UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/HRC/2/G/1
24 August 2006

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Second session
Item 2 of the provisional agenda

IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"

Note verbale dated 2 August 2006 from the Permanent Mission of Australia to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights

The Permanent Mission of Australia to the United Nations and other International Organizations at Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to refer the first session of the Human Rights Council.

The Government of Australia has the further honour to refer to the joint statement delivered under agenda item 4 on 27 June 2006 on behalf of the Governments of Australia, New Zealand and the United States of America on the Chair's text on the draft declaration on the rights of indigenous peoples.

Owing to time constraints, the joint statement was delivered in truncated form. The Government of Australia has the honour to request that the full text of the statement*, which contains additional important elements of substance, be circulated as an official document of the Human Rights Council.

* Reproduced in the annex as received, in the language of submission only.

Annex

Joint statement by Australia, New Zealand and the United States of America on the Chair's Text on the Declaration on the Rights of Indigenous Peoples

(HUMAN RIGHTS COUNCIL, 27 June 2006)

The mandate of this new Council is that the promotion and protection of rights should be based on the principles of "cooperation and genuine dialogue and aimed at strengthening the capacity of member States to comply" with their obligations for the benefit of all. Reaching agreement on a text for a Declaration on the Rights of Indigenous Peoples must be consistent with that mandate.

We are deeply disappointed that it has not yet been possible to reach a consensus amongst States on a text for the Declaration on the Rights of Indigenous Peoples. We are indebted to the Chair for his unflagging efforts. We see his text as providing a basis for further consideration and work. But, it does not enjoy consensus – far from it.

It was prepared and submitted after the Working Group meeting had concluded. There has not yet been an opportunity for States to discuss this text collectively. This is extraordinary in any multilateral negotiation exercise and sets a poor precedent with respect to the work of this Council.

In order for a declaration to provide States and indigenous peoples with a blueprint for harmonious and constructive relationships, it must be clear, transparent and capable of implementation. Unfortunately, the current text is confusing and would risk endless and conflicting interpretations and debate in its application.

For example, the provisions for articulating self-determination for indigenous peoples in this text inappropriately reproduce common Article 1 of the Covenants. Self-determination in the Chair's text could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States.

The Chair's text also appears to confer upon a sub-national group, a power of veto over the laws of a democratic legislature (Article 20). We strongly support the full and active engagement of indigenous peoples in democratic decision-making processes, but no government can accept the notion of creating different classes of citizenship. Nor can one group in society have rights that take precedence over those of others. In this context, it is important to be mindful of the Convention on the Elimination of Racial Discrimination.

The provisions on lands and resources are also particularly unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both

indigenous and non-indigenous (Article 26). Such provisions would be both arbitrary and impossible to implement.

Other important provisions in the Chair's text are potentially discriminatory. It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of the Working Group was not that collective rights prevail over the human rights of individuals, as could be misinterpreted in Article 34 of the text and elsewhere.

The forty-seven members of this Council are being asked to endorse a text that will apply to all States. By our recollections, many of them did not participate in the negotiations over the past eleven years. And others, while present, were not actively engaged. However, many of their indigenous minorities were actively engaged in the negotiations in Geneva.

It was NGOs who have most forcefully argued against any language that would limit the right of self-determination in such a way as to protect the political and territorial integrity of existing UN member states that observe human rights standards. Can the States that now want to adopt this text live without such basic, universally agreed and legitimate safeguards?

That leaves us asking ourselves whether States have really carefully examined the provisions in this fundamentally flawed text, with all its ramifications. And if they have, we would like to know how would they propose to live up to the provisions on the rights to traditional lands and resources and the right of self-determination, for example?

We cannot accept the argument some are making that this declaration will only apply to countries that have significant or obvious indigenous populations. There is no definition of indigenous peoples in the text. The Chair's text could be read as authorizing indigenous peoples to self-identify, precisely because they expect some States to continue to say they have only ethnic or cultural minorities, not indigenous peoples as such.

The lack of definition or scope of application within the Chair's text means that separatist or minority groups, with traditional connections to the territory where they live – in all regions of the globe - could exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources. And this text would allow them to claim international endorsement for exercising such rights. This Council would then be asked to support such claims. When that happens - as inevitably it would - how would this Council respond?

Our three countries have discussed the Chair's text in detail in many capitals and in all regions. It has become very clear that others share our concerns. And, it has become apparent too that many believe we should not rush to adopt it at this time and that further work on it is required.

Significantly, no one has told us they cannot live with the basic safeguards we consider must be taken into this text if it is to be credible and consistent with international law. That is why we are convinced that States need to pause and reflect very carefully indeed on the shortcomings in the current text before of any action on it could be legitimately contemplated in the United Nations.

We want a declaration that can become a tangible and on-going standard of achievement. And, we want a declaration that is universally accepted, observed and upheld with political and moral force.

We do not want a declaration that is deemed irrelevant because it is unrealistic from the outset. The situation for indigenous people in some countries is very worrying indeed. What is needed is a standard of achievement that has the potential to make a real difference in their circumstances and one that is an investment and positive force in their futures. Sadly, the current text falls well short of ever achieving that. It would amount to a failed opportunity.

It will be evident to the States who have taken part in the negotiations over the past eleven years that our three countries were actively and constructively engaged in the process of developing the text throughout. We repeatedly proposed compromise language, individually, collectively and in partnership with other States that shared our concerns. And, we repeatedly argued from the outset for a meaningful declaration that could be capable of implementation by all States. We have been nothing but consistent and transparent in our approach to this new instrument.

We have been reminded on many occasions that this declaration is an aspirational document and not legally binding. That is indeed true, of course. But we consider that indigenous peoples deserve and need a declaration that is capable of implementation and that represents a standard of achievement against which all States can be measured. The current text fails these tests.

Nor do we accept the notion that this text is as good as we could achieve. We must make the necessary effort to get a quality instrument for indigenous peoples. That is within our reach. And if we do not, what will it say about this new Council's role in standard setting?

To endorse this text would be premature and irresponsible. It would risk creating confusion, ambiguity and endless debate on what the declaration means. We believe that States could never live up to it, even with the best of intentions. Its adoption would be a gross disservice to indigenous peoples. And, it would potentially undermine the cause of advancing human rights internationally.

What we do not want to see is a declaration that from the outset is undermined, disowned or even reversed in its intent through lengthy interpretive statements. There is every likelihood that some States will nominally endorse this text while simultaneously reinterpreting it in ways that amount to rewriting and even reversing its intent and purpose.

That would deliver only a second-rate instrument, forever the subject of frustration, disputes and bitterness. The result would be an "implementation gap" of unprecedented dimensions. And, it would be the members of this Council who would have to carry the responsibility for that.

There is, however, another scenario – and that is to adopt a declaration that enjoys genuine agreement – in other words, a declaration from which no State explicitly dissents. Such a declaration would have moral authority internationally and would be of real value and impact.

To achieve that, States need more time to resolve their differences. What this Council should now be addressing, in the interests of indigenous peoples, is a process to bridge the differences that exist between States. One way forward might be to appoint a facilitator or a friend of the Council, to undertake informal consultations with and between States. The objective would be to narrow the gaps on the most significant provisions in the text. The facilitator could report

back to a subsequent meeting of this Council. This could be done reasonably expeditiously, we think.

The international community must have an outcome that has genuine agreement, that is consistent with international law, that is non discriminatory, that is capable of being implemented and that will stand the test of time as a viable and robust standard of achievement for all countries. That is the challenge, the responsibility and the opportunity before this Council.

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