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Introductory Note

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INTRODUCTORY NOTE TO THE UNITED NATIONS DECLARATION ON THE RIGHTS OF
INDIGENOUS PEOPLES

[September 13, 2007]

AND *CAL v. ATTORNEY GENERAL*, SUPREME COURT OF BELIZE

BY SAIRA MOHAMED*

[October 18, 2007]

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After more than twenty years in the making, the UN General Assembly (GA) adopted the non-binding Declaration on the Rights of Indigenous Peoples on September 13, 2007. Four States—Australia, Canada, New Zealand, and the United States¹—voted against adoption of the Declaration, and eleven States abstained.²

The UN first addressed the problems faced by indigenous peoples in the context of its work on racism and discrimination. In 1970, the Subcommission on Prevention and Discrimination and Protection of Minorities, a nongovernmental subsidiary body of the Commission on Human Rights (CHR), commissioned a comprehensive study on discrimination against indigenous populations.³ The resulting report found that indigenous peoples faced widespread discrimination and did not enjoy the same level of access to public services and political participation as did other groups.⁴

In response to this study, and in light of interest of the Subcommission and other nongovernmental organizations, in 1982 the Economic and Social Council of the United Nations authorized the establishment of a Working Group on Indigenous Populations, which set out as a primary goal the development of a set of principles on the rights of indigenous peoples.⁵ In 1993, the Working Group reached agreement on a draft declaration, which the Subcommission submitted to the CHR for consideration.⁶ A draft was eventually adopted in June 2006 by the Human Rights Council, the successor body to the CHR, by a vote of 30 in favor, 12 abstentions, and 2 against, with 3 absent.⁷

The Declaration was sent to the GA for consideration following its adoption by the HRC. Because of concerns over a number of provisions, however, the GA deferred consideration and action on the Declaration.⁸ The co-sponsors of the Declaration and the African Group of States ultimately negotiated a final text that included amendments to the version that had been adopted by the HRC.⁹ The Declaration, incorporating those amendments, was finally adopted just prior to the conclusion of the GA's 61st session.¹⁰

The negotiation process of the Declaration was unique in two respects. First, representatives of indigenous peoples participated regularly both in the meetings of the Working Group on Indigenous Population¹¹ and as observers in the sessions of the CHR's working group, which was set up to consider the text prepared by the WGIP. Under a special procedure set up by the CHR, not only groups with consultative status with the Economic and Social Council, but also those without were authorized to participate in the drafting and negotiation of the Declaration.¹² Second, the Declaration as it was adopted by the GA was finalized between the African Group and the co-sponsors *after* negotiations had concluded, and thus never was subject to discussion by all interested Member States. Several States objected that the Assembly had not had an opportunity to discuss the instrument and reach agreement on a consensus text.¹³

The Declaration covers a wide scope of commitments, concerning not only the individual rights of indigenous persons, but also the collective rights of indigenous peoples—though the Declaration does not define the term “indigenous peoples.” These rights range from the rights of indigenous peoples and individuals to belong to an indigenous community or nation,¹⁴ to the right to redress in the event that indigenous peoples are deprived of their means of subsistence and development,¹⁵ to the rights of indigenous peoples to education without discrimination¹⁶ and to traditional medicines and health practices.¹⁷ The Declaration also addresses issues of self-determination as well as land and resource rights.

In the short time since its adoption, the Declaration has already been invoked as one of several arguments in a judicial decision holding that a national government, which had voted in favor of adoption of the Declaration, failed to adequately respect and protect indigenous land interests. In *Cal v. Attorney General*, the Supreme Court

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of Belize cited the Declaration as supporting its interpretation that Belize domestic law required the government of Belize to respect the indigenous land rights of members of Maya communities in villages of the Toledo District in Southern Belize. Members of the Maya communities brought an action against the government of Belize seeking relief for alleged violations of the Belize Constitution based on the government's failure to respect their rights to and interests in land in the villages. The claimants contended that the government granted concessions to conduct oil exploration on their land, told Maya residents of the villages that they would have no rights in their lands unless they obtained government-issued leases to those lands, and failed to delimit, demarcate, or otherwise clarify and protect the Maya lands in the Toledo District, despite the Government's acknowledgement of Maya rights to land and resources in an October 2000 agreement.¹⁸ The court decided in favor of the claimants on each issue and ordered the entirety of the relief sought.¹⁹

The Court first evaluated whether Maya customary land tenure exists in Southern Belize. Placing significant weight on extensive expert testimony presented by the claimants attesting to the existence of a customary system of land tenure under which Maya villages hold land collectively and individuals and families enjoy derivative, subsidiary rights of use and occupancy,²⁰ the Court ultimately concluded that a Maya customary land tenure system exists in the Toledo District of Southern Belize.²¹

The Court then turned to the question of whether the members of the villages have interests in land based on Maya customary land tenure, and, if so, the nature of those interests. The Court examined a volume submitted by the claimants on the history, land use, and culture of the Maya in Southern Belize and affidavits submitted by the claimants describing how they live and occupy the lands in the villages in accordance with the Maya customs of the villages. These documents, as well as the submission of an indigenous expert explaining that the villages are occupied under Maya customary practices, convinced the Court that the members of the villages have interests in the land based on Maya customary land tenure.²²

The Court evaluated the nature of those interests based on decisions of other jurisdictions that have decided similar issues, including a decision of the British Privy Council that recognized usufructuary rights as a form of "native title" and accepted the notion of community title to land.²³ The Court also emphasized the decision of the Court of Appeal of Malaysia that native or customary title can exist in conjunction with a sovereign or state title to land.²⁴ In light of these two decisions, the Court determined that the Maya in Toledo District have usufructuary rights in their land, defined as "the right to occupy the land, farm, hunt and fish thereon, and to take for their own use and benefit the fruits and resources thereof."²⁵ Rejecting the argument of the defense that any claim or title the claimants might have had was extinguished when Great Britain acquired sovereignty over Belize, the Court held that acquisition of sovereignty, whether by Great Britain or by the independent governments of Belize in 1981, did not displace pre-existing interests in and rights to land, whether that acquisition of sovereignty was accomplished by conquest or by settlement. The Court conceded that the government of Belize is vested with the ultimate title to the land, but concluded that this title is burdened by the pre-existing rights to and interest of the claimants in the land.²⁶

Finally, the Court examined the constitutional implications of the claimants' interest in the land of the villages. Cautioning that indigenous title or interests in land should be characterized not by reference to concepts in English law, but rather through consideration of the indigenous laws and customs themselves,²⁷ the Court determined that the Maya people's interest in land constitutes "property" under the Constitution²⁸ and is thus subject to the Constitution's guarantees that all persons are entitled to "protection from arbitrary deprivation of property" and that "[n]o property . . . shall be compulsorily taken possession of and no interest or right over property . . . shall be compulsorily acquired," except under certain limited circumstances.²⁹ The Court contended that its conclusion was strengthened by a recommendatory decision of the Inter-American Commission on Human Rights, which had determined that the communal property right of the Maya people is subject to protection of Article XXIII of the non-binding American Declaration of the Rights and Duties of Man, a provision which the Court deemed "provides in a not dissimilar fashion like the Belize Constitution . . . for the protection of property."³⁰ The Court conceded that the claimants had not suffered an arbitrary deprivation of property or a compulsory taking or acquisition of their land, as prohibited under the Constitution, but maintained that because the government had granted concessions to third parties to utilize the property and exploit the resources located on lands "belonging to the claimants," the defendants had impaired the claimants' property interests in violation of the Constitution.³¹

The Court also agreed with the claimants that the government's treatment of the claimants' rights and interests in their land violates the Belize Constitution's prohibitions against discrimination and guarantee that every person is entitled to the same rights and freedoms regardless of race, place of origin, political opinions, color, creed or sex.³² Without explaining the content of the non-discrimination or equal protection protections or describing the jurisprudence relating to them, the Court determined that the defendants' failure to recognize the customary land tenure system, as well as its failure to take measures to accommodate Maya customary rights to land and resources, "fall[] short of the Constitution's guarantee of equality and non-discrimination."³³

The Court offered a similarly conclusory discussion of the claimants' contention that the government's acts had violated the Constitutional guarantees to life, liberty, security of the person, and law and protection against intentional deprivation of life.³⁴ The Court agreed with the claimants, noting that the Maya rely on agriculture, hunting, fishing, and gathering for their physical survival and that the land they use and occupy forms a central part of their physical, cultural, and spiritual existence.³⁵ The Court opined that "without the legal protection of [claimants'] rights to and interests in their customary land, the enjoyment of their right to life and their very lifestyle and well-being would be seriously compromised and be in jeopardy," which "will not be in conformity with the Constitution's guarantees."³⁶

After outlining its reasoning and conclusion on each issue, the Court briefly discussed its view of international law, reasoning that some of Belize's international obligations "resonate" with its domestic constitutional obligations and thus further support the result.³⁷ In this section, the Court notably treated as international law instruments and opinions that would not be considered legally binding sources of international law, and even referenced treaties to which Belize is not a party. For example, citing the report of the Inter-American Commission on Human Rights in *Maya Indigenous Communities of the Toledo District v. Belize*, the Court commented that the rights to property protected under the non-binding American Declaration of the Rights and Duties of Man "include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."³⁸ Next, the Court recalled the recommendatory statement of the Committee on the Elimination of All Forms of Racial Discrimination that States should "recognize and protect the rights of indigenous peoples to own, develop, control and use communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories,"³⁹ and noted that the Committee had recently sent a letter to the government of Belize expressing its concern regarding reports that the government had privatized and leased land and granted concessions for oil development and logging without the prior consultation or consent of the Maya people.⁴⁰

The Court subsequently opined that both customary international law and general principles of international law require that Belize respect the rights of its indigenous people to their lands and resources. Aside from noting that customary international law constitutes a source of international law that is binding on States, the Court did not address whether any rules of customary international law would obligate a State to recognize the rights of indigenous peoples to land.⁴¹ Instead, the Court focused on its view of general principles relating to indigenous rights. First, the Court expressed support for the non-binding opinion of the Inter-American Commission that general international legal principles include "the right to indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property" and "the recognition of their property and ownership rights with respect to lands, territories, and sources that they have historically occupied."⁴² Next, the Court opined that Convention No. 169 of the International Labor Organization—a treaty to which Belize is not a party—contains in Article 14 clear protections of indigenous peoples' right to land, which according to the Court "resonate with the general principles of international law regarding indigenous peoples."⁴³

Finally, the Court turned to the Declaration on the Rights of Indigenous Peoples, the adoption of which, the Court emphasized, Belize had supported in the GA.⁴⁴ The Court found Article 26 of the Declaration, concerning land and resource rights,⁴⁵ of particular relevance to the case and opined that because it reflects "the growing consensus and the general principles of international law on indigenous peoples and their lands and resources," Belize must not disregard it.⁴⁶

Moreover, despite the non-binding nature of the document, the Court contended that because Article 42 of the Declaration states that "[t]he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration," Belize would be bound to

respect the rights of its indigenous peoples. Indeed, the Court opined that the Declaration “import[s] . . . significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned,” and presumed that Belize would be “unwilling, or even loath to take any action that would detract from the provisions of this Declaration.”⁴⁷

Decisions such as that of the Supreme Court of Belize in *Cal*, in which enforcement provisions are read into a non-binding document, may make it more difficult for advocates to use the Declaration as tool to urge and encourage States to protect indigenous peoples, as States may need to distance themselves from the Declaration if it takes on a new life as a purportedly binding document. The lasting impact of the Declaration remains to be seen.

ENDNOTES

- 1 At the time of the vote, the United States delivered its explanation of vote and observations with respect to the Declaration, which are available at <http://www.usunnewyork.usmission.gov/press_releases/20070913_204.html>. The United States provided its views on the nature of the Declaration as well as on various provisions of the Declaration, including its objections and concerns with respect to treatment in the Declaration of issues of self-determination, lands and resources, and redress.
- 2 See U.N. GAOR, 61st Sess., 107th plen. mtg. at 19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) [hereinafter GA Sept. 13, 2007 Records].
- 3 Office of the High Comm’r for Human Rights, Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples (1997), available at <<http://www.unhchr.ch/html/menu6/2/fs9.htm>> [hereinafter Fact Sheet].
- 4 See U.N. Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on the Promotion and Prot. of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Working Paper on Discrimination Against Indigenous Peoples, ¶ 5, U.N. Doc. E/CN.4/Sub.2/2001/2 (2001).
- 5 See ECOSOC Res. 1982/34, ¶ 1, U.N. Doc. E/RES/1982/34 (May 7, 1982).
- 6 See Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities Res. 1994/45, ¶ 4 & Annex, U.N. Doc. E/CN.4/SUB.2/RES/1994/45 (Aug. 26, 1994).
- 7 Press Release, Human Rights Council, Human Rights Council Concludes First Session, (June 30, 2006); see also H.R.C. Res. 2006/2 (June 29, 2006).
- 8 See G.A. Res. 61/178, U.N. Doc. A/RES/61/178 (Dec. 20, 2006).
- 9 See United Nations Permanent Forum on Indigenous Issues, United Nations Declaration On The Rights Of Indigenous Peoples Adopted by the General Assembly 13 September 2007, <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>> (last visited Nov. 29, 2007).
- 10 See Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; “Major Step Forward” Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007).
- 11 See Fact Sheet, *supra* note 3 (“The Working Group is open to representatives of all indigenous peoples and their communities and organizations. . . . In 1985, the Working Group began preparing a draft declaration on the rights of indigenous peoples, taking into account the comments and suggestions of participants in its sessions, particularly representatives of indigenous peoples and Governments.”).
- 12 See Comm’n on Human Rights Res. 1995/32, ¶ 7 & Annex, U.N. Doc. UN Doc E/CN4/RES/1995/32 (March 3, 1995).
- 13 See, e.g., GA Sept. 13, 2007 Records at 11 (statement of representative of Australia noting that “Australia and others repeatedly called for a chance to participate in the negotiations on the current text of the declaration” and expressing disappointment that “no such opportunity has been afforded” and that the Assembly was unable to arrive at a consensus text); *id.* at 15 (statement of representative of United States characterizing the negotiation process as “extraordinary” and noting that the document presented for action “was prepared and submitted after the negotiations had concluded,” which “sets a poor precedent with respect to United Nations practice”); *id.* at 16 (statement of representative of Russia asserting that the “non-transparent” negotiation process “ensured that a group of countries, on the territory of which live a significant number of those who may be considered indigenous peoples, was excluded at a decisive stage from the negotiation process” and expressing hope that such a process “will not set a negative precedent for the General Assembly’s activities”); *id.* at 17 (representative of Colombia expressing regret that “the most recent consultative process in the Assembly was characterized by a lack of transparency, a lack of willingness to negotiate and a lack of openness, which did not permit . . . consensus to be reached”).
- 14 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 9, U.N. Doc. A/Res/61/295 (Oct. 2, 2007).
- 15 *Id.* art. 20(1).
- 16 *Id.* art. 21(1).
- 17 *Id.* art. 24(1).
- 18 *Cal v. Attorney General* (Belize 2007), ¶ 103–105.
- 19 The claimants sought a declaration that the villages and their members hold collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute “property” that is protected under the Belize Constitution; a declaration stating that the villages hold collective title to the lands its members have used and occupied within the

- boundaries established through Maya customary practices, and that the collective title includes derivative individual rights and interests of members of the villages; an order requiring the government to determine, demarcate, and provide official documentation of the title and rights over the land in accordance with Maya customary law and practices; and an order that the government must not take any acts that might lead the government or third parties to affect the existence, value, use, or enjoyment of the property in the villages, including directing the government to refrain from leasing or granting lands or resources, registering any interest in the land, issuing any regulations concerning land or resources, and issuing any concessions for exploitation of resources. *Id.* ¶ 9.
- 20 *Id.* ¶¶ 29–39.
- 21 *See id.* ¶ 40.
- 22 *See id.* ¶¶ 50–59.
- 23 *See id.* ¶ 65.
- 24 *See id.* ¶ 66.
- 25 *Id.* ¶ 67.
- 26 *See id.* ¶¶ 69–92.
- 27 *See id.* ¶ 101.
- 28 *See id.* ¶ 102.
- 29 Belize Const. arts. 3(d), 17.
- 30 *Cal* ¶ 100.
- 31 *Id.* ¶¶ 109–110.
- 32 *See* Belize Const. arts. 3, 16.
- 33 *Cal* ¶¶ 113–114.
- 34 *See* Belize Const. Arts. 3(a), 4.
- 35 *See Cal* ¶ 116.
- 36 *See id.* ¶ 117.
- 37 *Id.* ¶ 118.
- 38 *Id.* ¶ 122 (quoting *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 171 (2004)).
- 39 *Id.* ¶ 123 (quoting Comm. On the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII: Rights of Indigenous Peoples, ¶ 5, U.N. Doc. A/52/18, Annex V (Aug. 18, 1997)).
- 40 *See id.* ¶ 124.
- 41 *See id.* ¶ 127.
- 42 *Id.* ¶ 129 (quoting *Dann v. U.S.*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶ 130 (2001)).
- 43 *Id.*
- 44 *See id.* ¶ 131 (“It is of some signal importance, in my view, that Belize voted in favour of this Declaration.”); *id.* ¶ 132 (stressing that “Belize, it should be remembered, voted for [the Declaration]”).
- 45 Article 26 provides:
 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
- 46 *Cal* ¶¶ 131–132.
- 47 *Id.* ¶ 133.