

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

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

Nature of the Declaration:

With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force. Its persuasiveness and usefulness to the international community therefore critically depends upon the extent to which it enjoys unqualified support among States. This text contains recommendations regarding how States can promote the welfare of indigenous peoples. It is not in itself legally binding nor reflective of international law.

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

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

Self-Determination:

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

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

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

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

Lands, Resources, & Redress:

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

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

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

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

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

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

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

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