

OHCHR

Working Group on the Declaration on the Rights of Indigenous Peoples

6<sup>th</sup> session

Geneve

20 November -1 December 2000

## **ARTICLE 12**

*Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.*

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Prepared by Michael Eckford

For and on behalf of the Nyoongar Ghurradjong Murri Peoples and  
The Sovereign Union of Aboriginal Nations and Peoples of Australia

Mr Chair and Member States, we note with keen interest your alternative language and find the language deceptive, immoral and in many ways contradicts established international legal norms on established human rights. Clearly, the language of the alternate text together with the additional paragraphs demonstrates a clear ambition on the part of several Member States to maintain a dominant legal position over our customary Laws/Lores and impedes and restricts our religious freedoms. This is the only conclusion we can make when we read the alternative language. There is absolutely no way the alternate text facilitates a better position for us. In reality, Mr Chair, it provides even greater powers for member States to maintain control over our customary traditions and to practise and maintain our spiritual rights.

I reiterate what I said in a previous intervention. What you are dealing with here and recognised by the General assembly is to develop a set of rights for a distinct group of Peoples, whose customs, traditions values religion and spirituality for many of those that influence participating Member States.

When Christianity came to the lands of Indigenous Peoples it failed to influence us because our customs traditions and Laws/Lores and spirituality are much stronger than what they could offer.

We are somewhat perplexed by the brief Australian intervention of yesterday when they said: "The Australian government is strongly supportive of indigenous peoples' endeavours to revitalise their traditional culture and customs." We are grateful for this statement from the Australian delegation because it permits us to articulate what we Indigenous Peoples are fighting for here. While Member States may argue that they are in support of our endeavours their national legal systems deny our ability to achieve the protections and rights we seek in this Declaration.

Let me illustrate this point. In 1992 the High Court of Australia in the Mabo decision [no.2] concluded that *terra nullius* was a racist legal fiction and could NOT remain within Australian law any longer. For Aboriginal Peoples of Australia our customs, traditions and Law/Lore have, in fact, continued since 1788. The Court agreed that our customary Law/Lore and traditions provide us with title to our traditional lands. In essence, Mr Chair, this means our sovereignty remains intact and our Law/lore is, in fact, the law of the land, but this law and title is now burdened with the Crown title. This raises another very serious and interesting matter that will not go away until properly dealt with by all concerned.

While displacing one racist legal fiction the High Court created another, by concluding that we do not, and I emphasise the word DO NOT, *HAVE THE RIGHT TO* revitalise our cultural traditions and customs, because this will be viewed in Australia as creating an ability to reclaim title to our lands through the revitalisation of our culture and traditions.

Mr Chair and Member States, I put it to this forum that this objective is in direct conflict with an established domestic common law in Australia. It is, therefore, difficult for us to try and find some common ground with our government on this matter, considering the contradictions and conflict of the two positions. For us in Australia, if the wording of this alternate text remains in place, that is: "...[in conformity with domestic laws] we will have enormous problems in the future with regards to our rights and what is being developed here as an international over-riding clause that will serve to suppress our interests and rights.

It is also clear that there is a large number of countries participating here who have very real problems with the word "restitution" and we can understand why. Take for example the French museum of ethnology is full of Indigenous peoples' human remains and other body parts that they have exhibited for many years demonstrating the physical otherness of Indigenous people from Europeans. Yes we can understand their problems with restitution. Then we have the Greeks, Egypt, Iran, China who all seek restitution of their material culture from museums in other countries and, indeed, from some private collections.

One would have thought that these countries would be support strongly our positions because they are experiencing the same problems that we face. So it is not too difficult for us to understand why countries like the United States and Japan seek not to improve the language of articles 12, 13, and 14, but to create language that provides protection for their interests.

We are not Peoples of western religion so we really don't know the role of the representative of the Holy See is, but when they represent the interest of the Vatican I would like to say to them that they too, have many sacred objects that belong to Indigenous Peoples. For my People, they hold sacred carved trees that were felled in an attempt to prevent us from maintaining our ceremonies at late as the 1930s.

Yesterday we heard Japan articulate their position which adds to their statement of 1997 and, in some ways, provides further details of their objections. It is our view that Japan has adopted a very racist position, because, as they stated yesterday, we can only conclude that they prefer maintaining the *status quo* which provides for the citizens of the dominant society to have precedence over the rights of Indigenous Peoples.

Japan should realise that they cannot enunciate that the rights of Indigenous Peoples must conform to domestic laws, but what is more concerning is the apparent rights of the dominant society to over-ride the rights of Indigenous Peoples. They can't have their cake and eat it too.

On another point, Mr Chair, there appears to be considerable concern for archaeological and historical sites being recognised as an international right for Indigenous Peoples. I hope the various countries' concern is not dictated to by the fight over Jerusalem, because, as was stated yesterday, by our brother from Guatemala where even their priests have to pay a tourist fee in order to visit his sacred place for worship and pray. As can be seen we are dealing with matters that go beyond western legal norms.

In 1997 the Philippines and Malaysia dealt with this matter with Brazil, Chile Mexico along with others. But Malaysia and Philippines raised another point and sought definition of spiritual property. We submit to this forum, Mr Chair if Member States want to be educated about the true meaning of spiritual property you would need to establish a special workshop so that we Indigenous Peoples can educate you.

Having said this, I choke on these words because the alternate text demonstrates to us that you do have an understanding of the importance and value of spiritual property. This is why you now seek to continue to deny us our rights, while arguing for the rights of your nationals to retain them in museums as major tourist attractions. What else would you have to show if you gave them back?

In concluding this intervention, I use an example of the need to reclaim our material culture. When I confronted my father six years ago and asked him why he went back to drinking alcohol, after we had worked so hard to make him sober, he pointed to another Aboriginal man staggering down the road. And he said: "Look at that old brother there! He is a walking corpse. The whitefella came here and took everything that was important to us and he tried to give us a spirit from a book but we ended up with a spirit in a bottle. We don't own our Laws, our religion and our spirituality, they, the Wunda, {whiteman} took them

from us and left us with nothing. We now live under their laws, not ours, and it is no wonder the spirit in the bottle fills for us an empty space." His niece said: "At least when we take the spirit from the bottle it hides the pain and hurt and it makes us laugh again."

So, Mr Chair and Member States, what we seek here has absolutely nothing to do with world politics, nor does it impact upon the G7's economic globalisation ambitions. There have been two world wars both started by men of Christian faith. It was Christians who effected the holocaust against the Jewish people and it was a Christian state that dropped the atomic bombs on Hiroshima and Nagasaki. We don't seek to start another world war, not drop bombs. We are only asking for decency and respect.

Finally, Mr Chair, when we look at your 1997 report, Japan did one thing for us which I think summarises the belligerence of some State Members when they commented that: "...the Declaration in reality was of little consequence under international law as it was non-binding by nature, so strong wording such as "shall take effective measures", as stipulated in these articles, had little effect on State parties under international and domestic law.

Thank you.

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Convenor

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