



Comments on the Review of the U.S. Position on the U.N. Declaration on the Rights of Indigenous Peoples

Submitted by EarthRights International¹ to the U.S. Department of State
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EarthRights International (ERI) makes this submission in response to the Department of State's request for comment on the U.S. review of its position on the U.N. Declaration on the Rights of Indigenous Peoples ("Declaration"). ERI's submission focuses on the impact that the U.S. position on the Declaration may have outside the United States and on U.S. foreign policy.

I. Overview

About EarthRights International

EarthRights International is a nongovernmental, nonprofit organization dedicated to the protection of human rights and the environment. ERI specializes in fact-finding, legal actions against perpetrators of abuses, training grassroots and community leaders, and advocacy campaigns. ERI works directly with indigenous communities around the world, including in the Amazon basin, in Nigeria, and in Southeast Asia.

Summary of comments

This submission argues that endorsement of the Declaration would promote U.S. foreign policy aims in two basic ways. First, it would strengthen the voice of the U.S. as an international advocate of human rights and the rights of indigenous peoples. An endorsement would signal a retreat from "American exceptionalism" and a return to this country's historical position as a participant and leader in regimes of international law and human rights standards. It would also lend greater credibility to the current administration's statements of support for a stronger and more respectful relationship with indigenous peoples, encourage indigenous advocates abroad, and provide a principled basis for U.S. efforts on indigenous people's rights in other countries.

Second, it would provide U.S. businesses with greater detail and certainty regarding their own obligations with respect to indigenous issues. Businesses have often insisted that the ambiguity of international standards makes compliance difficult. The detailed and unambiguous nature of the Guidelines, especially with respect to issues of consultation and consent, would allow them to serve as a clear statement of U.S. policy and a helpful guide to companies on the conduct expected of them under international standards.

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II. Support for the Declaration will give the U.S. greater standing to advocate for positive developments in the rights of indigenous people at an international level

Endorsement of the U.N. Declaration on the Rights of Indigenous Peoples would give the United States greater legitimacy in its engagement with foreign states over indigenous issues. While a Declaration does not, of course, impose any binding obligations on the countries that endorse it, it serves as a guiding statement of principles, a platform on which policy advocacy can be based. The ability to refer to the Declaration as a component of U.S. policy worldwide could lend strength to the U.S.'s voice as an advocate of indigenous rights and enable the U.S. to intervene more credibly in important international issues that touch on our country's basic values.

The U.S. has a long history of endorsing multilateral statements that evidence its values and moral stance in the international arena. The U.S. was instrumental in drafting and negotiating the Universal Declaration of Human Rights, and the principles enshrined therein remain the mainstay of the State Department's annual review of the human rights performance of every country in the world.² American officials have drawn inspiration from non-binding Declarations to promote important U.S. policy goals; for example, Maria Otero, the Under-Secretary of State for Democracy and Global Affairs, recently cited to the American Declaration on the Rights and Duties of Man in support of democratic elections.³ If the U.S. had not endorsed the American Declaration and other non-binding statements of principles, it would have been coming from a weaker position in an important multilateral, regional initiative to strengthen democracy and promote free and fair elections.

Historically, the United States has not been a leader on international indigenous issues. Nor is it in a particularly strong position to act as such; if its position on the Declaration does not change, the U.S. is likely soon to be the sole remaining nation whose official policy is in opposition to the Declaration.⁴ The notion of "American exceptionalism" on human rights issues is a well-known obstacle to the advancement of U.S. foreign policy, as scholars, advocates and foreign governments question U.S. legitimacy in promoting a pro-human rights agenda without accepting human rights instruments that have been adopted by the majority of the world's nations.⁵ Indeed, President Obama himself has described the most glaring example of U.S. exceptionalism in human rights policy—the lingering failure of the United States to ratify the Convention on the Rights of the Child—as "embarrassing," and promised to "review this and

² See, e.g., Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on the Human Rights Agenda for the 21st Century, (Dec. 14, 2009), available at <http://www.state.gov/secretary/rm/2009a/12/133544.htm>.

³ Remarks to the Organization of American States on Electoral Commissions (May 7, 2010), available at <http://www.state.gov/g/141608.htm>. In this context, Otero referred to Honduras's November 2009 elections, which the U.S. had backed as a means of ending the electoral stalemate between President Manuel Zelaya and Roberto Micheletti, the former President of the Honduran National Congress who became *de facto* President when Zelaya was removed from office and exiled by the Honduran military.

⁴ Of the four countries that originally voted against the Declaration, "Australia and New Zealand have reversed their positions and now endorse the Declaration," and "[i]n March 2010, the Government of Canada announced it would take steps to endorse the" Declaration, leaving the U.S. as the only standout. United Nations Permanent Forum on Indigenous Issues, United Nations Declaration on the Rights of Indigenous Peoples, at <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

⁵ See, e.g., Michael Ignatieff, *American Exceptionalism and Human Rights* (2005).

other treaties and ensure that the United States resumes its global leadership in human rights.”⁶ Opposition to the Declaration has also been highlighted as an example of “American exceptionalism,”⁷ and certainly undermines the ability of the United States to be a leader in indigenous rights issues worldwide.

If the United States were to take a greater role in indigenous peoples’ advocacy, endorsement of the Declaration would be an important and necessary step, without imposing significant new policy burdens.⁸ There are indications that a shift to such a role is underway. Last year, President Obama signed a Presidential Memorandum on Executive Order 13175, which commits all federal agencies to consultation and coordination with tribal governments on policies that affect them.⁹ This year, the State Department announced that its Human Rights Country Reports would include wider coverage of practices that threaten the health, well-being, or livelihoods of indigenous persons.¹⁰ If these steps are in fact evidence of a new focus on indigenous issues, endorsement of the Declaration will give the U.S. a stronger hand in advocating protections for indigenous peoples in international fora, including international financial institutions, the OAS, the OECD, and the Voluntary Principles on Security and Human Rights.

Non-binding Declarations serve as a means of providing encouragement to individuals who would promote important principles in repressive environments; they are, however, substantially weaker without U.S. support. During the Cold War, for example, the Helsinki Accords became a rallying point for human rights standards in the Eastern bloc, despite their non-obligatory nature. Dissidents behind the Iron Curtain seized on the human rights provisions in Article VII of the Helsinki Final Act and used them to insist on their right to freedom of expression and conscience. With U.S. support, Helsinki Watch Groups formed all over the world to hold governments to their words and report on violations. Thus the Accords became a kernel for the development of a network of human rights champions. The potential for Declarations to inspire social change has not gone unnoticed by other repressive regimes; in 2008, for example, Iranian security forces raided and closed the Center for the Defense of Human Rights “immediately prior to a scheduled ceremony to celebrate the 60th anniversary of the Universal Declaration of Human Rights.”¹¹

⁶ Child Rights Information Network, *United States: Is Obama’s win also a victory for children’s rights?*, at <http://www.crin.org/resources/infoDetail.asp?ID=18874&flag=news>.

⁷ See, e.g., Natsu Taylor Saito, *Human rights, American exceptionalism, and the stories we tell*, 23 *Emory Int’l L. Rev.* 41, 65-67 (2009).

⁸ The potential burden of endorsing the Declaration is eased by the fact that U.S. law already incorporates many of the principles enshrined in the Declaration in part or in whole, including the right to consultation and participation, recognition of land rights, and political autonomy and self-determination. Of course, the Declaration also recognizes some rights that may go well beyond those currently recognized under U.S. law, but in light of President Obama’s pledge for a new, committed relationship with tribal leaders, the Declaration could provide a ready-made framework for discussion on how that relationship should develop.

⁹ Barack Obama, U.S. President, Memorandum for the Heads of Executive Agencies – SUBJECT: Tribal Consultation (Nov. 5, 2009), available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

¹⁰ U.S. State Dept., Bureau of Public Affairs, Tracking Human Rights Worldwide: State Dept. Country Reports (Feb. 23, 2010), available at <http://www.america.gov/st/texttrans-english/2010/February/20100224174352xjsnommis0.782284.html>.

¹¹ U.S. State Dept., 2008 Human Rights Report: Iran (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119115.htm>.

Similarly to the Helsinki Accords, the Declaration, with U.S. support, could embolden proponents of the rights of indigenous peoples and give the U.S. a greater ability to advocate in specific instances that are of national interest. For example, Peru recently announced its intention to expel Paul McAuley, a British missionary and environmental activist who has worked for decades to help Peruvian indigenous groups defend their rights and protect their lands from environmental damage. The Peruvian government denounced McAuley's work as political and attacked him for taking part in public demonstrations and petitions to the Constitutional Court; this action may be an attempt to deny numerous rights elaborated in the Declaration by reducing indigenous peoples' ability to organize politically and to protect their natural environment. Were an American indigenous rights activist to be similarly targeted in another nation, U.S. standing to complain about mistreatment could be undermined by the fact that the other nation would have endorsed the Declaration, while the U.S. has not. As an endorser of the Declaration, on the other hand, the U.S. would have a stronger hand both to advocate on behalf of its own citizens and to help protect the rights of indigenous peoples worldwide.

In sum, U.S. endorsement of the Declaration would give the U.S. a more credible voice in indigenous peoples' rights internationally, a field in which it asserts a strong and growing interest. It could also give much-needed encouragement to promoters of the rights of indigenous peoples and allow the U.S. to engage in their defense.

III. The Declaration provides greater certainty and uniformity regarding the obligations of U.S. businesses acting abroad

U.S. endorsement of the Declaration would assist the U.S. business community in its operations abroad by helping to clarify the nature of obligations toward indigenous peoples. While the Declaration, as a non-binding instrument, does not create new obligations, agreement on its text helps to provide content to terms that are found in other binding instruments, and to remove uncertainty about the legal context in which multinational businesses may operate.

A common complaint of the business community regarding human rights issues is that the rules are uncertain and lack specificity. For example, the OECD Guidelines for Multinational Enterprises have been criticized as being insufficiently detailed to allow corporations to determine whether they are in compliance with the Guidelines' human rights obligations. Another concern is that multinational corporations may be subjected to overlapping and conflicting standards, as may be the case where one country endorses a particular human rights instrument but another one does not.

This uncertainty extends to operations of corporations in the traditional territory of indigenous peoples, and corporations' responses to the problem vary dramatically. For example, Occidental Petroleum, a U.S. company with substantial operations in South America and not infrequent contact with indigenous groups there, has a policy stating that it respects "the cultural values of the communities in which it operates including the indigenous peoples recognized by the laws of the applicable jurisdiction," and that it is "committed to consulting with, and seeking the pre-approval of, any legitimate local communities affected by its business operations in order to

minimize potential negative impacts on such communities as well as its operations.”¹² On the other hand, other U.S. multinationals operating in the same region—even those with human rights policies—do not mention indigenous peoples in their policy statements at all.¹³

Many concepts present in the Declaration are already part of international legal instruments. For example, the notion that indigenous peoples must be consulted regarding decisions that affect them and their lands is enshrined in the Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization. Convention 169 is widely ratified in South America,¹⁴ and thus already applies in many of the places where U.S. multinationals come into contact with indigenous groups. But exactly what this consultation requires in any given circumstance is not spelled out in the Convention; here, the Declaration is useful in elaborating these protections. For example, articles 18 and 19 of the Declaration specify that, when indigenous peoples are consulted in matters that affect them, such consultation should be done “through representatives chosen by themselves” and “through their own representative institutions,” providing guidance on how such consultation is to occur.

Concepts present in the Declaration are also part of several institutions and initiatives that the U.S. champions or in which the U.S. participates; here again U.S. endorsement of the Declaration would help to clarify obligations under these measures. For example, the U.S. supports the Voluntary Principles on Security and Human Rights, which includes as one of its principles that “[c]ompanies should consult regularly with host governments and local communities about the impact of their security arrangements on those communities.”¹⁵ The Declaration provides some guidance about what “consultation” means with respect to indigenous communities. Similarly, the World Bank’s Operational Policy 4.10 requires “a process of free, prior, and informed consultation with the affected Indigenous Peoples’ communities” regarding Bank projects,¹⁶ and Operational Policy 4.12 generally requires informed consultation prior to resettlement of any communities.¹⁷ The International Finance Corporation’s Performance Standards have similar requirements.¹⁸ U.S. endorsement of the Declaration would serve to reinforce these policies, remove any uncertainty about the official position of the United States, and provide added clarification on the obligations of U.S. businesses operating abroad.

In sum, the lack of U.S. endorsement of the Declaration has contributed to the uncertainty surrounding the obligations of states and multinational businesses regarding indigenous peoples, and changing the position of the United States would help to alleviate this problem.

¹² Occidental Petroleum, “Human Rights Policy,” at http://www.oxy.com/sr/7-2_human_rights_policy.asp.

¹³ See, e.g., Chevron Corporation, “Human Rights,” <http://www.chevron.com/globalissues/humanrights/>.

¹⁴ Nine of the twelve nations of South America are parties to Convention 169, all but Uruguay, Guyana, and Suriname. See Convention No. 169, at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

¹⁵ The Voluntary Principles on Security and Human Rights, “The Principles: Interactions Between Companies and Public Security,” at http://www.voluntaryprinciples.org/principles/public_security.

¹⁶ See The World Bank, “OP 4.10 – Indigenous Peoples,” at <http://go.worldbank.org/UBJJIRUDP0>.

¹⁷ See The World Bank, “OP 4.12 – Involuntary Resettlement,” at <http://go.worldbank.org/GM0OEIY580>.

¹⁸ See International Finance Corporation, *Performance Standards on Social & Environmental Sustainability* at 19-20, 29-31 (Apr. 30, 2006), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf).

IV. Conclusion

In conclusion, U.S. endorsement could provide modest but significant benefits to U.S. foreign policy, without introducing binding policy obligations or entailing other drawbacks. These benefits could include 1) providing greater legitimacy and strength to U.S. advocacy on indigenous issues; 2) providing greater certainty and more precise content on the standards of conduct for U.S. businesses operating in indigenous areas; and 3) providing encouragement to indigenous activists in difficult environments.

Finally, endorsement of the Declaration would be important for its symbolism – it would signal a retreat from the position that the U.S. need not participate in international human rights regimes, and a return to this country’s historical position as a leader in the promotion of multilateral human rights instruments and respect for international law and institutions.