United States

Submission of the Episcopal Diocese of Maine Committee on Indian Relations on the United States' human rights record relevant to the UN Universal Periodic Review
April 19, 2010

I. Recommendations, Key Words/Names, Wabanaki, Committee on Indian Relations

The Committee on Indian Relations (CIR), a group operating within the Episcopal Diocese of Maine, suggests the following recommendations to the UN Human Rights Council (HRC) pertaining to the United States' (US) human rights record concerning Indigenous Peoples:

- The US should adopt the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) without any qualifying statements or conditions limiting its original intent

- The US should expunge from all statutory and case law, regulations, and policies reliance on the Doctrine of Christian Discovery as documented in the *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights* a Preliminary Study submitted by Tonya Gonnella Frichner, Special Rapporteur, to the UN Permanent Forum on Indigenous Issues. The US should specifically examine the Maine Indian Claims Settlement Act (25 USCS §1721 - §1735) and the Maine Implementing Act (30 MRSA §6201 - §6214) for provisions that reflect Doctrine of Christian Discovery dominance and racism.

- The US Congress with support of the US Executive branch of government should hold oversight hearings on the implementation and effectiveness of the Maine Indian Claims Settlement Act (MICSA) and companion State of Maine legislation, the Maine Implementing Act (MIA), to examine how the agreements have complied with Congressional intent, the understanding of the negotiators of these agreements, general Federal Indian Law, treatment of other federally recognized tribes, and international human rights instruments as they pertain to Indigenous Peoples

- The US should actively participate in the Maine Indian Tribal-State Commission (MITSC), the entity created under the Maine Implementing Act (MIA) §6212, charged with continually reviewing "the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State" to ensure that the legal and human rights of the Wabanaki are upheld

Key words/names: Wabanaki, Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, Penobscot Indian Nation, sovereignty, self-determination, nation-to-nation relationship, sustenance fishing, assimilation, acculturation, culture

The Wabanaki, People of the Dawn Land, is an umbrella term for the Indigenous Peoples who reside in what we today know as the State of Maine and eastern provinces of Canada. In this submission, Wabanaki specifically refers to the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Indian Nation.

The Episcopal Committee on Indian Relations formed in 1992. We are called by our Creator to deepen our relationship with the Wabanaki of Maine in order to stand with them in the pursuit of justice, the affirmation of their inherent sovereignty, and the preservation of Native languages and culture. The Episcopal Church comprises between two and three million worshipers in about 7500 congregations across the United States and related dioceses outside the US. In July 2009, the Episcopal Church passed Resolution D035 calling for the repudiation of the Doctrine of Discovery and US adoption of the UNDRIP.

II. Background and Normative/Institutional Framework

The Wabanaki comprise some of the oldest continuous governments in the world predating the US by many millennia. The first nations the US allied itself with were the Maliseets and Micmacs (Treaty of Watertown July 19, 1776). US General George Washington dispatched Colonel John Allan to strengthen US relations with all four Wabanaki Tribes to defend what today is Eastern Maine from the British. Despite the critical role that the Wabanaki played in securing US independence and freedom, their fidelity to the fledgling US was soon forgotten and Massachusetts and white settler encroachment on their lands quickly intensified following the American Revolution.

Massachusetts encroachment on Wabanaki land took place despite Article I, section 8, clause 3 of the US Constitution that states the Congress shall have sole power to regulate commerce with Indian Tribes. In addition, the US Indian Trade and Intercourse Act of 1790 required any land transaction with any Indian Tribe must be approved by Congress. The Penobscot Nation, faced with the potential loss of all their lands, wrote to the Governor of the State of Maine in 1829 pleading that Maine abandon its latest request to acquire more Wabanaki land:

> And what do white people suppose we must think when we see they wish to take from us one piece of land after another, till we have no place to stand on, unless it is to drive us, our wives, & our little children away? But if so great & so free a country as this would exterminate us, we have no chance any where else; we or our children must sooner or later be driven into the salt water & perish.

Nationally, Indigenous Peoples fared no better than the Wabanaki when it came to the US' insatiable desire to acquire and many times take by force Indigenous land. The US constantly expanded westward eliminating many Indigenous peoples and forcing others sometimes to relocate hundreds of miles away to environments completely foreign to their homelands. Under US law, Indigenous Peoples do not possess title to their land, only a right of occupancy at the discretion of the US. This racist concept was fully articulated in the US Supreme Court decision Johnson v M'Intosh (*Johnson & Graham's Lessee* v. *M'Intosh* 8 Wheat. 543 (1823)).

In addition to the constant encroachment on Wabanaki land, the State of Maine did not recognize nor respect inherent Wabanaki sovereignty. Maine treated the Wabanaki as if they were children requiring the State to manage their affairs. Maine's policy toward the Wabanaki is captured in the 1842 State Supreme Court decision Murch v. Tomer. "Imbecility on their part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man (Supreme

Judicial Court of Maine, County of Penobscot, 21 Me. 535; 1842 Me. LEXIS 141)." Maine passed numerous laws without Wabanaki input or consent controlling virtually every aspect of the Wabanaki's lives (see *State of Maine: A Compendium of Laws Pertaining to Indians*).

The Maine Advisory Committee to the US Commission on Civil Rights examined the deplorable plight of the Wabanaki in the early 1970s (see *Federal and State Services and the Maine Indian* 1974). Investigators found huge differences between the Wabanaki and the surrounding Maine population in terms of income, life expectancy, health, educational attainment, and other key factors associated with societal well-being. On page 23 of the report the Maine Advisory Committee writes, "That, as a basic matter of principle, both State and Federal governments re-examine their policies toward Native Americans in Maine and elsewhere, and affirm the inherent right of Indian self-determination and tribal sovereignty."

Two years earlier the Passamaquoddy Tribe and then the Penobscot Nation sued the US seeking the protection of the US Indian Trade and Intercourse Act of 1790 (Nonintercourse Act) and a court order to have the US sue the State of Maine for monetary damages for the taking of the Tribes' land. On January 20, 1975, US District Court Edward Gignoux issued his decision supporting the Passamaquoddy and Penobscot complaint (see *Passamaquoddy v Morton*). During more than five years of intensive political negotiations over the two Tribes' land claims, the Maine Supreme Court issued its 1979 decision in State v. Dana finding Maine had little legal jurisdiction over the Wabanaki, reversing over 150 years of State policy.

On October 10, 1980, President Carter signed MICSA into law. It settled the Passamaquoddy and Penobscot land claims while also addressing a later claim of the Houlton Band of Maliseet Indians. Beyond the text of the agreement is the understanding that the agreement would prevent the assimilation and acculturation of the three Wabanaki signatories. "Nothing in the Settlement provides for acculturation, nor is it the intent of Congress to disturb the culture or integrity of the Indian people of Maine. To the contrary, the settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all internal matters" (*Senator Melcher, Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829, Report Number 95, 95th Cong., 2nd Session, September 17, 1980).*

III. Implementation of MICSA, MIA and Other US Agreements to the Wabanaki

MICSA represents a 160 year struggle by the Houlton Band of Maliseets, Passamaquoddy Tribe, and Penobscot Nation to have the US and State of Maine recognize their inherent sovereignty. The negotiators of the agreement anticipated a new era of Wabanaki-Maine relations following the enactment of the Act characterized by mutual respect for each party's sovereignty, increasing cooperation, and trust. This vision has not been realized. Many serious breaches of MICSA and MIA have occurred leaving the Wabanaki questioning if any human rights bodies truly care about the recurring legal and political transgressions against them.

One of the most egregious violations of MIA occurred when the State of Maine sought sole authority to administer provisions of a US law, the Clean Water Act, in waters upstream and

adjacent to Wabanaki homelands. The Penobscots, Passamaquoddies, and Maliseets all objected fearing Maine's historical lax record of environmental enforcement against major polluters affecting Wabanaki waters jeopardized two of the Tribes' sustenance fishing rights and general cultural interests of all four Wabanaki Nations. In the midst of this jurisdictional change, three paper corporations filed suit against the Passamaquoddy Tribe and Penobscot Nation contending communications and records in possession of the Tribes were subject to Maine's Freedom of Access (FOA) law (see Maine Supreme Court 2001 ME 68 decided 5/1/2001). MITSC in two separate opinions agreed with the Wabanaki that they should not be subject to FOA in the particular circumstances and requiring such compliance violates the Internal Tribal Matters provision of MIA. Maine State Government gave no apparent consideration to the MITSC opinion even though MITSC exists to review disputes concerning the interpretation of MIA. Maine's actions clearly violate UNDRIP Articles 3, 4, 8, 18, 19, 20, 25, 26, 27, 29, 32, 34, 37, and 40.

The Penobscot Nation asserts that it possesses the Penobscot River bed from bank to bank starting at its Indian Island Reservation and extending north. Maine disputes the Penobscot Nation ownership claim (see 6/3/97 letter Paul Stern to John DeVillars, EPA Region I Administrator) despite people intimately involved with MIA, including former State Senate Majority Leader at the time of MIA's passage and past MITSC Chairman Bennett Katz, criticizing the State of Maine position. The Penobscot People are so closely identified with the Penobscot River that a person familiar with the Tribe and the River can hardly think of one without reflecting on the relationship to the other. Maine's attempt to separate the Penobscot Nation from legal ownership of the Penobscot River threatens the essence of Penobscot identity and a major aspect of Penobscot culture, something the US said that MICSA was designed to prevent (see previous Sen. Melcher quote). CIR contends that the State of Maine's stance on the Penobscot River's ownership and the seeming US acquiescence to this position violates Articles 25 and 26 of the UNDRIP.

The Stern letter to EPA Region I Administrator John DeVillars reflects a general State of Maine hostility to Wabanaki fishing rights and in particular to sustenance fishing rights reserved to the Penobscots and Passamaquoddies under MIA §6207, §§4. Maine's intense disagreement with the Penobscot Nation over the ownership of the Penobscot River has led to the State conceding at most a thread of Penobscot waters surrounding the islands that the Nation owns in the Penobscot River. For this undefined thread, the State contends it has no obligation to ensure either the presence of historically harvested species or the fitness of such fish for human consumption. Essentially, the State of Maine position says to the Wabanaki whatever meager amounts of contaminated fish you might catch you can have.

The US has failed to exercise proper oversight over its political subdivision the State of Maine allowing it to violate US law and international human rights standards applicable to Indigenous Peoples. Maine supported the private paper corporations when they sued to obtain documents in possession of the Passamaquoddy and Penobscot Tribal Governments. In addition, Maine has asserted land use authority over tens of thousands of acres of Passamaquoddy and Penobscot trust lands held by the US on behalf of the Tribes. A large portion of the State of Maine consists of unorganized territory under the jurisdiction of the Maine Land Use Regulation Commission (LURC). MITSC has repeatedly said the Tribes should possess exclusive land use regulatory

authority over Tribal lands within LURC jurisdiction. Maine has disagreed with the Tribes and MITSC.

Maine has treated the Wabanaki signatories to MIA as possessing an inferior legal status despite MICSA and MIA equally acknowledging the full sovereignty of all the parties. The State has unilaterally acted to determine the MITSC budget without consultation and approval of its Wabanaki counterparts (see 3/20/07 & 4/28/08 letters of Penobscot Chief Kirk Francis and 4/23/08 letter of Maliseet Chief Brenda Commander to Maine Governor John Baldacci). The US has permitted this subversion of MICSA and MIA by the State of Maine.

Two years ago the Maine Legislature attempted to coerce the Houlton Band of Maliseets to waive its right to approve any changes to MIA directly affecting the nation's interests (see LD 2221 An Act To Implement the Recommendations of the Tribal-State Work Group). Such action by Maine potentially violated UNDRIP Articles 3, 4, 5, 8, 18, 19, 23, 26, 29, 32, 37, and 38.

Section 6204 of MIA states, "Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein." Besides violating a number of UNDRIP articles, this language reflects a Doctrine of Christian Discovery legal framework. On what basis should Indian Nations be subject to the laws of a nation-state political subdivision?

IV. Recommended US Actions to Improve Its Human Rights Record *vis-à-vis* the Wabanaki and Indigenous Peoples Residing Within US Borders

The US should adopt the UNDRIP without preconditions. Following US adoption, the President should issue an executive order directing all entities within the Executive Branch of the US to identify laws, regulations, and policies inconsistent with the UNDRIP and recommend actions to bring the US into compliance.

The relevant committees of the US Congress should hold oversight hearings on MICSA, MIA, and the Micmac Settlement Act (Pub. L. 102-171, Nov. 26, 1991, 105 Stat. 1143). Witnesses should include representatives from all of the affected Tribes.

All branches of the US Government should repudiate the Doctrine of Christian Discovery. Congress should also abandon its colonial-like plenary power over Indian Nations and replace it with negotiated agreements involving full Indigenous participation and consent. The US should review specific provisions of MICSA, MIA, including §6204 and §6206-A, and the Micmac Settlement Act that reflect a Doctrine of Discovery legal framework and work with the Wabanaki to replace them with more equitable provisions that reflect Wabanaki inherent sovereignty.

The US should fully participate in MITSC including attending all of its meetings and sharing responsibility for funding it.