

yesterday today tomorrow

STRUGGLE

"as long as Indigenous peoples have land, we will have to fight"

Chief Oren Lyons, Faithkeeper, Onondaga Nation

**UPDATE on the SECOND PART of the 11TH SESSION
of the UNITED NATIONS WORKING GROUP
on the DECLARATION on the
RIGHTS of INDIGENOUS PEOPLES**

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SETTING THE TONE	2
OPPOSITION	4
THIS REPORT	4
THE DELEGATION	5
SUMMARY OF PREAMBULAR PARAGRAPHS AND ARTICLE IN THE DECLARATION ON INDIGENOUS PEOPLES RIGHTS	6
SELF-DETERMINATION	8
ARTICLE 31.....	8
ARTICLE 45.....	9
LANDS, TERRITORIES AND RESOURCES	14
ARTICLE 21.....	14
ARTICLE 25.....	14
ARTICLE 26.....	15
ARTICLE 27.....	15
ARTICLE 28.....	15
TREATIES	16
COMING ATTRACTIONS	18
SOME OPTIONS BASED ON INCOMPLETE INFORMATION:	20

Setting the Tone

The following is a statement written, but not given during the session, to summarize our overall position on the Declaration:

Greetings from the Indigenous peoples, nations, communities and organizations represented by the American Indian Law Alliance and the Lakota Nation Owe Aku delegation at the XIth Session of the Working Group. We come today asking that our ancestors impart their wisdom to us to both speak and listen. We come today in the name of the leaders and elders who have fought and died for the Declaration that we have spent the last 20 years creating and defending. We come today knowing that without the support of our peoples at home on our territories and the guidance of those that have gone before us, we are powerless and pitiful in our attempts to revitalize and find recognition of the rights given to us by the Creator. We acknowledge those here present in this room that have approached this process with an open mind and a good heart and are grateful for all the friends and allies we have made in the non-Indigenous world.

We come today, to the XIth session of the Working Group on the Declaration to share with you some of our concerns and especially our hopes for the passage of a strong and clear Declaration on the Rights of Indigenous peoples. From the beginning we have argued for nothing more than a just and equal acknowledgment of the rights granted to all other peoples and to begin to make amends for the plunder and colonization of our peoples after hundreds of years of genocide and colonization.



We entered this process with the highest goal of protecting our peoples' future, the lands and territories for which we have been responsible since time immemorial and preserving a way of life that understands we are but one part of creation in which everything from the sand on the beach to the buffalo on the plains play a critical role in the balance that is our life on Earth.

Many of us in the Indigenous caucus are concerned that a declaration may be submitted to the Commission in which our views and language are not adequately reflected. Rather, the minority view of one or two states are being used to reflect language that is opposed overwhelmingly by Indigenous

delegations and with the support of many, many states. Time and time again, Indigenous peoples and the allies we have found amongst the states have carefully addressed the concerns of these minority view states. Time and time again, our logic has been rejected, not because of the truth of our reasoning, but because of the economic and political interests of these states in violation of human rights law and standards.

Mr. Chairman, just as Great Britain and the United States have stated that there are threshold provisions beyond which they are unprepared to go, Indigenous peoples must insist upon minimum standards in a Declaration on our rights. These are the inherent nature of our human rights, the unqualified right to self-determination, the right to spiritual freedom including unhindered access to our sacred sites according to the nature of our practices, the international character of our treaties and, perhaps most critically, our right to the interpretation of all of these rights under international law and standards without the arbitrary and unilateral interference of state governments.

We would urge that these are the minimum level of standards that we are willing to support. Anything less will not be a human rights declaration on Indigenous peoples with the support of Indigenous peoples. Many of us must go home and justify the 20 years that we have participated in this process and are accountable to our communities for the resources used in struggling to achieve these minimum standards. A declaration that does nothing more than maintain a status quo of state dominance, prejudicial application of international law and unilateral control of our lives and resources IS NOT justifiable. We cannot support such a declaration. If such a declaration is submitted to the Commission, it will be our duty to communicate these objections at every level of the United Nations. We will never surrender to colonization. Colonization, racism, prejudice and genocide are indeed evil. It is therefore our responsibility to continue this fight. We hope you will make it yours.



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Xlth Session of the Working Group on the Declaration

OPPOSITION



The representatives of the United States Government discuss how to more effectively limit Indigenous Peoples rights

The United States delegation, in their opening statement on the first day of the second part of the 11th Session of the Working Group, began with an assault on the rights of Indigenous peoples. In an all too common interpretation of their colonial legacy they limited our rights to those which they can control:

“the United States government looks forward to a robust right of self-determination for Indigenous peoples but one that limits that right to autonomy and a right to self-determination that is only applicable in a domestic context”.

This is in contrast to established human rights law which clearly states

that all peoples have the right to self-determination. The United States continues to lower human rights standards applicable to Indigenous peoples. The United States is joined by its allies Australia and New Zealand in their assault on the rights of Indigenous peoples with far too frequent support from France and Great Britain. In fairness though, on the last day, Great Britain did agree to language insisted upon by Indigenous peoples by stating they would not block consensus.

This Report

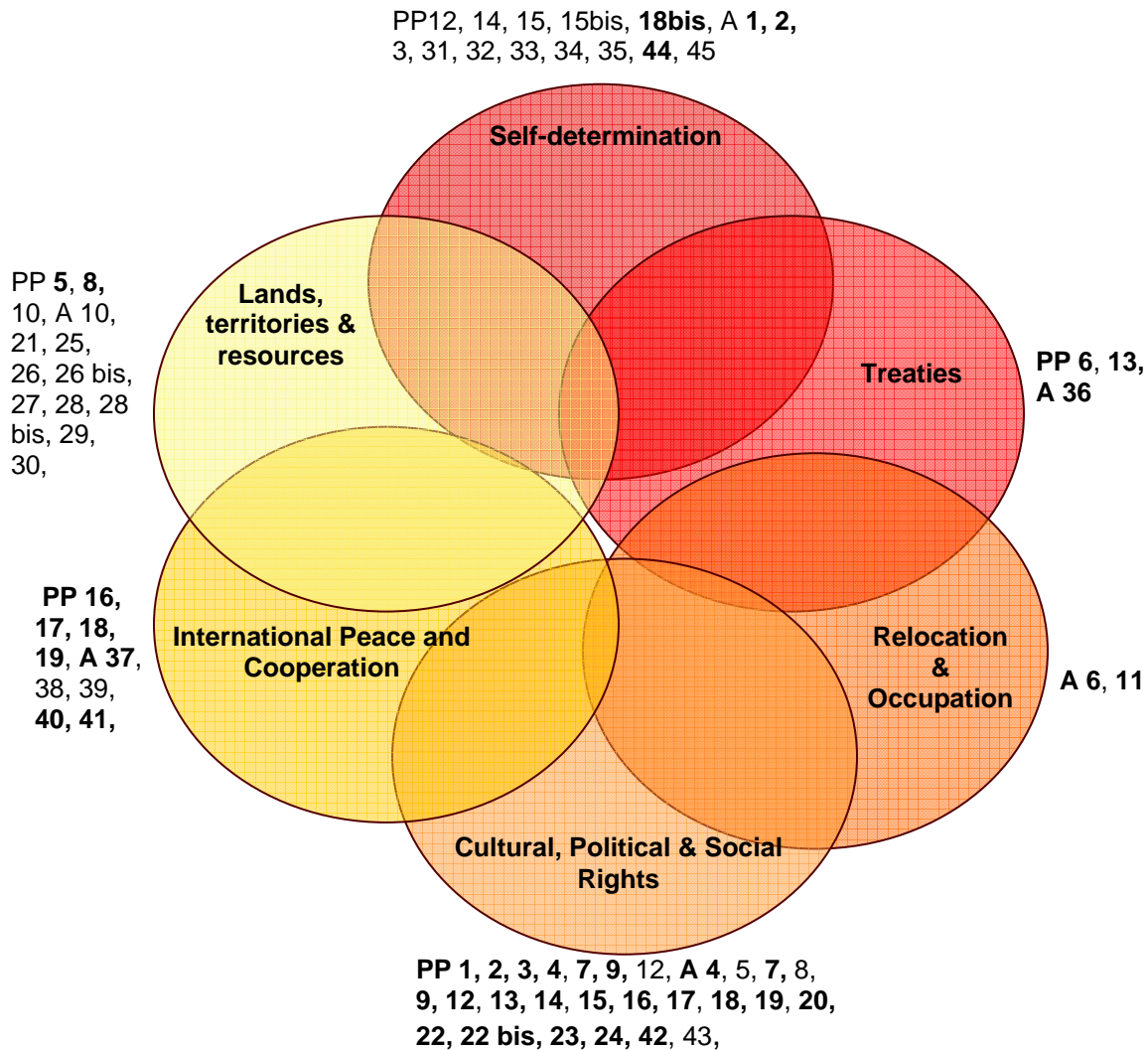
This is the context in which the very difficult third week of the struggle to defend the rights of Indigenous peoples began. The first two weeks of this 11th Session were held from December 5 through 16th of 2005. A report on the December session, including some background on the process and the efforts of Indigenous peoples over the years, has already been distributed. That report contained the status of preambular (introductory) paragraphs and articles (operative paragraphs) at that time. That report is available on the American Indian Law Alliance website at www.ailanyc.org or, for a printed copy, by contacting the Law Alliance. An oral version of the report is being prepared in the Lakota language by the Lakota Nation's Owe Aku tiospaye which will be available on cassette tape. After a hiatus of a few weeks, the third week of the same session was held from January 30th through February 3rd of 2006. This report will attempt to generally summarize the language that has been agreed to, some of the highlights of the disputes with national governments, as well as another chart on the status of the Declaration's provisions. However, that chart will not be completed until the Chairperson releases his report. Finally, the report will address the possible options available to Indigenous nations and organizations in the ongoing process to have a lasting, effective and principled Declaration.

The Delegation



The delegations of the American Indian Law Alliance and the Owe Aku: Kent Lebsock, Teri Jo Afraid of Hawk, Kaela ????, June Lorenzo, Maivan Clech Lam and Debra White Plume

Summary of Preambulary Paragraphs and Article in the Declaration on Indigenous Peoples Rights



Preambulary paragraphs and articles in bold have been provisionally agreed to by the states and Indigenous delegates participating in the Norway consultations. These consultations, ably chaired by Astrid Ajamay of Norway, were an opportunity for Indigenous peoples and state representatives to frankly discuss specific issues on language and represent a substantial consensus on the language presented. Ms. Ajamay, the Norwegian Chairperson, then presented the results of these consultations to the Chair of the Working Group in the plenary sessions. This language should be reflected in the Chair's text and report due out later in February 2006.



Self Determination Provisionally Adopted	Self Determination Not Adopted
PP 18bis Articles 1, 2, 44	PP12, 14, 15, 15bis, , A, 3, 31, 32, 33, 34, 35, 45
Treaties Provisionally Adopted	Treaties Not Adopted
PP 6, 13 Article 36	
Relocation and Occupation Adopted	Relocation and Occupation Not Adopted
Articles 6, 11	
Cultural, Political & Social Rights Adopted	Cultural, Political Social Rights Not Adopted
PP 1, 2, 3, 4, 7, 9, Articles 4, 7, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 22 bis, 23, 24, 42,	PP 12 Article 5, 8, 43
International Peace & Cooperation Adopted	International Peace & Cooperation Not Adopted
PP 16, 17, 18, 19, A 37, 40, 41,	Articles 38, 39
Lands, Territories & Resources Adopted	Lands, Territories & Resources Not Adopted
PP 5, 8,	PP 10 Articles 10, 21, 25, 26, 26 bis, 27, 28, 28 bis, 29, 30,

In many ways the visual displays of the rights contained in the Declaration are deceptive because, in reality, every provision is reflective of the right to self-determination. One non-Indigenous scholar, Tyge Lehmann, has stated that the Declaration might be just as effective if it contained nothing more than Article 3, which states,

“Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

It is difficult to get clearer than that.

However, the two charts are designed to give an overview of the contents of the Declaration, which provisions are applicable to specific issues of interest to Indigenous nations and communities and the status of provisional adoption.

A quick review will easily show that the two most contentious issues that still remain are self-determination and lands, territories and resources. Of course, these are also the most critical issues for Indigenous peoples. Although countries do not want to give up what they see as their colonial right to the resources of Indigenous peoples’ lands and territories, most Indigenous delegations have stated their intention to fight for these rights without compromise. Of course, rights to lands, territories and resources flow directly from the right to self-determination and the paragraphs pertaining to self-determination are to be equally defended.

Self-Determination

Article 31

As stated above, Article 3 contains the right of Indigenous peoples to self-determination. Article 31 (and indeed Articles 31-36) is about the right to self-government which is only one aspect of the right to self-determination. However, many states are attempting to use Article 31 to limit Indigenous peoples' rights. One way to accomplish this is to reduce the right to self-determination to that of autonomy. Under the domestic law of the United States, autonomy already exists and is implemented through the IRA governments. The second part of the attempt to limit the right of self-determination is by limiting it to a domestic context, subject to the laws of the colonizing country. These limitations are not consistent with international human rights standards and are prejudicial to Indigenous peoples. The United States went so far as to state that the contents of Article 31 must be combined with Article 3 (so that their proposed limitation on Indigenous peoples rights is clear).

In the Chairman's proposed text, there is a second paragraph to Article 31 designed to address these state concerns which has been added to the Subcommission text. The Chair's second paragraph states:

"This right shall be exercised in accordance with the rule of law, with due respect to legal procedures and arrangements and in good faith."

The American Indian Law Alliance intervened on this Article, opposing the US formulation and the inclusion of the second paragraph in Article 31.

"Greetings to the Indigenous brothers and sisters joining us here and to the elders who lend their guidance and leadership. Also, greetings to the representatives of states and you, yourself Mr. Chairman. I am Kent Lebsock and here on behalf of the American Indian Law Alliance, an NGO in consultative status with ECOSOC. I am Lakota and my Lakota name is Tetuwan Okshila."

"AILA looks forward to a productive week in which we reach the fullest possible consensus and in which isolated positions are just that: isolated. Minority views, especially extreme minority views, whether they come from states or Indigenous peoples, should not be permitted to hijack what has been a revolutionary and evolutionary process in the search for equal and inalienable rights for Indigenous Peoples. We hope we can proceed with the realization that this is a declaration on the rights of Indigenous peoples and not a declaration on the relationship of states with Indigenous peoples..."

"Finally, the American Indian Law Alliance is opposed to the inclusion of the second paragraph contained in the Chairman's proposal summary. This paragraph is, again, nothing more than an attempt to domesticize the human rights of Indigenous peoples."

Madam Daes, the former Chairperson of the Working Group that was responsible for the original draft of the Declaration, concurred. She said,

"delete the second paragraph, delete it. The language [of the second paragraph] is unacceptable."

In a joint statement several organizations addressed the same issue:

“Articles 3 and 31

“We reiterate the fundamental importance of the right of self-determination, from which flows so many of our rights, including our collective rights. This right needs to be reflected in its true essence, as we believe it has, in the article 3 as reproduced in the chairperson’s proposal. We cannot agree to any changes to this formulation. Furthermore, the essence of one of the corresponding articles on the right of self-determination, namely, that autonomy and self-determination, as contained in article 31, must also remain unqualified. Its placement as the first article of Part VII, is logical, and must be so retained. Any proposed reordering of the placement of the provisions this article, such as to place them in an article after article 3 would be inappropriate, confusing and limit the scope and extent of the right of self-determination.

“We hope that the strong views that we have expressed with regard to the provisions of articles 45, 45 bis, 3 and 31 will be accurately and appropriately reflected in the report of this working group on its 11th session.”¹

Article 45

This has been one of the most difficult articles in the Declaration. So many proposals have been put forward and so many concoctions have been presented to diminish the rights of Indigenous peoples in this last paragraph of the Declaration, it is hard to keep track of them all. The original version simply states:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.”

Nothing could be more strait-forward, right? Wrong. Some states have wanted to add a laundry list of limitations on the Declaration, basically rendering the whole thing impotent. Many States have, however, spoken against making this a junkyard of provisions (Canada, for example) insisting that the Declaration should end on a positive, uplifting note. The American Indian Law Alliance also intervened on the contents of this article:

“...As was stated...Article 45 has been a dumping ground for any left-over suggestions. This seems to be continuing again and we would sarcastically suggest that soon some states will be asking that the entire contents of ILO 169, US Federal Indian Law and all of the United States Supreme Court decisions that attempt to limit the rights of Indian peoples should be included in Article 45. This way they can continue to colonize, exploit and oppress our peoples and territories unabated.

¹ Joint Statement by Taungya, American Indian Law Alliance, Association of the Shore People, Programa pueblos Indigenas del Cealp, Asociacion Napguana, Wara Instituto Indigena Brasileiro, Aotoroa Indigenous Rights Trust, Comision de Juristas Indigenas de Argentina, Centro de Estudios disciplinarios Aymara, International Indian Treaty Council, Association TAGAZT Djanet Tuareg people, Culture et developpement du monde berbere, Co-ordination Autochtone Francophone (CAF), Unissons-nous pour la Promotion des Batwa (UNIPROBA), (IPACC, Tamaynut, World Amazish Congress, African Caucus, and JOHAR - Agenda Item: Articles 31, 45 and 45bis (Autonomy & Self Determination and Third Party Rights)

“The American Indian Law Alliance agrees with the statement of Norway, the Teton Sioux Nation Treaty Council and others that the best resolution of this situation is to simply delete the second paragraph of Article 45.

*“We also agree with our respected brother and leader, Joseph Ole Simel, from Africa, that phrases such as ‘the rule of law, general welfare, and the public interest’ being proposed by some states are all phrases and concepts used to limit the rights of Indigenous peoples. Even today, the Patriot Act in the United States, which is said to be in the public interest, and was duly passed under the rule of law, limits the rights of individual freedoms **despite the pretence** of the United States to so arduously protect these same freedoms with respect to the Declaration.*

‘You just stated that you don’t understand why Indigenous peoples and some states so adamantly oppose the inclusion of language [that] is a part of most other international instruments. Your text is derived from Article 29 of the Universal Declaration on Human Rights. However, that Article 29 is referring to the individual to individual relationship of rights and is therefore inappropriate in a document dealing with the rights of peoples. Even with all the changes proposed by you and others, the language seems to be unfixable in this context. While Article 29 of the Universal Declaration uplifts the rights contained in that declaration and rises them to a level equal to other aspects of international law and standards, the purpose of the suggested additions in Article 45 are designed to limit and drag down the rights established in the Declaration on Indigenous Rights, making them subservient to other law and standards.

“However, the American Indian Law Alliance is committed to the achievement of an effective and lasting Declaration and we understand that some compromise on this article may be necessary. We therefore agree with the position presented by Canada that the Declaration needs to end on a positive and forward-looking note. We therefore are willing to consider the compromise language Canada has proposed with reference to the second paragraph of Article 45. We believe that, as you requested, this language comes closer to achieving a much more equitable resolution. Finally, it seems to fulfill the requirements of offering you the assistance you just sought in finding language that will bring us closer to resolving this issue. Thank you Mr. Chair.”

Although a second and third paragraph were deemed unnecessary by some (including our own delegation), in the spirit of reaching consensus the following language was proposed by Canada and the American Indian Law Alliance to satisfy everyone’s needs:

February 3, 2006

ARTICLE 45:

- 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.*
- 2. In the exercise of the rights enunciated in the present Declaration, respect for the human rights and fundamental freedoms of all persons shall be observed. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are in accordance with international human rights law and international standards of good governance.*
- 3. The principles of this Declaration, and of justice, democracy, and respect for human rights, equality, non-discrimination, good faith, and good governance for all constitute essential elements for harmonizing the rights of indigenous peoples, individuals, States and other concerned parties.*

Nonetheless, even some Indigenous delegations were concerned that this language would not go far enough in appeasing the states and believed that references to “*territorial integrity, just requirements of morality, rule of law and the common good*” would have to be included. The Indian Law Resource Center presented the following language for paragraph 2 of Article 45:

“...The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are in accordance with international human rights law determined by law, non-discriminatory, and strictly necessary for the purpose of securing due recognition for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

At the Indigenous caucus meeting on this significant article, Kent Lebssock of the American Indian Law Alliance spoke forcibly for the importance of maintaining the key principles of the Declaration without compromise.

“For our delegation there are certain articles upon which we cannot make any more concessions. To do so would be to betray the communities to whom we are accountable and to forget the direction and guidance given to us by the elders that originally led us, as Lakota people, to the United Nations in the first place. These principles are especially contained in the articles on self-determination, including Article 45, and all of the articles on treaties. Many of the states have said that there are certain ‘portals’ beyond which they are not prepared to go. There is no reason that we are not entitled to take the same position and, for us, Article 45 cannot include language that puts individual rights and domestic law above the Indigenous right to self-determination. Some delegations are prepared perhaps to do that, but for us, it would be a consensus breaking position.”

The language proposed above by the Indian Law Resource Center is exactly the kind of compromise AILA and the Owe Aku is not prepared to make. Reading through the legal mumbo jumbo, it clearly states that “*the rights set forth in this Declaration*” shall be subject to such limitations ... *strictly necessary for the purpose of securing due **recognition for the rights and freedoms of others*** [in other words third-parties (a key concern of states) which includes non-Indigenous land owners/occupiers, corporations and state governments] *and for meeting the just and most compelling requirements of a democratic society*”. The “just” and “compelling requirements” of a democratic society could be anything from taking land for military purposes (as in the Badlands on the Pine Ridge Oglala Lakota Homelands), building a Wal Mart superstore, or creating a shooting range on the Lakota sacred mountain Bear Butte if the economy is considered (and it always is considered) a just and compelling requirement for society.

Debra White Plume of the Owe Aku also spoke on this matter:

“I am Debra White Plume of the Owe Aku and I am a mother and a grandmother. I have come here in a good way to fight for my people and represent our way of life. I know that the language being proposed in articles 45 and 45 bis are going to hurt our way of life, not just our people, but our way of life. We have to take responsibility for that. Some of the states are acting collectively to deprive us of our rights and they’ve drawn their line in the sand and I think it behooves us to look at that. That is not fear, that is just looking at reality. If we have to make a choice between a bad, harmful declaration and walking, we need to be prepared to do that collectively, together; and if there are indigenous organizations friendly with the oppressors and that are not prepared to

stand with us, then we need to make it known that those groups do not represent this indigenous caucus, or our people, or our work.”

Both statements made the position of our combined delegation clear. The language that we worked on with Canada and others should still satisfy the legitimate concerns of others in which all rights must be balanced. However, none should be given preponderance. The wording proposed in our 2nd paragraph of Article 45 makes all rights equal and in compliance with **international standards of good governance.**

“The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are in accordance with international human rights law and international standards of good governance.” (paragraph 2 of Article 45, AILA/Canada Proposal)

International standards of good governance is increasingly used in international standard-setting interpretations (even though some states, such as the UK, were unaware of the fact that they had entered into agreements of this nature through the European Union with dozens of peoples around the world). To insist on anything else, simply demonstrates that the states and some Indigenous delegations supporting their language are not interested in a fair, just and balanced Declaration, but one in which Indigenous human rights can be trumped by domestic power. All we are fighting for is that our rights be balanced in the same context and on the same level as everyone else’s rights. The proposed third paragraph makes this clear:

“3. The principles of this Declaration, and of justice, democracy, and respect for human rights, equality, non-discrimination, good faith, and good governance for all constitute essential elements for harmonizing the rights of indigenous peoples, individuals, States and other concerned parties.” (paragraph 3 of Article 45, AILA/Canada Proposal)

No agreement was, however, reached on Article 45 during this session of the meeting. For that reason, several delegations submitted a joint statement on the last day of the proceedings making our position clear on the critical nature of this language:

On Article 45

“The indigenous peoples’ delegations joining together in this statement are conscious of the fact that the enjoyment of the rights and freedoms referred to in the Draft Declaration, as in other human rights instruments, must be balanced with the rights and freedoms of others. However, the manner in which such enjoyment of rights is to be balanced cannot, and should not, be determined in an instrument of this nature. Firstly, the detailed nature and extent of the numerous possible ways of balancing the potential conflicts or tensions, would be impossible to accurately anticipate, and provide for, in this Declaration. Secondly, and more importantly, there is ample scope for balancing the enjoyment of such potentially conflicting rights and freedoms under existing instruments on international human rights law, to which states, indigenous peoples and others may have recourse to, when so required.

“The wording contained in the Subcommission draft of Article 45 goes in this direction by stating that no state, group or person should interpret this Declaration in a manner that would be contrary to the Charter of the United Nations.

“However, a small number of delegations at this Working Group had difficulties with this formulation and wished to add further limitations. In an effort to reach consensus, and in order to account for these concerns, the delegations subscribing to this statement were flexible and

accommodative enough to agree to some of the proposed changes to the Subcommission draft. Some of these delegations thereby agreed to the inclusion of language stating that the exercise of the rights and freedoms contained in this Declaration must meet international human rights law and international standards of good governance. However, the proposed inclusion of further limitations, namely, the “just requirements of morality, public order and the general welfare in a democratic society”, which have been reflected in the proposal of the chairperson of this Working Group’s (as contained in UN Doc E/CN.4/2005/WG.15/2 dated 15 September, 2005) have no place in this Declaration, because such requirements of “morality” etc. have historically been invoked to justify the perpetration of severe injustices against indigenous peoples, including genocide and ethnocide. They are sweeping in nature, and would severely undermine the exercise of indigenous peoples’ rights, and undo a most fundamental purpose of this declaration, namely, to protect and promote the rights of indigenous peoples.

“Generic references to limitations upon the exercise of rights and freedoms are more appropriate, and more common, in national legal instruments, than in international law. Limitations of this nature refer generally to specific individual rights and freedoms, such as the freedom of expression, or freedom of assembly, or freedom of movement. Other references to such limitations are applicable in their particular contexts, and are not relevant to the situation of the rights of indigenous peoples in general.

“Therefore, we believe that the best way to address this issue is to accept the proposal made by the Canadian delegation, with amendments to it by the American Indian Law Alliance (AILA), as presented on 1 February, 2005, (an English language copy of which is annexed to this statement). This proposal has been supported by a large number of governmental and indigenous delegations, whereas the proposals contained in the chairperson’s proposal (as contained in UN Doc E/CN.4/2005/WG.15/2 dated 15 September, 2005) are based upon the support of only a very few delegations participating at this Working Group.”²

We believe that the language proposed by all of these organizations, with the support of several states, is the most fair and equitable solution to this issue and is the best basis for consensus with Indigenous support. Finally, although we never even discussed the provisions of Article 45bis proposed by some states, it was addressed in the same intervention:

On Article 45 bis

“Given the broad scope of Article 45, as contained in the AILA proposal on Article 45, the concerns, if any, regarding potential conflicts or tensions between the rights of indigenous peoples and the interest of states, and rights of other third parties, have already been met, and we therefore see no need whatsoever of retaining the provisions of this proposed new article.”³

² Ibid.

³ Ibid.

Lands, Territories and Resources

A review of the chart shown on page 7 will demonstrate that progress on lands, territories and resources has not been great. As of the close of this supposed final session, only two preambular paragraphs and **no** operative articles have been submitted for provisional adoption. The discussions on these articles were very difficult, not only reflecting the completely converse world views on lands, territories and resources between Indigenous peoples and some states, but also the unrelenting greed of corporate governments in exploiting the environment.

“if we continue to hear all of the examples of ways in which Indigenous peoples have suffered because their rights have been violated, we will be here for years...”

Chairperson Luis Chavez, January 30, 2006

The statement by the Chairperson highlighted above was in response to an intervention of Mikhail Todyshev from RAIPON (the Indigenous peoples from Siberia and the far east in the Russian Federation) on Article 25. He used specific examples of how harmful language would be used against Indigenous peoples. The Chair responded, probably unknowingly, by admitting the great injustices leveled against our peoples worldwide. Hopefully the language he uses in the article will also reflect his obvious realization of the true nature of the abuse of our rights.

Here is a discussion on some of the language in the discussions around lands, territories and resources.

Article 21

This article addressed the right to subsistence and development and provides for redress when this does not occur. The original language talks about “just and fair” redress. The Chair, at the urging of some states is proposing “effective mechanisms.” The representative of the Saami Council stated that:

“We cannot agree with ‘effective mechanisms’ for redress in reference to means of subsistence because this is the very nature of our live and existence. ‘Effective mechanisms’ limits us to domestic law and there is no effective redress in domestic law.”

At the end of the discussion, the Chairperson did accurately reflect that “there is a preference for ‘just and fair.’”

Article 25

This article addresses the right “to maintain and strengthen” the “spiritual and material” relationship with the land. However, some states want to remove ‘material’ because, of course, they fear that this will invoke some kind of property rights. Although these rights are addressed in other parts of the Declaration, Indigenous peoples repeatedly explained that this particular article is talking about the indivisible relationship between the spiritual and material, i.e., sacred

sites. Andrea Carmen of the International Indian Treaty Council gave an eloquent intervention on why the inclusion of “*material*” is so critical:

“Please try to understand with your hearts, not just your minds and your law books.”

Article 26

This article is critical in that it addresses Indigenous peoples’ right to “*own, use, develop and control*” lands, territories and resources. The original language simply states that this right applies to lands “*traditionally owned or otherwise occupied.*” This would therefore not exclude the right being applied to treaty territory or territory from which Indigenous peoples were forcibly removed. However, some states, with the support of a couple of Indigenous delegations, want to add the phrase “*possess*” or “*hold by reason of traditional ownership.*” This would limit the right only to the lands and territories currently held and deny many Indigenous peoples rights to claims to lands because of treaties, relocation, theft and displacement. It would also exclude rights to access to lands for traditional use if those lands are not held by the Indigenous peoples concerned. Again, Mattias Ahren of the Saami Council provided an example:

“The majority of indigenous peoples don’t like the inclusion of ‘possess/hold’ because this excludes many peoples from our traditional use of land. For example, the Saami herd reindeer and there are places where we go, sometimes just for a day or two during the year because that is where the reindeer go. We do not possess or hold that land but we have the right to use it.”

Article 27

This article sets out ways for Indigenous peoples to recover on lands and territories that have been confiscated, occupied used or damaged. In our report on the first part of the XIth Session, AILA stated that we believe the Chairman’s text actually improved the original Subcommittee text because it provided for the right to “*redress*” instead of “*restitution.*” Redress is a broader concept giving Indigenous communities and nations more rights in settling their claims. However, in the reformulated text, the Chairman actually included language suggested by the United States which stated only that “*Indigenous peoples have the right to **pursue claims for redress...***” As stated by many delegations, including some states, anyone can pursue a claim but there is no prescribed resolution. A right to redress would more specifically prescribe that states take some action in these cases. The AILA delegation made an intervention stating that the inclusion of the phrase “*pursue claims for*” was unacceptable.

The Chairman’s text also included a second paragraph. This second paragraph is basically little more than a rewording of the original Subcommittee text prescribing that redress include compensation in the form of land, or, when this is not possible, “*monetary compensation or other appropriate relief.*” Of course, the United States, Australia and New Zealand were joined by France in opposing any kind of redress being directed. Nonetheless the Chairperson recognized that there is a “*clear majority in support of the inclusion of the second paragraph but there are some who still object to it.*”

Article 28

This article addresses Indigenous peoples' rights to conservation, restoration and protection of environmentally damaged lands and territories. The United States opened this discussion by stating that they saw no reason for inclusion of anything pertaining to environmental restoration in a document on the rights of Indigenous peoples. The response of the American Indian Law Alliance was actually recorded and aired on Pacifica Radio. We said this simply demonstrates the United States' unwillingness to even try to understand the rights of Indigenous peoples or to have learned anything about the worldview of Indigenous peoples after so many years.

We also suggested that keeping the word "restoration" was a critical component of the Article's intent. Some states say that there can be no right to "restoration" of land because it may not be possible. The Chair suggested that no one was asking anyone to do the impossible. The Chairperson stated that the AILA proposal to keep in "restoration" and wording the sentence so that it reads "*Indigenous peoples have rights pertaining to the conservation, restoration and protection of the environment...*" is a formulation that seemed to work for all the Indigenous and state delegations (including Sweden, Mexico, Canada and Venezuela) and the only objections came from Russia and New Zealand. The United States remained silent.

Treaties

And now for the good news! Thanks in large part to the efforts of Willie Little Child, the Confederacy of Treaty Six First Nations and others, including the government of Canada, the Articles relative to treaties are ready for provisional adoption by the vast majority of states and Indigenous nations and peoples.

"It is important that we have strong wording on treaties because this is also a United Nations declaration on our treaty rights. Virtually every article in the Declaration touches on our treaties... Self-determination, lands, territories and resources, free, prior and informed consent, access to sacred sites and spiritual freedom. All of these and many more are treaty rights. They are also inherent rights enshrined in treaties. Whenever states talk about, 'states shall do', these are treaty obligations. We cannot accept lower standards because to do so would violate our own treaties. Non-indigenous peoples and states also have treaty rights and treaty obligations. We will work to understand treaties and our obligations through them and in this way contribute to the effective implementation of the Declaration."
Willie Little Child

The three main paragraphs dealing with treaties are preambular paragraphs 6 and 13 and operative paragraph 36. As of the last session, only two states seemed to have problems with the language contained in the treaty paragraphs. Great Britain objected to the use of the term "inherent" when speaking of Indigenous peoples rights in PP6, and the United States disagreed with characterizing Indigenous treaties as matters of "*international concern*" in PP 13.

Now, we know, you are sitting there in your living room, reading this report, and saying, "*huh?, international diplomats don't realize that treaties are matters of international concern?*" Ask anyone on the street, any international scholar, any elder, or read the United States Constitution and one will see clearly that treaties **ARE** international in character, definition, application and enforcement. But again, for the United States government, a double standard applies for Indigenous peoples, relegating us to the back of the international bus. In their prejudicial view, our treaties are only matters of concern to domestic governments and there is no need to be just and equitable in dealing with Indigenous nations and peoples.

“The United States government would like to make some brief introductory remarks on treaties. As one of the three member nations of the United Nations that has treaties with Indigenous peoples, the United States recognizes the importance of these articles. This cluster of articles on treaties is especially important to the United States because we have more treaties than any other nation with Indigenous peoples. In fact, the United States has sought to strengthen the article (36) on treaties making the interpretation of the treaty according to the understanding of the Indigenous nation. [However, as we have stated] treaties are a matter of domestic character and PP 13 is therefore unacceptable.”

It is important to note that there are far more than three member nations of the United Nations that have treaties with Indigenous peoples. Furthermore, the United States has broken every treaty it has made with Indigenous peoples and can hardly claim to be taking the moral high ground in this regard.

Debra White Plume responded:

“I am from the Owe Aku in Lakota country and the American Indian Law Alliance. I address the Chair and all the room on Article 36.

“Treaties are not made with domestic ethnic minorities. Treaties are made between sovereign nations.

“In 155 years, since the 1851 Fort Laramie treaty between the Great Sioux Nation and the United States, the United States has not had to answer to any international body of law regarding their repeated violation of this treaty which has resulted in the extreme poverty and social injustice our Lakota people live under, while the corporations of America become richer and richer, raving our land and resources while our people are the poorest in America.

“From the first contact with the pioneers, our ancestors agreed the wagon trains could go through Indian Country and only use the land between their wagon wheels. Now we are here at the United Nations attempting to persuade the world to support us in attaining rights for our people, basic human rights, and treaty rights. For example, our people have five doctors to serve 48,000 people. This is just one example of a treaty violation. The language proposed by Willie Little Child is the most appropriate and I support that language for Article 36.”

Nearly everyone spoke against the United States' position including the Navajo Nation, Native American Rights Fund and the National Congress of American Indians (all from within the colonial US borders). Joseph Ole Simel of Africa stated that *“everyone spoke against the US position”* and *“Article 36 should be considered a consensus minus one.*

The dissention by Great Britain and the United States was addressed in the Norway Consultations. After a lengthy discussion with Great Britain on the inclusion of the word *“inherent”* in PP 6 (*“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples”*), the United Kingdom of Great Britain and Ireland actually said that though they did not like the inclusion of the word, **they would not block consensus**. Credit must be given to Great Britain for its true spirit of understanding the way in which consensus is built and that one dissenting voice should realize its obligation to the collective. Indeed, the Chairperson for the Norway Consultations is also to be given credit for her expert leadership in seeking Great Britain's willingness to be flexible. Here is the language of PP 6 and 13 as it stands:

PP 6:

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;

Further recognizing the urgent need to respect and promote the rights of Indigenous Peoples affirmed in treaties, agreements and other constructive arrangements with States

PP 13:

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and Indigenous Peoples are [in some situations] matters of international concern, interest, responsibility and character;

Also considering that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous Peoples and States.

Therefore, although we have put the treaties in the column of articles ready for provisional adoption, the United States is still standing firmly against Indigenous peoples with respect to the international character of Indigenous peoples' treaties. Unfortunately, because they are the United States and the Chairperson often gives undue weight to their positions, he stated that he would take these articles under advisement. However, he also stated his realization that there is overwhelming support for the language presented in the treaty articles.

Coming Attractions

The last day, Friday, of the Working Group, especially the afternoon session, was surreal. Even experienced note-takers could not keep up with what the Chair was doing. He jumped not only from article to article at break-neck speed, but from paragraph to paragraph within different articles. To manage to get the exact details of what he was saying on the language he was "considering" was impossible and determining the state of the "discussion" was equally difficult.

The last afternoon was also remarkable for its lack of any acknowledgment of the long and significant process in putting this Declaration on Indigenous rights together. Some of the Indigenous leaders had been at the United Nations for 23 years specifically working on the Declaration. The majority in attendance had been present in the United Nations from 10 to 20 years. For the first time in history, peoples whose rights were involved in a United Nations process had a significant input in the language and development of an international Declaration on human rights. The work represented by, first, the Working Group on Indigenous Populations and then, the Working Group on the Declaration, was an important step towards humankind's evolution for a more peaceful, just and non-prejudicial world.

Yet, none of this was even acknowledged. Although the Chair and many states repeatedly stated that this would be the last session of the Working Group, they did not deem it important enough to acknowledge this critical historical development. The Confederacy of Treaty Six First Nations attempted to give the Chairperson a medal acknowledging his contribution to the

process, but the Chair did not even take the time to accept the gift during the session. He shamed himself and the Commission on Human Rights in showing such disrespect to a Chief from a treaty nation.

It is important to point this out, because it demonstrates the unwillingness of some colonizers to learn lessons from Indigenous peoples, even after so many years. It is in sharp contrast to Madame Erica-Irene Daes, the former Chairperson of the Working Group on Indigenous Populations and the Special Rapporteur on Indigenous Peoples Permanent Sovereignty Over Lands and Resources, and Professor Miguel Alfonso Martinez, the Chairperson of the Working Group on Indigenous Populations and the Special Rapporteur on Treaties between Indigenous peoples and Member Nations of the UN. Both of these individuals have publicly acknowledged the ways in which their lives have been changed through their work with Indigenous peoples, nations, and communities.

Clifford White Eyes, of the Teton Sioux Nation Treaty Council, was able to say a closing prayer and sing a Sundance song for all of us after the session ended. We extend our gratitude to him.

So, what's next? It depends, of course on the text submitted to the Commission by the Chairperson, as well as Indigenous peoples' response to that text. The Chairperson, on the final afternoon, told us of his intentions:

"In the summary, I want to reflect the progress that has been made. I'm going to write the final version of language based on language in the draft that has already been consented to [in other words, the articles ready for provisional adoption will be presented as agreed upon between states and Indigenous peoples]. With respect to the paragraphs on self-determination, it seems we are very close on consensus [this would include Articles 3, 31, and 45]. And on lands, territories and resources we are a lot closer together although there are still substantive issues on which consensus has not been reached. [With respect to articles and paragraphs for which there is no consensus, he will write language that he believes best reflects the discussion.] One of the minimum requirements is that you don't object to my proposals. You don't have to like them or they don't have to make you happy, but they should not be so bad that you feel obliged to object to them. I would be extremely grateful indeed if you did not object to them. This report of mine has to be taken to the Commission on Human Rights, or the body replacing it. They will take a decision about the future of this process. I shall comply with my duty by handing in my report and making my proposal."

The most important part of this closing statement by the Chairman is that it is up to the Commission on Human Rights to decide upon the next step in the process. It is not our responsibility to support the Chairman's text if it does not comply with the original spirit, intent and principles of the Declaration. In fact, if the language is unacceptable it is our duty, to object to it and continue this process. As Debra White Plume stated:

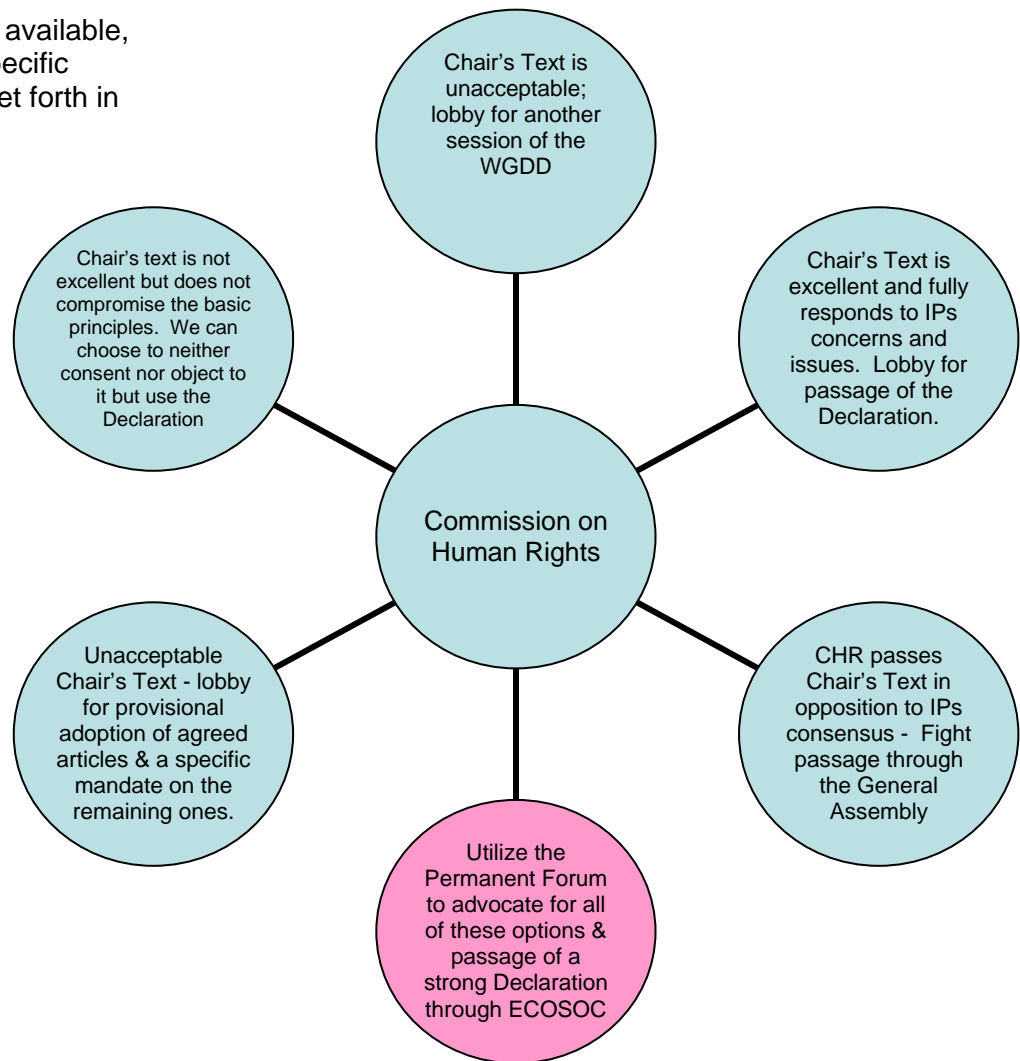
"If we have to make a choice between a bad, harmful declaration and walking, we need to be prepared to do that collectively, together; and if there are indigenous organizations friendly with the oppressors and that are not prepared to stand with us, then we need to make it known that those groups do not represent this indigenous caucus, or our people, or our work."

Some Options Based on Incomplete Information:

The first step will be to review the text, in light of the discussion at the Working Group, proposed by the Chairperson with respect to the preambular paragraphs and articles NOT ready for provisional adoption. In particular a close review will have to be made on Articles 3, 31 and 45 (self-determination) and Article 21 through 30 (lands, territories and resources). As this report is going to print, the Chairperson's text is being released and we will soon have an indication of his language.

A technical review team of Indigenous peoples is already being put in place to analyze from an international legal standpoint whatever text the Chair may submit. This will have to be completed in advance of the Commission on Human Rights in the spring of this year.⁴

Some of the options available, depending on the specific circumstances are set forth in this diagram:



⁴ The Commission on Human Rights generally meets in the early spring. However, the UN is considering changes to the Commission and it is unknown at this time how this will affect our work and participation. Whatever happens, the Chairperson's report on the results of the Working Group will be submitted at that time.