UNITED NATIONS COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of Discrimination and Protection of Minorities

Working Group on Indigenous Populations

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Agenda Item 5
STANDARD SETTING

SUBMISSION OF PROFESSOR GLENN MORRIS OF THE FOURTH WORLD CENTER FOR THE STUDY OF INDIGENOUS LAW AND POLICY AT THE UNIVERSITY OF COLORADO AT DENVER

Madame Chair:

I appreciate the opportunity to address this esteemed body on the matter of standard setting under agenda item number five.

Although some speakers have offered their comments on many diverse and important topics, I will limit my remarks specifically to standard setting in one particular area -- religious freedom for indigenous peoples. Although this point may seem insignificant in the face of challenges to the very physical existence of some indigenous nations, the spiritual continuity and well-being of our nations is an important issue which demands continuing attention by this Working Group. Our spirituality is central to our individual and collective personalities, and is essential to our continued survival as indigenous nations.

At first glance, there is an appearance of state acceptance of the principle of religious freedom generally, and for indigenous peoples in particular. In practice, however, many states hold traditional indigenous spiritual beliefs in contempt and would welcome their demise or destruction. This is evidenced by the collusive activities of the Summer Institute of Linguistics, New Tribes Movement, and other Christian evangelical sects and various governments, particularly in Latin America and Asia. Others have spoken to the specifics of these arrangements, so I will illustrate my comments on standard setting by utilizing the practices of the United States in the area of indigenous religious freedom.

The practice of the United States in this field has been highly sophisticated and is fully justified under the color of its municipal law. Throughout the 19th century, U.S. policymakers and bureaucrats

operated in cooperation with Christian missionaries in an effort to "civilize" indigenous peoples by manufacturing them into white people through Christian dogma.

The philosophical underpinnings of this policy were reflected in the words of President John Adams when he wrote;

What infinite pains have been taken and expenses incurred in treaties, presents and stipulated sums of money, instruments of agriculture, education...to convert these poor savages to Christianity! And, alas! with how little success! The Indians are as bigoted to their religion as the Mohametans are to their Koran, the Hindus are to their Shaster, the Chinese to Confucius, the Romans to the Saints and Angels, or the Jews to Moses and the Prophets. It is a principle of religion, at bottom, which inspires the Indian with such invincible aversion both to Civilization and Christianity. The same principle has excited their perpetual hostilities against the colonists and the independent Americans.

In this vein, and in a manner similar to current state practices in Latin America and Asia, the U.S. government promoted Christian sects to invade indigenous territories and, in collusion with government officials, actively to work to undermine indigenous national sovereignty. Tactics included allowing missionaries to kidnap indigenous children from their communities and raise them as non-indigenous, to censure and imprison spiritual leaders, to effectuate the passage of statutes outlawing indigenous ceremonies, and the destruction of objects and sites central to Indian spiritual practices.

On the point of legal prohibition, my own religion - the Sun Dance religion - along with the ceremonies of other indigenous nations such as the Hopi and the Taos Pueblo, was specifically outlawed by U.S. government regulation. As recently as 1974, Sun Dancers have been jailed for practicing their ceremonies. Even today, the U.S. Indian Health Service reserves to itself the right to intervene in and stop our ceremonies if, in their judgment the public health and welfare is endangered.

The U.S., and other states, will maintain that such restrictive policies, while once common, have now been replaced with new and enlightened legislation designed to protect indigenous interests. Undoubtedly they would use the American Indian Religious Freedom Act of 1978 (AIRFA), Pub. L. 95-431, 42 U.S.C.A. ss 1996, as an example of a policy reversal designed to support indigenous practices. In fact, a review of the statute reveals glowing rhetoric and sentiment, but nothing in the creation of substantive rights that indigenous peoples may utilize for their own survival. A review of the major cases litigated under this Act, resulting in an appeal to the u.s. Supreme Court, reveals a disturbing result.

Of the six cases in this category litigated since 1979 utilizing this law, the courts have never upheld the claims of the indigenous plaintiffs. In the most recent case, Lyng v. Northwest Indian Cemetery Protective Assn. 108 S. Ct. 1319 (April 19. 1988). and cited by Mr. James Anaya and Prof. Miguel Alfonso Martinez, the U.S. Supreme Court stated that even if the actions of the government will "virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding [the Indians'] legal claim."

This opinion was simply the latest in a long line in which the desires of the dominant settler society were upheld against the survival of ancient indigenous wisdom and practices. A short review of some of the dominant interests that have been protected at the expense of indigenous peoples indicates an insensitive, if not ethnocidal, jurisprudential trend.

In the 1980 case of Sequoyah v. Tennessee Valley Authority, 620 F. 2d 1159 (6th Cir. 1980), cert. den. 449 U.S. 953 (1980), the Court held that the interests of traditional Tsulagi (Cherokee) people in protecting their sacred burial grounds and ceremonial sites were inferior to those of the U.S. in the construction of a hydroelectric dam.

In the 1981 case of Badoni v. Higginson, the federal courts found that downstream water storage and recreational motor boating on Lake Powell in southern Utah were more overriding than the flooding of one of the most central religious sites to the Dine and Hopi nations. The indigenous sites are now forty-six feet under water. Case citation; 638 F. 2d 172 (10th Cir. 1980) cert. den. Badoni v. Broadbent 452 U.S. 954 (1981).

In Fools Crow v. Gullet, 706 F. 2d (8th Cir. 1983), cert. den. 464 u.S. 977 (1983), the court allowed the interests of tourists and hikers to destroy one of the most sacred sites for the Lakota, Dakota, and Cheyenne nations.

In Wilson v. Block, 708 F. 2d 735. cert. den. Hopi Indian Tribe v. Block 464 u.s. 1056 (1984), the federal courts found that the interests of the National Forest service to grant timber leases, mining leases, and in allowing the expansion of a ski resort, were paramount to the right of the Dine and Hopi peoples to continue to utilize a sacred mountain for spiritual purposes, as they had done for millennia.

Finally, in the most recent decision, Lyng, the Supreme Court paved the way for the U.S. Government to continue to ignore the religious liberties of indigenous peoples. The Court agreed with the position that the U.S. Constitution does not require any affirmative act by the federal government in insuring that indigenous spiritual practices be respected, and, in fact, prohibits such affirmative acts. If this is as far as municipal law has evolved in 1988, then the need for international standards for the

protection indigenous peoples is obvious.

Madame Chair, these decisions point to important points about the manner in which your proposed draft declaration addresses these issues. First, Paragraph 8 is a useful first step in recognizing the religious freedom of indigenous peoples - recognizing our right to manifest, teach, practice and observe our religious traditions, and ceremonies, and including our right to have access to traditional ceremonial sites.

Second, as Professors Weissbrodt and Alfonso Martinez described previously, the need for effective mediation of the diverse issues between indigenous peoples and states is obvious in this case. As we sit here discussing the nature of standards to be used in a declaration, states continue to violate the physical, spiritual and political integrity of indigenous nations. For the Dine and the Lakota, their spiritual and cultural sites continue to be destroyed daily, and there exists no effective municipal forum or remedy available to them, the Supreme Court has made that point clear. In this regard, the suggestions of Professors Weissbrodt and Alfonso that Paragraph 28 of your draft may provide an important first step toward the creation of causes of action and fora for the resolution of these types of disputes is very important. I hope that we can move forward will all deliberate speed in the protection of indigenous peoples rights before more irreparable harm is done.

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