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United Nations Permanent Forum on Indigenous Issues 13th Session New York, 12-23 May 2014

AGENDA Item 3: Principles of Good Governance Consistent with the UN Declaration on the Rights of Indigenous Peoples: Articles 3-6 and 46

Joint Statement of Constitutional and Customary Indigenous Governments

Due to the significance of the considered Agenda Item this Joint Statement is shared with the UN Secretary General, High Commissioner for Human Rights, Special Rapporteur on Indigenous Issues, European Council, European Parliament, European Union, Organization on Security and Cooperation in Europe, African Commission on Human Rights, Organization of American States, ASEAN, indigenous governments and civil society indigenous organizations.

Executive Statement

This statement is made with the endorsement of the following indigenous governments acting on their own behalf: the governments of the Qom Nation of Potae Napocna Navogoh (Argentina), Rohingya Nation (Burma [Myanmar]), Nation of Biafra (Nigeria), Lenape Tribe of Delaware, Mohegan Nation, Nanticoke Indian Tribe, Nanticoke Lenne-Lenape Nation, Machantucket Piquot Nation, Quinault Indian Nation, Yamasi (United States of America), Nation of San Francisco Xochicuautla (United States of México) *{from the continents of South America, Southeast Asia, Africa and North America}*. These constitutional and customary governments speak on behalf of an estimated 31.8 million combined peoples and the territories they govern.

Quinault President Joe DeLaCruz spoke these words in 1989 that continue to guide many indigenous leaders throughout the world today:

No right is more sacred to a nation, to a people, than the right to freely determine its social, economic, political and cultural future without external interference. The fullest expression of this right occurs when a nation freely governs itself. We call the exercise of this right Self-determination. The practice of this right is Self-Government. (DeLaCruz, 1989)

The right to effective governance is unambiguously affirmed by Articles 3 and 4 of the **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)** and supported by other international agreements such as the **International Labor Organization (ILO) 169, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Political and Civic Rights (ICCPR), the International Covenant on the Rights of Indigenous Nations and the Universal Declaration on Human Rights (UDHR)**. Article 5 supports the right of indigenous peoples to maintain their own

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institutions as well as their right to participate fully in the institutions of the state if they so choose. Article 6 affirms the right of an indigenous individual to a nationality that affirms the inherent authority of indigenous constitutional or customary governance. Article 46, §1 imposes a restriction on the political development of some indigenous nations – nations which find themselves included in a state under whose authority to which they have not consented. Whereas, Article 46 §2 subscribes to the principle that human rights may not be violated and relations must be carried out in accord with accepted democratic principles. Finally, Article 46 §3 subscribes to the principle that what is stated in the Declaration will be carried out in accord with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith (UNDRIP, 2007).

In June 2013 the Alta Outcome Document was drafted and adopted by indigenous representatives from seven global regions in preparation for the World Conference on Indigenous Peoples. **In the Alta Declaration representatives recommend that “States *develop processes to ensure that regional, constitutional, federal/national, provincial, and local laws, policies and procedures comply with the Declaration and other international human rights standards that uphold the rights of Indigenous Peoples*” [Theme 3 (1)(a)] (emphasis added).** Further, it recommends “States enter into new Treaties, *agreements* and other *constructive arrangements* with Indigenous Peoples and Nations as a way to effectively implement their rights” (Alta, 2013).

We note that a significant aspect of indigenous governance requires the ability to engage in dialogue with other governments and to grant or reject decisions or proposals by other governments on the basis of the principle of free, prior and informed consent. Noting furthermore that while the Declaration speaks to this principle on five different occasions, the significance of the principle is embedded in international law in International Labor Organization Convention 169 at Article 6. (ILO, 1989) Governance necessarily implies the ability to engage in intergovernmental dialogue, negotiations and exercising the principle of free, prior and informed consent in connection with all matters affecting the interests of an indigenous nation.

It is important to recognize the principle of self-determination as an ongoing process of choice for the achievement of human security and fulfillment of human needs with a broad scope of possible outcomes and expressions suited to different and specific situations. These include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity (van Walt, 1999). Self-determination is only fully expressed when a nation governs itself through institutions of its own choosing. When the historical development of modern indigenous constitutional and customary governments result in their full capacity for self-government the individual governments function as institutions that are accountable to the people who adhere to the nation and its culture. The ethos and culture thus practiced by the people ultimately determine the nature and character of governing institutions that regulate life internal to the nation and in relations with other nations and states externally.

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While it is true that the full expression of self-government can lead to desires to act independently, the historical tendency of nations in the exercise of governance has been to establish working relationships with neighbors for mutual benefit. This tendency is encouraged when neighboring governments and jurisdiction respect the authority and inherent powers of indigenous governments.

Governance to be understood in terms of the Declaration affirms the fundamental reality that self-government or autonomy require that indigenous nations exercise a form of government of their own choosing and that these governments possess inherent powers to regulate social, territorial, economic, political and the cultural order of indigenous societies. The Declaration clearly offers guidance to all indigenous nations' and states' parties to respect the inherent authority and powers of indigenous constitutional and customary governments as would be applied to any state government. There is fundamentally no difference in the level of respect that must be accorded to human governing institutions that represent either a nation or a state. Accordingly, to fully implement these provisions we respectfully suggest the following recommendations:

- Indigenous constitutional and customary governments and state governments enter into bi-lateral or multi-lateral intergovernmental dialogue to mutually define and agree to an intergovernmental framework (that defines the inherent powers of each government and procedures for engaging) as a foundation for negotiation of mutual concerns providing for a third party guarantor and mediator as a permanent intergovernmental mechanism - wherein each state government and indigenous government can engage in dialogue and negotiate outcomes.
- Pro-actively engage in the prevention and resolution of conflicts involving states and indigenous nations. In doing so the United Nations should respect and promote the implementation of self-determination as the means to self-government in the broad sense affirmed by the UNDRIP, and as a means to advance peace and mutual benefit.
- Establish a new body (or reactive the Trusteeship Council with a new Mandate) responsible for promoting state implementation of the UNDRIP and monitoring states' actions with regard to indigenous peoples' rights. Such a monitoring and implementation body must have a mandate to receive relevant information, to share best practices, to make recommendations, and otherwise to work toward the objectives of the Declaration. Such a body would do more than anything else to achieve the purposes of and promote compliance with the Declaration.
- Normalize the language of autonomy, self-determination and managing intergovernmental relations based on standards enshrined in international agreements discussed above (especially UNDRIP), amending states' legal regimes, and indigenous constitutions and customary practices to reflect this language.

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- Form commissions at indigenous nations' governmental levels to begin proposing language for intergovernmental frameworks with state governments.

That concludes this statement and it is here noted that a more detailed analysis is attached.

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United Nations Permanent Forum on Indigenous Issues 13th Session New York, 12-23 May 2014

AGENDA Item 3: Principles of Good Governance Consistent with the UN Declaration on the Rights of Indigenous Peoples: Articles 3-6 and 46

Joint Statement of Constitutional and Customary Indigenous Governments

The Need for New Mechanisms

No right is more sacred to a nation, to a people, than the right to freely determine its social, economic, political and cultural future without external interference. The fullest expression of this right occurs when a nation freely governs itself. We call the exercise of this right Self-determination. The practice of this right is Self-Government. (DeLaCruz, 1989)

The majority of today's political and violent conflicts in the world take place within states where nations are aspiring to greater recognition of their cultural and political rights. Conflicts such as those in Pashtunistan, Yemen, South Sudan, Sudan, Central Republic of Africa, Columbia, Palestine, Israel, the Philippines, Indonesia (Borneo, Sumatra, West Papua), Bangladesh (Chittagong Hill Tracts), India (Naga, Kashmir), and New Caledonia represent this reality. In most states indigenous nations and state governments engage in political conflicts that do not rise to levels of direct violence, but may chronically fester over time for lack of effective intergovernmental mechanisms or mediation. To effectively govern, indigenous nations must have the opportunity to engage in intergovernmental dialogue, yet in most regions of the world the framework for intergovernmental dialogue does not exist.

The very existence of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) calls on state parties and indigenous nations to formalize intergovernmental mechanisms to conduct dialogue and negotiate agreements to settle differences. Democracy and good governance are firmly established only when the autonomy, self-governance and self-determination of pre-existing nations within state's borders are respected, both internally and externally; and a significant measure of good governance is the ability of indigenous governments and states'

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governments to engage in intergovernmental dialogue and negotiations for peaceful and mutually beneficial outcomes.

The right to effective governance is unambiguously affirmed by Articles 3 and 4 of the Declaration and supported by other international agreements such as the International Labor Organization (ILO) 169, the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**, the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**, the **International Covenant on Political and Civic Rights (ICCPR)**, the **International Covenant on the Rights of Indigenous Nations** and the **Universal Declaration on Human Rights (UDHR)**. Article 5 supports the right of indigenous peoples to maintain their own institutions as well as their right to participate fully in the institutions of the state if they so choose. Article 6 affirms the right of an indigenous individual to a nationality that affirms the inherent authority of indigenous constitutional or customary governance. Article 46 §1 imposes a restriction on the political development of some indigenous nations – nations, which find themselves included in a state under whose authority to which they may not have agreed. Whereas, Article 46 §2 subscribes to the principle that human rights may not be violated and relations must be carried out in accord with accepted democratic principles. Finally, Article 46 §3 subscribes to the principle that what is stated in the Declaration will be carried out in accord with the principles of justice, democracy, and respect for human rights, equality, non-discrimination, good governance and good faith (UNDRIP, 2007).

On May 28, 2013, the **Statement of 72 Indigenous Nations and Ten Indigenous Organizations**, presented at the Twelfth Session of the United Nations Permanent Forum on Indigenous Issues, recognized that the Declaration could not yet be said to have “reduced the attempts to destroy indigenous cultures and societies, or the taking of indigenous homelands and resources, or the economic marginalization of indigenous peoples” and called for a mechanism within the United Nations to ensure the implementation of the Declaration (Statement of 72, 2013).

Additionally, in June 2013 the Alta Outcome Document was drafted and adopted by indigenous representatives from seven global regions in preparation for the World Conference on Indigenous Peoples. In the Alta Declaration representatives recommend that “States *develop processes* to ensure that regional, constitutional, federal/national, provincial, and local laws, policies and procedures comply with the Declaration and other international human rights standards that uphold the rights of Indigenous Peoples” [Theme 3 (1)(a)] (emphasis added). Further, it recommends “States enter into new Treaties, *agreements* and other *constructive arrangements* with Indigenous Peoples and Nations as a way to effectively implement their rights” [Theme 3 (2)] (emphasis added) (Alta, 2013).

These statements reflect the reality that the Declaration and other instruments for indigenous people’s rights will be wholly ineffective until nations and states together establish new relationship models that are capable of recognizing the equality of their respective governments. An intergovernmental framework for creating new and more suitable political structures between indigenous nations and states must, therefore, be developed. Only mutual recognition of governing authorities within such a framework will make good

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governance, dialogue and negotiations possible between the parties. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions are found. In order to preserve the wealth of our diversity, we must open the way to multi-national states, based on ethical principles and international instruments capable of advancing both the cultural and political rights of indigenous nations (van Walt, 1999).

The right to self-determination is a specific contribution to peace building. Cultural repression, the denial of the rights of peoples and the political marginalization of nations are causes of insecurity. If we want political stability and peace in all parts of the world, we must progress in our respect for the cultural and political rights of all peoples permitting peoples who choose to govern themselves (van Walt, 1998). The principle and fundamental right to self-determination is firmly established in international law, including human rights law, and must be applied equally and universally and this right is realized through the exercise of self-government.

Self-Determination, Autonomy and Self-Governance

It is important to understand self-determination as an ongoing process of choice for the achievement of human security and fulfillment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity (van Walt, 1999). Self-determination is only fully expressed when a nation governs itself through institutions of its own choosing. When the historical development of modern indigenous constitutional and customary governments result in their full capacity for self-government the individual governments function as institutions that are accountable to the people who adhere to the nation and its culture. The ethos and culture thus practiced by the people ultimately determine the nature and character of governing institutions that regulate life internal to the nation and in relations with other nations and states externally.

While it is true that the full expression of self-government can lead to desires to act independently, the historical tendency of nations in the exercise of governance has been to establish working relationships with neighbors for mutual benefit. This tendency is encouraged when neighboring governments and jurisdiction respect the authority and inherent powers of indigenous governments.

Indigenous peoples advance their claims primarily in terms of self-determination. This is often interpreted as a challenge to the territorial integrity of existing states, because it is feared that indigenous peoples want to form their own states. Underlying this fear is the assumption that the state is the basic but also the highest form of organization to which all communities, including indigenous peoples, aspire. But indigenous peoples articulate their right "to live freely and to determine their own destiny" without relating this to the idea of states with mutually exclusive territories and sovereignties. "Instead, the backdrop is interrelationships. Emphasis is not so much on separation: rather, the goal is relations and connections. Separation in this context is

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only a transition to break away the negative, to create new bonds" (Anaya, 1998).

It may be that the traditional concept of the state needs reevaluation given modern circumstances. Sovereignty is no longer understood to be the exclusive prerogative of the central authorities of the state, but, rather, a collection of functions that can best be exercised at different levels of society, depending on the nature of decisions that need to be made and the manner of their most appropriate implementation (van Walt, 1998).

Autonomy (or an autonomy regime) in international law is characterized principally by: ethnic/cultural distinctiveness, attachment to the state and self-government of the people of an autonomous region. It often derives from the internal constitution or legislation of the state and the existence of bilateral treaties between the affected parties, still in force (Dinstein, 2011). An argument can be made that under international law the territories of indigenous nations in the context of the United States, Canada and Mexico (i.e. reservations, reserves, communities and *comunidades*) and elsewhere can be considered autonomous regions.

To adopt the language of autonomy may represent a necessary conceptual shift in the way indigenous peoples are viewed and is consistent with international legal regimes based on UNDRIP and other agreements. The shift is a move away from the language of "sovereignty" (a term nowhere used in UNDRIP), to one of self-government and autonomous governance.

Crucial Aspects of Intergovernmental Frameworks

Merely conducting meetings or conferences between state governments and indigenous peoples do not constitute official intergovernmental relationships, any more than when a state government simply declares it has a "government-to-government" relationship with an indigenous nation. Neither does the bureaucratic relationship between indigenous governments and an internal state agency regulated by domestic laws and codes. Even novel contemporary arrangements like self-governance compacts instituted in the United States and Canada fall short of the full scope of an effective intergovernmental framework. While these measures represent steps toward the full realization of self-determination and self-government, they are only steps toward that outcome.

An intergovernmental framework is a vehicle for managing intergovernmental relationships to ensure good governance by all parties involved. It is needed in nation and state relations when there is an overlapping of jurisdictions between governments, necessitating bi- or multilateral agreements for the administration of legitimate governmental functions. It is also needed when authority is transferred between governments, as between a colonial or dominating government and a previously subsumed national entity or people. Typically it administers fiscal relationships that can include taxation, subvention (management of grants and other financial aid) or other related functions of economy. However, it can also address purposes related to law enforcement, national defense, citizenship and other civic considerations. Intergovernmental framework agreements between indigenous nations and states must be as expansive as possible and not limited to merely fiscal relationships.

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Formal intergovernmental agreements between indigenous nations and states must recognize the inherent authority of nations, rooted in their ownership and occupancy of ancestral territory, their respective worldviews and distinctive cultures. Such agreements between governments are goal-oriented and designed for problem solving in an atmosphere of non-subordination. Such agreements shore up relationships of trust and confidence or ties between intergovernmental actors, and hold them together—bound by mutual commitments and benefits. They are characterized by:

- Common values and vocabulary
- Relative governmental autonomy
- A relationship of trust with continuous contact (a means of nurturing the relationship)
- Special interests represented through associational ties of governmental officials (Agranoff, 1994).

Authority sharing via an intergovernmental agreement occurs through the creation of a mechanism that might be called an Intergovernmental Relations Body. It would consist of representatives from each government as well as outside, third party mediators or monitors. The mechanism would recognize three types of mutually agreed upon powers:

- Reserved and exclusive powers (held by a state's government)
- Concurrent powers (shared authority)
- Reserved and exclusive powers (held by the indigenous national government)(Agranoff, 1994).

Article 46

Taken at face value Article 46 seems to preclude the possibility of indigenous secession based on an interpretation of self-determination as meaning exclusively internal self-determination. State governments have taken this position based on their fear of state dismemberment. However, the argument suggests that this definition of the right of self-determination is discriminatory to indigenous peoples and contrary to normative definitions of the term as well as interpretive conventions in international law.

Rather, nowhere in the text of the Declaration is there a qualification of the term “self-determination” that implies internal self-determination only. Therefore, it is “imperative that any interpretation of UNDRIP treat the right of indigenous peoples to self-determination as equal to the right afforded to ‘all peoples’”... Further, preambular paragraph 17 states “nothing in UNDRIP may be used to deny any peoples their right to self-determination exercised in conformity with international law” (Cowan, 2013).

Cowan's argument concludes:

In other words, self-determination under UNDRIP derives from and is consistent with existing law on self-determination. That does not mean the

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right of self-determination is exactly identical in nature for all peoples in all cases—self-determination manifests in different forms, depending on the circumstances—but it supports the argument that all peoples are entitled to equivalent recognition of the right” (Cowan, 2013).

Governance to be understood in terms of the Declaration clearly offers guidance to all indigenous nations and states’ parties to respect the inherent authority and powers of indigenous constitutional and customary governments as would be applied to any state government. There is fundamentally no difference in the level of respect that must be accorded to human governing institutions that represent either a nation or a state. Accordingly, to fully implement these provisions we respectfully suggest the following recommendations:

Recommendations

- Indigenous constitutional and customary governments and state governments enter into bi-lateral or multi-lateral intergovernmental dialogue to mutually define and agree to an intergovernmental framework (that defines the inherent powers of each government and procedures for engaging) as a foundation for negotiation of mutual concerns providing for a third party guarantor and mediator as a permanent intergovernmental mechanism - wherein each state government and indigenous nations can engage in dialogue and negotiate outcomes.
- Pro-actively engage in the prevention and resolution of conflicts involving states and indigenous nations. In doing so the United Nations should respect and promote the implementation of self-determination as the means to self-government in the broad sense affirmed by the UNDRIP, and as a means to advance peace and mutual benefit.
- Establish a new body (or reactivate the Trusteeship Council with a new Mandate) responsible for promoting state implementation of the UNDRIP and monitoring states’ actions with regard to indigenous peoples’ rights. Such a monitoring and implementation body must have a mandate to receive relevant information, to share best practices, to make recommendations, and otherwise to work toward the objectives of the Declaration. Such a body would do more than anything else to achieve the purposes of and promote compliance with the Declaration (Statement of 72, 2013).
- Regularize the language of autonomy, self-determination and managing intergovernmental relations based on standards enshrined in international agreements discussed above (especially UNDRIP), amending states’ legal regimes, and indigenous constitutions and customary practices to reflect this language.
- Form commissions at indigenous nations’ governmental levels to begin proposing language for intergovernmental frameworks with state governments.

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