Shadow Report for the Universal Periodic Review of the
United States of America

territory within the meaning of Chapter XI of the charter and it was again included in the list of such territories¹²."

The Indigenous Peoples and Nations Coalition and the Koani Foundation refutes the claim by the United States of America in Document CCPR/CUSA/3 of the 28 November 2005 and in similar preparations such as to the 87th Meeting of the Human Rights Committee that Alaska and Hawaii are not foreign insular cases through their omission. The United States of America continues to equivocate regarding insular territories and so-called possessions in its implementation reports and to other reports on its international human rights obligations to the Human Rights Committee pursuant to Article 40 and all relevant Articles of the International Covenant on Civil and Political Rights and to other international reporting procedures.

It is this manner of fraudulent reporting; the United States of America is violating the principle that a state cannot plead provisions of its own domestic law or its deficiencies in violation of its international law obligations when it applied domestic law and its deficiencies for the situations of Alaska and Hawaii. The United States of America persistently and habitually submits false and misleading reports and information to cloak the violations of the Charter of the United Nations and international law, including the international human rights law they have agreed to uphold and to address. This contravenes the statement made by United States of America Under Secretary of State for Democracy and Global Affairs Ms. Maria Otero to the 13th Session of the United Nations Human Rights Council on 1 March 2010 during its High Level Segment in Geneva, Switzerland that they would act on three tenets in participation of the Human Rights Council to 1) a commitment to principled engagement, 2) consistent application of international human rights law and 3) to fidelity to the truth. The IPNC and the Koani Foundation call upon the United States of America to address our cases in good faith utilizing the three tenets.

Special Rapporteur James Anaya stated in his report (A/HRC/21/47/Add.1) that: the economic and cultural transformations accelerated by ANCSA [Alaska Native Claims Settlement Act] have bred or exacerbated social ills among indigenous communities, manifesting themselves, for example, in high rates of suicide, alcoholism, and violence (paragraph 62). And that: the problem runs deeper than ANCSA, to the incorporation of Alaska into the United States as a federal state through procedures that allegedly were not in compliance with the right of the indigenous people of Alaska to self-determination (paragraph 63).

The United States of America denied as one of its recommendations to address the right to self-determination in association with the economic, social and cultural rights of peoples. The United States of America has not given specific or justifiable reasons for denying these recommendations.

¹² <http://www.nationsencyclopedia.com/United-Nations/Independence-of-Colonial-Peoples-THE-ROLE-OF-THE-UN.html#ixzz0cXDm0Y0t> Read more: [The role of the un - Independence of Colonial Peoples - problem, annual, future, power http://www.nationsencyclopedia.com/United-Nations/Independence-of-Colonial-Peoples-THE-ROLE-OF-THE-UN.html#ixzz0lZxOdetZ](http://www.nationsencyclopedia.com/United-Nations/Independence-of-Colonial-Peoples-THE-ROLE-OF-THE-UN.html#ixzz0lZxOdetZ)

**Indigenous Peoples and Nations Coalition and Koani Foundation
International Council For Human Rights**

Shadow Report for the Universal Periodic Review of the
United States of America

In A/68/284 of the General Assembly report of the Independent Expert on the promotion of a democratic and equitable international order, paragraph 69 (n) it was recommended that the United Nations Decolonization Committee of 24 receive communications from, among others, Alaska, Hawaii and the Lakota Great Sioux Nations to address the colonialism in those situations.

The Report is prepared by Ambassador Ronald Barnes of the Indigenous Peoples and Nations Coalition (IPNC) with contributions of Kaiopua Fyfe, Leon Siu and Victoria Hykes Steere. The invaluable assistance of the Partner to IPNC, Professor Alfred de Zayas is vastly appreciated. Special mention is to the honor and memory of the late Professor Miguel Alfonso Martinez for his invaluable contribution to the rights of Indigenous Peoples and the substantive conclusions and recommendations in his Report. Many thanks to Professor Erica-Irene Daes for her excellent Land Rights Report and also for her contribution to the rights of Indigenous Peoples, including the substance of her reporting on Alaska.

This paper is also supported via Alaska Inter-Tribal Council resolution 2005-10 and the Alaska Native Brotherhood and the Alaska Native Sisterhood in Alaska via Grand Camp Alaska Native Brotherhood (ANB) resolution 18-09. Also thanks for the support of the Indian Council of South America and to others who have continually supported our international efforts in Geneva.

Other supporting organizations

International Council For Human Rights
Indian Council of South America
International Human Rights Association of American Minorities

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