

**Submission to the United Nations Human Rights Council
in regard to the
Universal Periodic Review of the United States of America**

**Submitted By:
First Peoples Human Rights Coalition¹
April 2010**

1. This Submission is made in regard to the Human Rights Council's Universal Periodic Review (UPR) of the United States, which is scheduled to take place on 26 November 2010.²
2. The primary focus of this Submission is the United States' actions and non-actions relating to the *United Nations Declaration on the Rights of Indigenous Peoples* (hereinafter "*UN Declaration*" or "*Declaration*"), adopted by the UN General Assembly on 13 September 2007.
3. It is provided in Human Rights Council resolution 5/1 of 18 June 2007 that the basis of the UPR is: (a) The Charter of the United Nations; (b) The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is a party; (d) Voluntary pledges and commitments made by States; including those undertaken when presenting their candidature for election to the Human Rights Council, and applicable international humanitarian law.
4. All members elected to the Human Rights Council "shall uphold the highest standards in the promotion and protection of human rights" and "shall fully cooperate with the Council".³ The United States' performance must be consistent with these standards and obligations.
5. The *UN Declaration* does not create new rights, but elaborates on the inherent rights of Indigenous peoples worldwide. It provides a principled framework and Indigenous context for interpreting existing international human rights instruments, such as the *Universal Declaration on Human Rights*,⁴ the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. The *Declaration* is therefore highly relevant to the United States' existing international obligations.

Indigenous peoples are most disadvantaged

6. The Letter dated April 22 2009 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the General Assembly⁵ contains the human rights commitments and pledges of the United States of America in regard to its candidature to the HRC and mentions vulnerable groups such as women and children. However, the United States omits entirely one of the most vulnerable and impoverished groups in the United States and globally – Indigenous peoples.
7. For instance, worldwide, "poverty rates are significantly higher among indigenous peoples compared to other groups. While they constitute 5 per cent of the world's population, they are 15 per cent of the world's poor," according to a recently released UN report, "State of the World's Indigenous Peoples".⁶ According to the same report, in North America "Native Americans and Alaska Natives have higher death rates than other Americans from tuberculosis [600 per cent

higher] ... diabetes [189 per cent higher], unintentional injuries [152 per cent higher], homicide [61 per cent higher] and suicide [62 per cent higher]”.

8. The national situation is surprisingly similar to the global situation even though the United States is a highly developed country. According to a 2004 article, “The Shame of a Nation”⁷, “the health status of the more than 2.5 million tribal members is worse than that of any other U.S. minority or majority group. Native Americans have a life expectancy of 71, roughly 5 years less than all others. They face higher maternal and infant mortality rates...” Additionally, an “Indian Housing Fact Sheet”⁸ produced by the National American Indian Housing Council, highlights poverty experienced by Indigenous peoples in the United States. “In tribal areas, 14.7 of homes are overcrowded, compared to 5.7% of homes of the general U.S. population”; 11% do not have kitchen facilities (compared to 1% nationally) and 11.7% do not have complete plumbing facilities (compared to 1.2% of the general population). Additionally, “12% [of homes] are without a safe and reliable water supply”. “The poverty rate for Native Americans is approximately 26% ... more than twice the average for all Americans at approximately 12%.”
9. When Raquel Rolnik, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, submitted her report, “Mission to the United States of America”⁹ she wrote, “The conditions in the houses on the [Pine Ridge] Reservation were the worst seen by the Special Rapporteur during her mission, evidence of the urgent and severe need for additional subsidized housing units there.” Yet by the first week of March 2010, block grant housing funds for Indian housing in 2011 had been cut to nearly 50% of the 2010 funding.¹⁰
10. These statistics suggest that the United States has failed at home to promote universal respect for human rights for all. It is worth noting that in the same letter to the President of the General Assembly regarding its candidature to the HRC, the United States made a specific commitment to look at its own domestic record, “in promoting and protecting human rights and fundamental freedoms in the United States”.¹¹

UN Declaration – integral part of international law

11. The previous government of the United States cast one of the four votes in opposition to the adoption by the UN General Assembly of the *UN Declaration*. Regretfully, the present government of the United States has not yet openly addressed or reversed the positions of its predecessor in regard to the *Declaration* – a crucial instrument in international human rights law.
12. Although the *UN Declaration on the Rights of Indigenous Peoples* is not expressly mentioned as one of the documents used by the HRC during the Universal Periodic Review of the United States, international treaties such as *International Convention on the Elimination of All Forms of Racial Discrimination* are included in the review. The CERD Committee has recommended to the United States:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee ... recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.¹²

13. As explained by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, the *Declaration* provides an essential global context for addressing Indigenous peoples' human rights:

... the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.¹³

U.S. policies contradictory and in disarray

14. In regard to the rights of Indigenous peoples, United States policy appears to be discriminatory, contradictory and in a general state of disarray. For example, the discriminatory nature of U.S. policies is described in a 2004 Joint Submission by Indigenous and human rights organizations to the Office of the High Commissioner for Human Rights:

One of the most outrageous State strategies to limit Indigenous peoples' status and human rights under international law continues to emanate from the United States. The National Security Council, which is headed by the President of the United States, has in effect targeted the world's 300 million Indigenous people as some kind of security risk. While there is one national security strategy for all of the United States, there is another very specific one to limit the human rights of all Indigenous peoples globally – in the absence of any factual, legal or political context.¹⁴

15. The U.S. National Security Council established this global strategy in a document entitled, "Position on Indigenous Peoples", dated January 18, 2001¹⁵. No other peoples in the world are singled out, as a class of people, for such wholesale discriminatory treatment. For example, the Council's document stipulates that the draft UN Declaration can only use the term "Indigenous peoples" if the following footnote is added:

The use of the term "peoples" in this document shall not be construed as having any implications as regards the rights that may attach to the term under international law.

16. At the time of the vote in the General Assembly on the *UN Declaration*, the United States indicated that what is "fundamental and debilitating to the effective application and implementation of the declaration is its failure to define the phrase 'indigenous peoples'. This obvious shortcoming will subject application of the declaration to endless debate..."¹⁶ This contradicts the National Security Council's "Position on Indigenous Peoples":

In the context of the UN declaration, no definition of indigenous peoples has been offered, nor is it expected that one will be offered. The US has determined it does not need to define who is indigenous in order to accept a final draft.

17. In regard to the right of self-determination, the United States has opposed the *Declaration* because article 3 reflects this right of "all peoples" in article 1 of the two international human rights Covenants. The U.S. indicated in September 2007 at the General Assembly that Indigenous peoples are not entitled to the resource rights referred to in article 1 of the Covenants or to "any right of self-government within the nation-state." This position contradicts the position of the

U.S., as indicated in 2005 to the UN Working Group that was mandated to consider the draft Declaration:

We do not deny the proposition that some indigenous peoples in the world might qualify for this common Article 1 self-determination. When adopted, this Declaration would not preclude any peoples from claiming that existing right, under appropriate circumstances. Nor do we seek or wish, in any way, to qualify, limit or diminish this existing right. Moreover, it is not part of the mandates of this Working Group to do that.¹⁷

18. The current exclusion of Indigenous peoples from article 1 of the Covenants is discriminatory. It contradicts the interpretation of the UN Human Rights Committee, which has explicitly applied the right of self-determination, including the right to natural resources,¹⁸ to Indigenous peoples in the United States and other regions of the world:¹⁹

The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.²⁰

Extreme positions and statements

19. At the time of the General Assembly vote on the *UN Declaration*, the U.S. opposed affirmation of Indigenous peoples' collective rights as human rights.²¹ This position is inconsistent with UN practice which, for approximately thirty years, has addressed Indigenous peoples' rights as human rights under the international human rights system. In accordance with the Human Rights Council's "Agenda and Framework for the Programme of Work",²² the "Rights of peoples" are permanently considered under Item 3 – "Promotion and protection of all human rights".
20. At the time of the General Assembly vote, the United States made several extreme statements. It indicated publicly that "one group cannot have human rights that are denied to other groups within the same nation-state."²³ However, under international law, "peoples" have collective human rights that differ from those of "minorities" *per se* and individuals. The government added that the rights of non-native Americans would be threatened. Clearly, affirmation of the human rights of one group should never be characterized as a threat to those of others.²⁴
21. The United States also claimed that the text of the *Declaration* "could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples free, prior and informed consent before passage of any law that "may" affect them (e.g., Article 19).²⁵ We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process." Such extreme statements are simply false, since – as reflected in the *Declaration* – human rights are generally relative in nature. The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. See, e.g. Article 46. The false statements could serve to generate fear among the American policy makers and the American public, as well as opposition to the *Declaration* and discrimination against Indigenous peoples' human rights.
22. At the UN General Assembly on September 13, 2007, the United States also declared that the *UN Declaration* is "not reflective of international law. The United States rejects any possibility that

this document is or can become customary international law.” However, the *Declaration* is fully consistent with international law.²⁶ While the *Declaration* is generally a non-binding instrument, in many respects, it is already declaratory of existing customary international law.²⁷

Need to redress injustices

23. As in other regions of the world, Indigenous peoples continue to suffer a wide range of human rights violations that the United States urgently needs to address.²⁸ Yet the U.S. still has no national human rights institution²⁹ and has failed to boldly address pressing Indigenous human rights concerns.³⁰
24. For over two centuries, the policies and practices of federal Indian law, based on the Doctrine of Discovery,³¹ Manifest Destiny and terra nullius have caused incredible damage.³² The United States apology in December 2009 was a step in the right direction and was an improvement on what previous administrations had done. However on December 19, 2009, the President signed the apology resolution into law so quietly (as part of a defense appropriation and without any announcement from the White House) that it has been described in national Indigenous media as not even being ‘out loud’ Nor was there any “effort to tell Native Americans, or the general public, about the resolution.”³³
25. It has been reported that the position of the United States regarding endorsement of the *UN Declaration* is under review.³⁴ Yet no final determination has been made.
26. As UN Secretary-General Ban Ki-moon emphasizes: “The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. ... [I]t provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.”³⁵

In regard to the United States and the *UN Declaration on the Rights of Indigenous Peoples*, we respectfully submit the following recommendations to the Human Rights Council:

- 1. That the United States join the favorable momentum generated by the adoption of the *UN Declaration on the Rights of Indigenous Peoples*, endorse the *Declaration* without qualification and, in partnership with Indigenous peoples, fully implement the standards contained therein.**
- 2. That, given the CERD Committee’s recommendation regarding the *Declaration* (*supra* para. 12), the United States should indicate the steps taken to educate all levels of government and civil society as to the provisions of the *Declaration* and how they apply.**
- 3. That, as a member of the Human Rights Council, the United States should set a positive example in upholding Indigenous peoples’ human rights consistent with the *Charter of the United Nations*, the principle of universality³⁶ and its international obligations, especially as a Council member.³⁷**

Endnotes

[Note: These endnotes are included as a more detailed and factual report that is attached as a reference to the above 5-page document.]

¹ First Peoples Human Rights Coalition is a small 501 (c)3 Brooklyn-based organization providing human rights information and educational materials to Indigenous leaders and peoples throughout the world, including North America. We are grateful to Paul Joffe, Julie Cavanaugh-Bill, and Jennifer Preston for their valuable comments on earlier drafts.

² Sections of this submission are drawn from the Grand Council of the Crees (Eeyou Istchee) *et al.*, “Joint Submission to the United Nations Human Rights Council in regard to the Universal Periodic Review Concerning Canada”, Working Group on the Universal Periodic Review, Human Rights Council (September 2008), online: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/JS4_EI_CAN_UPR_S4_2009_GrandCounciloftheCreesEeyouIstchee_Etal_JOINT.pdf.

³ UN General Assembly, *Human Rights Council*, UN Doc. A/RES/60/251 (15 March 2006), para. 9.

⁴ “Statement by Acting UN High Commissioner for Human Rights Kyung-wha Kang, and S. James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: International Day of the World's Indigenous People”, *United Nations Press Release*, retrieved 29 March 2010 at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/10491F4417CB6875C125749C002EDB71?opendocument>:

The Declaration ... represents a significant contribution to the guiding principles of justice and dignity championed in the Universal Declaration of Human Rights, which celebrates its 60th anniversary this year.

⁵ See Letter dated 22 April 2009, “Human rights commitments and pledges of the United States of America”, “*As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations.*” [emphasis in original] online: http://www.un.org/ga/search/view_doc.asp?symbol=A/63/831&Lang=E [United States, “Letter dated 22 April”]

⁶ United Nations (Department of Economic and Social Affairs), *State of the World's Indigenous Peoples* (New York: United Nations, 2009), online: <http://www.un.org/esa/socdev/unpfii/en/sowip.html>, at 25.

⁷ Dr. Bernadine Healy, M.D., *The Shame of a Nation*, U.S. News & World Report, (4 October 2004) online: http://health.usnews.com/usnews/health/articles/041004/4healy_print.htm

⁸ National American Indian Housing Council, online: <http://www.naihc.net>.

⁹ Raquel Rolnik, *Human Rights Council*, UN Doc. A/HRC/13/20/Add 4, (12 February 2010) para 39, online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.20.Add.4_AEV.pdf

¹⁰ Mark Fogarty, *Indian Housing Money Cut*, Indian Country Today, (1 March 2010) online: <http://www.indiancountrytoday.com/archive/85845482.html>

¹¹ United States, “Letter dated 22 April” , *supra*, note 4

¹² Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), at para. 29. [bold in original]

¹³ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, A/HRC/9/9 (11 August 2008), para. 86 (Conclusions). [bold in original]

¹⁴ Grand Council of the Crees (Eeyou Istchee) *et al.*, “Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples’ Human Rights”, Joint Submission to the Office of the High Commissioner for Human Rights, Geneva (March 2004), para. 116.

¹⁵ U.S. National Security Council, *Position on Indigenous Peoples* (18 January 2001) at paras. 5 and 7 (regarding definition of indigenous peoples), online: <http://www1.umn.edu/humanrts/usdocs/indigenousdoc.html>

¹⁶ United States, “Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples”, tabled at the UN General Assembly, New York (13 September 2007), online: http://usun-nj.us/press_releases/20070913_204.html [United States, “Observations”].

¹⁷ Working group established in accordance with Commission on Human Rights resolution 1995/32, “WGDD: Self-Determination Proposal of Australia, New Zealand and the United States of America Explanatory Note”, 7 December 2005.

¹⁸ Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8: “... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.” See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17: “... the Committee expects Norway to report on the Sami people’s right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article.”

¹⁹ Similarly, see the jurisprudence of other treaty monitoring bodies: Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11: “The Committee is concerned about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant.” See also Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th sess., UN Doc. E/C.12/2002/11 (20 January 2002), para. 7: “Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.”

²⁰ Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006), para. 37 [bold in original].

²¹ United States, “Observations”, *supra*, note 16: “...if a collective entity or group -- as opposed to individuals -- could hold and exercise human rights, individuals within those groups would be extremely vulnerable to potential violations of their human rights by the collective.” In contrast, in the U.S. National Security Council’s “Position on Indigenous Peoples”, it is stated: “...in the domestic indigenous context, collective rights are viewed as furthering the rights of individuals”.

²² Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex, V (Agenda and Framework for the Programme of Work), C (Framework for the programme of work), Item 3.

²³ United States, “Observations”, *supra*, note 16.

²⁴ See also *UN Declaration*, article 26(2): “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected.”

²⁵ United States, “Observations”, *supra*, note 16.

²⁶ Human Rights Council, *Report of the Special Rapporteur S. James Anaya*, *supra* note 13, para. 41:

Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some

aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.

²⁷ Examples of existing customary international law include, *inter alia*: general principle of international law of *pacta sunt servanda* ("treaties must be kept"); prohibition against racial discrimination; right to self-determination; right to one's own means of subsistence; right not to be subjected to genocide; *UN Charter* obligation of States to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all"; and requirement of good faith in the fulfillment of the obligations assumed by States in accordance with the *Charter*. The former High Commissioner for Human Rights, Louise Arbour, among others, has highlighted that the rule banning gender discrimination is also now customary international law.

²⁸ Committee on the Elimination of Racial Discrimination, *Decision 1 (68) on the United States of America, Early Warning and Urgent Action Procedures*, UN Doc. CERD/C/USA/DEC/1 (11 April 2006), para. 7: "The Committee is of the view that past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the State party under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin."

²⁹ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, supra* note 12, para. 12: "**The Committee recommends that the State party consider the establishment of an independent national human rights institution in accordance with the Paris Principles.**" [bold in original]

³⁰ See also White House (Office of the Press Secretary), "Remarks by the President at the Acceptance of the Nobel Peace Prize", Oslo City Hall, Oslo, Norway (10 December 2009): "Furthermore, America -- in fact, no nation -- can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don't, our actions appear arbitrary and undercut the legitimacy of future interventions, no matter how justified."

³¹ S.T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power" 20 N.Y. U. Rev. Law & Social Change 303 (1993), at 304.

³² See also *UN Declaration*, 4th preambular paragraph: "Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust".

³³ Rob Capriccioso, *Brownback offers Obama Political Cover on Native Apology*, Indian Country Today, (29 January 2010) online: <http://www.indiancountrytoday.com/archive/83026687.html>.

³⁴ Haider Rizvi, "U.S.: Obama Urged to Sign Native Rights Declaration", United Nations (6 May 2009), online: <http://www.ipsnews.net/news.asp?idnews=46742>: The United States is considering whether to endorse a major U.N. General Assembly resolution calling for the recognition of the rights of the world's 370 million indigenous peoples over their lands and resources ... "The position on [this issue] is under review," Patrick Ventrell, spokesperson for the U.S. mission to the U.N."

³⁵ UN Secretary-General (Ban Ki-moon), "Protect, Promote, Endangered Languages, Secretary-General Urges in Message for International Day of World's Indigenous People", SG/SM/11715, HR/4957, OBV/711 (23 July 2008).

³⁶ United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5: "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. ... [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms."

³⁷ The work of the Human Rights Council is "guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights": General Assembly, *Human Rights Council*, UN Doc. A/RES/60/251 (15 March 2006), para. 4. Double standards or politicization should be carefully avoided: *Ibid.*, preamble.