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Indigenous Peoples' Right to Restitution

Joint Submission of the Grand Council of the Crees (Eeyou Istchee), Inuit Circumpolar Conference (ICC), Na Koa Ikaika Kalāhui Hawai'i, Indigenous Peoples of Africa Co-ordinating Committee (IPACC), Centro de Asistencia Legal Popular (CEALP) Programa de Pueblos Indígenas de Panamá, Saami Council, Taungya (Bangladesh), International Organization of Indigenous Resource Development (IOIRD), Foundation for Aboriginal and Islander Research Action (FAIRA), Mainyoito Pastoralist Integrated Development Organisation (MPIDO-Kenya), Tebtebba Foundation, First Peoples Human Rights Coalition, Organisation africaine des femmes autochtones (OAFA)/TIN HINAN, Native Women's Association of Canada (NWAC), Servicios del Pueblo Mixe (SER) México, Kus Kura Sociedad Civil (Costa Rica), Assembly of First Nations, Comisión de Juristas Indígenas en la Republica Argentina (CJIRA), American Indian Law Alliance (AILA), Indigenous World Association, Communauté des Autochtones Rwandais (CAURWA), Warã Instituto Indígena Brasileiro, Maasai Civil Society Forum (MCSF), ECUARUNARI, CONAIE (Ecuador), Caribbean Antilles Indigenous Peoples Caucus & the Diaspora (CAIPCD), Nepal Indigenous Peoples Development and Information Service Centre (NIPDISC), United Confederation of Taino Peoples, YABOA Native Women's Coalition, Traditional Kirati Peoples' Alliance (Nepal), Consejo General de Taino Boricanos, South African First Indigenous and Human Rights Organization (SAFIHRO), Rights and Democracy, Canadian Friends Service Committee, Netherlands Centre for Indigenous Peoples (NCIV), KAIROS: Canadian Ecumenical Justice Initiatives.

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EXECUTIVE SUMMARY

A number of States have asserted that there is no right to restitution under international law. This paper demonstrates otherwise. In the context of lands, territories and resources, the right to restitution is critical to Indigenous peoples. In addressing reparation or redress, restitution is the primary form of reparation. Where this is not possible, other forms of redress, such as compensation would be applied. Unless agreed to by Indigenous peoples, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Some States have argued that, without mentioning the rights of third parties, the right to restitution in Article 27 would, in effect, be an absolute right. This is simply incorrect. It is widely recognized that human rights are generally relative in nature and not absolute. This is also true for the right to restitution.

Article 27 recognizes that restitution may not be possible in all situations. In determining whether or not restitution is "possible," the rights of all interested parties -- including State governments and other third parties -- would be systematically considered. This contextual approach is recognized both in international and national law. In this context, there is no need to explicitly refer to the rights of third parties in the *draft U.N. Declaration*.

In terms of an effective remedy for their own interests, States generally insist upon restitution. Consequently, states should not apply a significantly less effective standard for addressing the human rights of Indigenous peoples.

The right to an effective remedy is a human right that is recognized in major international human rights instruments. In light of the profound significance of lands, territories and resources to Indigenous Peoples and our survival and well-being, the right to an effective remedy must include the right to restitution.

Proposals to add a State obligation to provide "effective mechanism of redress" could prove beneficial. However, these proposals are not an adequate replacement for the right to restitution of Indigenous peoples' lands, territories and resources. Also, in cases where restitution is not possible, these State proposals seek to eliminate reference to rights to compensation in the form of replacement lands or resources of equivalent quality, size and legal status.

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Indigenous Peoples' Right to Restitution

Introduction

The right of Indigenous peoples to restitution of our lands, territories and resources is already included or being considered in a number of human rights texts (see Annex I). In particular, the draft *U.N. Declaration of the Rights of Indigenous Peoples* that was unanimously approved in 1994 by the U.N. Sub-Commission affirms in Art. 27:

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[1]

Yet within the current standard-setting processes at the United Nations and the Organization of American States (OAS), it is claimed by some States that there is no right of restitution under international law. It is said that, in a given situation, restitution is simply one of a number of remedies that could possibly be applied.

As will be demonstrated below, these claims are incorrect. To omit our right to restitution would not be consistent with international law and its progressive development. There are a number of reasons for explicitly affirming the right of Indigenous peoples to restitution in the draft declarations that are being considered at the U.N. and OAS. These reasons are elaborated below.

I. Right to restitution under international law

From the outset, it is important to highlight that the right to restitution is explicitly provided in the *African Charter of Human and Peoples' Rights* in Art. 21(2):

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[1] In regard to other forms of property, see also Art. 12 of the draft *U.N. Declaration*: "Indigenous peoples have … 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."

Despite the importance of Art. 12, this paper will focus primarily on right to restitution of lands, territories and resources, as reflected in Art. 27. However, many of the basic arguments that we advance would apply equally to restitution of the property referred to in Art. 12.

> In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

At the national level, the practice of restitution of Indigenous peoples' lands and territories is evident in the "land claims" procedures of numerous States. In the case of South Africa, the collective and individual right to restitution of land is explicitly recognized in its national law and in its constitution.[2]

At international law, the Committee on the Elimination of Racial Discrimination has highlighted the right of Indigenous peoples to "own, develop, control and use their communal lands, territories and resources".[3] In this crucial context, the right to restitution of Indigenous peoples is emphasized as follows:

> … where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[4]

This norm of restitution is fully reflected in Art. 27 of the draft *U.N. Declaration* (see text above and Annex II *infra*). Moreover, the Committee has consistently applied this

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[2] *Restitution of Land Rights Act 22 of 1994*, assented to 17 November 1994, date of commencement 2 December 1994, as amended, s. 2(1): A person [which includes a community] shall be entitled to restitution of a right in land if … *(d)* it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices …"

See also *Constitution of the Republic of South Africa 1996*, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Act 108 of 1996, s. 25(7): "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

[3] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted at the Committee's 1235th meeting on 18 August 1997), para. 5.

[4] *Id.*

standard to numerous States, including Japan,[5] Costa Rica[6] and Mexico.[7] The U.N. Human Rights Committee[8] and the Committee on Economic, Social and Cultural Rights[9] have also applied the *collective* right of restitution to Indigenous peoples' traditional lands.

It is important to note that the right of restitution in Art. 27 of the draft *U.N. Declaration* is also consistent with the same right as it is generally understood in international law. At the international level, restitution may pertain to a wide range of matters. As described in the 2001 *Report of the International Law Commission* (ILC), these include the "return of territory, persons or property, or the reversal of some juridical act, or some combination of them".[10] When States have committed wrongful acts under international law, restitution is considered as a primary form of reparation. As concluded by the ILC:

> … because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, *it comes first among the forms of reparation*.[11]

The primacy of restitution, as an effective remedy, has also been underlined in other specific contexts in international law, such as "housing and property restitution".[12]

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[5] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan*, U.N. Doc. CERD/C/304/Add.114, 27 April 2001, para. 17.

[6] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Costa Rica*, U.N. Doc. CERD/C/60/CO/3, 20 March 2002, para. 11.

[7] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Mexico*, U.N. Doc. CERD/C/304/Add.30, 11 December 1997, para. 27.

[8] Human Rights Committee, *Concluding observations of the Human Rights Committee: Guatemala*, UN Doc. CCPR/CO/72/GTM, 27 August 2001, para. 29.

[9] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Argentina*, U.N. Doc. E/C.12/1/Add.38, 8 December 1999, para. 4.

[10] *Report of the International Law Commission*, 53rd sess. (23 April-1 June and 2 July-10 August 2001) in U.N.GAOR, 56th sess., Supp. No. 10 (A/56/10), (Commentary on Article 35), pp. 240-241, para. (5).

[11] *Id.*, at pp. 238-239, para. (3) [emphasis added].

[12] "Housing and property restitution", Resolution 2004/2, adopted 9 August 2004, para. 3 (in the context of the return of refugees and internally displaced persons), in U.N. Commission on Human Rights, *Report of the Sub-Commission on the Promotion and Protection of Human Rights, Geneva, 26 July-13 August 2004, Rapporteur: Mr. Paulo Sérgio Pinheiro*, E/CN.4/2005/2, E/CN.4/Sub.2/2004/48, 21 October 2004, p. 17:

> *Affirms* that the remedy of compensation should only be used when the remedy of restitution is not possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution …

Based on the above, it is clear that the right to restitution exists in international law. However, within the current intersessional Working Group that is considering the draft *U.N. Declaration* (WGDD), some States have suggested a further reason for opposing Art. 27. They claim that such a right to restitution would enable Indigenous peoples to reclaim virtually all, or at least huge portions of, existing States. As a result, non-Indigenous persons or other third parties would be unjustly impacted, if not also totally displaced.

These extreme arguments cannot withstand scrutiny. They have no basis in law. Since they continue to block the possibility of consensus within the WGDD, they will be addressed under the heading below.

II. Right to restitution is a "relative" right

It is widely recognized that human rights are generally relative in nature and not absolute.[13] This is also true for the right to restitution.

Therefore, in the absence of any mention in the draft *U.N. Declaration* to the rights of third parties or State governments, this does not mean that these latter entities would be deprived of their rights. To our knowledge, no precedent exists anywhere to suggest otherwise. Also, while the adoption by the U.N. General Assembly of the draft *Declaration* would be a crucial first step, it is an aspirational instrument and is not legally binding.

In addition, in relation to Indigenous peoples, Art. 27 of the draft *Declaration* indicates that "where [restitution] is not possible, they have the right to just and fair compensation". Again, this is wholly consistent with international law.

For example, the International Law Commission states that, where restitution is not possible, compensation must be paid:[14]

> The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible".[15]

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[13] S.J. Toope, *Cultural Diversity and Human Rights (F.R. Scott Lecture)*, (1997) 42 McGill L.J. 169, at pp. 177-178: "None of this is to say, however, that rights are absolute. They are defeasible under certain circumstances by other rights and sometimes by necessity ... rights are subject to processes of balancing".

[14] *Report of the International Law Commission*, note 10, *supra*, at pp. 238-239, para. (3).

[15] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (Ser. A) No. 17, at p. 48.

Depending on the circumstances, it is said that restitution may or may "not [be] possible" in situations involving the rights of third parties:

> … whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.[16]

Thus, there is no need to explicitly refer to the rights of third parties in the draft *U.N. Declaration*. In the event of a future dispute, the rights of all interested parties – including State governments and other third parties – would be systematically considered in determining whether a right to restitution is "possible". Like all other rights cases, the outcome would depend on the relevant historical and contemporary circumstances in each case.[17]

III. Right to an effective remedy

In terms of an effective remedy for their own interests, it is interesting to note that States generally insist upon restitution.[18] Consequently, States should not apply a significantly less effective standard for addressing the human rights of Indigenous peoples.

In cases involving the application of peremptory norms, "restitution may be required as an aspect of compliance with the primary obligation".[19] Violations of peremptory norms, such as the prohibition of racial discrimination, are of particular relevance to Indigenous peoples.

Aside from the denial of self-determination and other human rights violations, Indigenous peoples globally have been subjected to widespread discrimination and dispossession in relation to our lands, territories and resources. These human rights abuses have had, and continue to have far-reaching adverse impacts on Indigenous peoples.

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[16] *Report of the International Law Commission*, note 10, *supra*, at p. 243, para. (10).

[17] R. McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. L.Q. 857, at pp. 884-885:

> ... the human rights approach ... does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed. This balance means that the geopolitical context of the right being claimed – the particular historical circumstances – and the present constitutional order of the State and of international society, is acknowledged and addressed.

[18] *Report of the International Law Commission*, note 10, *supra*, at pp. 238-239, para. (3): "States have often insisted upon claiming it in preference to compensation."

[19] *Id.*

Most often, these actions have resulted in a legacy of debilitating impoverishment. In turn, this acute poverty continues to largely inhibit, if not prevent, the enjoyment by Indigenous peoples of our basic human rights.

The severe poverty facing Indigenous peoples does more than gravely affect our human rights. It also undermines our participatory and other democratic rights. Eradication of poverty is vital to the elimination of all forms of discrimination. For these and other reasons, the dispossession of Indigenous peoples' lands, territories and resources must be redressed. As a minimum, reparations must lead to securing an adequate land and resource base.

The right to an *effective* remedy is a human right that is recognized in major international human rights instruments.[20] In light of the profound significance of lands, territories and resources to Indigenous peoples and our survival and well-being, the right to an effective remedy must include the right to restitution.

As emphasized by the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*:

> … the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[21]

Also, it has been concluded in the 1991 United Nations Meeting of Experts in Nuuk, Greenland:

> *Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-*

[20] See, for example, *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976, Art. 2, para. 3; and *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. Adopted by U.N. General Assembly on December 21, 1965, opened for signature on March 7, 1966, and entered into force on January 4, 1969, Art. 6.

See also *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity*, November 21, 1990, reprinted in (1991) 30 I.L.M. 190: "We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights."

[21] I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C No. 76 (2001), at para. 149.

> *government*. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures ...[22]

Similarly, R. Stavenhagen underlines:

> Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*.[23]

Some States seek to replace the right to restitution in Art. 27 of the draft *U.N. Declaration* with either the right to "redress" or "reparation".[24] Either of these alternate terms would mean that Indigenous peoples would have no explicit right to restitution, but that restitution could still possibly occur in redressing past dispossessions. In light of the tragic history of dispossessions relating to lands, territories and resources and the ongoing legacy of impoverishment, this would be a huge risk for Indigenous peoples to take.

Some States have proposed to eliminate the right of restitution in Art. 27 and replace this right with a right to "redress" or "reparation" and a general State obligation to provide "effective mechanisms for redress".[25] While it would be beneficial to add such an obligation to the draft *Declaration*, this alone would not be adequate. It would not in itself assure that we would have any of our confiscated or dispossessed lands, territories and resources returned. "Effective mechanisms for redress" may possibly result only in monetary compensation and not even provide replacement lands or resources of

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[22] United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1, at para. 4 [emphasis added].

[23] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations University Press, 1990), at p. 105 [emphasis added].

[24] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session*, E/CN.4/2005/89, 12 February 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), p. 7, para. 36.

[25] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, E/CN.4/2005/89/Add.2, 1 April 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), p. 34.

See also p. 22 of this Report, where a similar proposal is made in regard to eliminating the right to restitution of Indigenous peoples' cultural, intellectual, religious and spiritual property referred to in Art. 12 of the draft *U.N. Declaration*.

equivalent quality, size and legal status.[26] In the vast majority of global situations, this would not constitute an effective legal remedy.

It is also worth noting that a new Art. 26 bis is also being proposed by some States. This Article provides:

> States shall establish a fair, open and transparent process to adjudicate and recognize the rights of indigenous peoples pertaining to their lands and resources, including those which were traditionally owned or otherwise occupied or used. The indigenous peoples shall have the right to participate or, where appropriate, to be consulted in this process.[27]

One of the purposes of Art. 26 bis is to enable claims by Indigenous peoples concerning our dispossessed lands and resources to be raised in a "fair, open and transparent process". However, it is not clear that the proposed process would be wholly independent from State governments. It is also not clear what criteria or procedures would be used to "adjudicate and recognize" the land and resource rights of Indigenous peoples. Further, the sentence referring to "the right to participate or, where appropriate, to be consulted" is both ambiguous and confusing as to its purpose and intent.

According to Art. 26 bis, States would have an obligation to establish this process, which *could possibly* recognize the rights of Indigenous peoples over our traditional lands and resources that we no longer possess. Curiously, reference to the rights over Indigenous "territories" has been totally omitted. In addition, there would be no recognition of Indigenous peoples' "right" to restitution.

All of these shortcomings are likely to make it much more difficult for Indigenous peoples to succeed. A further problem is that Art. 26 bis is apparently intended to be read together with an *amended* Art. 26. The present text in Art. 26 of the draft *Declaration* states:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used.

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[26] See also *Indigenous and Tribal Peoples Convention, 1989*, Art. 16, para. 4 (relocation):

> When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, *these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.* Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. [emphasis added]

[27] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, E/CN.4/2005/89/Add.2, 1 April 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), p. 34.

In contrast, the proposed amended text would omit any reference to the environment. It would only recognize the rights of Indigenous peoples to traditional lands, etc. that we *presently* have, as well as those we *may acquire in the future*. Reference to our lands or resources that we acquire in the future would be a positive addition. However, it is a major concern that all of our rights to lands, territories and resources that were unjustly taken from us would not be recognized.

Presently, the rights asserted by Indigenous peoples before human rights bodies or courts are generally based on all of the rights that Indigenous peoples have over our lands, territories and resources that we have "traditionally owned or otherwise occupied or used".[28] Yet even with such broad criteria, the evidence often required by national courts is making recognition of Aboriginal title far too difficult. For example, in regard to Canada, the Committee for the Elimination of Racial Discrimination has expressed its concern that no Aboriginal people has yet succeeded in proving Aboriginal title over land.[29]

While some States are seeking to unjustly limit Indigenous peoples' rights to lands, territories and resources, international experts are reaffirming the appropriateness of the criteria in the existing text and calling for stronger provisions.[30]

The draft *U.N. Declaration* is intended to significantly alter the present situation of Indigenous peoples in all parts of the world. Yet these proposals from some States and

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[28] See, for example, I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, Case No. 12.053, Report No. 96/03, 24 October 2003, at para. 150:

> In summary, based upon the foregoing analysis, the Commission concludes that the Maya people of southern Belize have a communal property right to the lands that they have traditionally used and occupied, and that the character of these rights is a function of Maya customary land use patterns and tenure.

[29] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* CERD/C/61/CO/3,23 August 2002, para. 16:

> The Committee expresses concern about the difficulties which may be encountered by Aboriginal peoples before courts in the establishment of Aboriginal title over land. The Committee notes in that connection that to date, no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before courts.

[30] See, for example, U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes,* E/CN.4/Sub.2/2004/30, 13 July 2004, p. 19, para. 71 (Basic recommendations):

> **The draft United Nations declaration on the rights of indigenous peoples should be amended … At a minimum, articles 25 and 26 of the draft should include an express reference to subsurface resources and should include additional language that protects aboriginal property rights as well as rights to lands, territories and resources otherwise occupied, used, or lawfully acquired by indigenous peoples.** [bold in original]

See also World Commission on the Social Dimension of Globalization, *A fair globalization: Creating opportunities for all* (Geneva, Switzerland: International Labour Office, 2004), pp. 70-71, para. 312:

> There should also be a recognition of prior rights of indigenous peoples over lands and resources they have occupied and nurtured since time immemorial.

the WGDD Chair could serve to perpetuate the dispossession of Indigenous peoples globally and continue to deprive us of an adequate land and resource base. Such a result would have disastrous consequences for the present and future generations of the peoples concerned.

IV. Article 27 - Possible amendments to consider

While we support the existing text of Art. 27 of the draft *U.N. Declaration*, there are a number of possible amendments that are worthy of further consideration. The proposed amendments preserve the Sub-Commission text. Yet, at the same time, they clarify and strengthen the text.

In regard to Art. 27, the proposed amendments are outlined below (indicated in bold). Our brief comments are provided in an explanatory note.

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been ~~confiscated~~ **taken,** occupied, used or damaged without their free**, prior** and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.
>
> **States shall provide, in conjunction with indigenous peoples, just, fair and effective mechanisms and procedures for these purposes.**

Explanatory note:

> The term "confiscated" implies the lack of free, prior and informed consent by Indigenous peoples. Therefore, in the context of the whole sentence, it would be grammatically more correct to replace "confiscated" with the term "taken".
>
> Use of the concept or principle of "free, prior and informed consent" is consistent with the standard that has emerged internationally in the Indigenous context.
>
> The additional paragraph reflects language that a number of states have already proposed for this Article. The language creates a reinforcing State obligation to establish mechanisms for redress.

Conclusions

The existing text in Art. 27 of the draft *U.N. Declaration* is wholly consistent with international law and its progressive development. In particular, it is incorrect for some States to conclude that there is no "right" to restitution in international law. Moreover, the right of Indigenous peoples to restitution is consistent with the recommendations of the principal U.N. treaty monitoring bodies relating to human rights.

Proposals to add a State obligation to provide "effective mechanism of redress" could prove beneficial. However, these proposals are not an adequate replacement for the right to restitution of Indigenous peoples' lands, territories and resources.

As our own suggested amendments illustrate, proposals that create State obligations to establish "effective mechanisms for redress" can be constructive – if they are intended to reinforce the resolve and commitment of States to effectively redress the past or ongoing dispossessions of our lands, territories and resources. However, for some States, this is clearly not the intention.

Instead, such proposals are being made in order to eliminate any reference to Indigenous peoples' right to restitution under international law. In cases where restitution is not possible, these State proposals also seek to eliminate reference to rights to compensation in the form of replacement lands or resources of equivalent quality, size and legal status.

In the case of the United States, the detrimental positions go even further. In regard to Art. 27, the U.S. proposes to replace the right of Indigenous peoples to restitution with the right to "*pursue claims* for … restitution … or compensation or other redress".[31] This boldly defies any progressive developments in international law and the recommendations of the treaty monitoring bodies concerned with human rights.

In upcoming standard-setting sessions at the U.N. and the OAS, significant positive results can certainly be attained. This is especially true in relation to Indigenous peoples' rights to lands, territories and resources. However, it is vital that criteria be introduced that would eliminate consideration of any proposals that would discriminate against Indigenous peoples or otherwise undermine our human rights and our collective security.

As enshrined in Art. 1 of the international human rights Covenants, international law already includes a principled human rights framework for the elaboration of our rights to lands, territories and resources. If States participating in current standard-setting processes would solemnly fulfill their affirmative obligations under the *U.N. Charter* and the Covenants, a strong and uplifting Declaration on the rights of Indigenous peoples could well be achieved.

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[31] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, E/CN.4/2005/89/Add.2, 1 April 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), p. 35.

ANNEX I

Indigenous peoples' right to restitution: Existing and emerging texts

United Nations Declaration on the Rights of Indigenous Peoples (Draft), in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994, at 105-115, *reprinted in* (1995) 34 I.L.M. 541, Art. 27:

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Indigenous and Tribal Peoples Convention, 1989, I.L.O. Convention No. 169, I.L.O., 76th Sess., *reprinted in* (1989) 28 I.L.M. 1382, Art. 16, para. 4 (relocation):

> When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

African Charter of Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, Art. 21(2):

> In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

Indigenous Caucus Proposal, Organization of American States, February 2005, Art. XXIV, para. 7:

> States shall not take or appropriate the lands, territories or resources of Indigenous peoples under any circumstances. Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied, and which have been confiscated, occupied, used or damaged without their free, prior and informed consent. Where this is not possible, they have the right to compensation that shall take the form of lands of quality and legal status at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development.

Organization of American States (Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples), *Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, OEA/Ser.K/XVI, GT/DADIN/doc.139/03, 17 June 2003, Art. XII, para. 2:

> Indigenous peoples have the right to restitution of the property that is part of that heritage of which they have been dispossessed, or, when restitution is not possible, to fair and equitable compensation.

Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser/L/ V/.II.95, Doc. 6, 26 February 1997 (approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 95th regular session, 1333rd meeting), Art. XVIII, para. 7:

> Indigenous peoples have the right to restitution of the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged; or when restitution is not possible, the right to compensation on a basis no less favorable than the standard set by international law.

ANNEX II – UNDERSTANDING OF ART. 27 OF THE DRAFT *U.N. DECLARATION*

"Redress" – Satisfaction for an injury or damages sustained.[32]

"Reparation" – Payment for an injury or damage; redress for a wrong done.[33]

"Restitution" – Act of restoring; … restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury …[34]

"Compensation" – Indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value … equivalent given for property taken or for an injury done to another …[35]

Right to redress or reparation
(includes restitution and/or compensation)[36]

↓

Right to restitution

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Where this is not possible, right to compensation

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Land of equivalent size, quality and legal status

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Where otherwise agreed by peoples concerned, monetary compensation

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[32] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), at p. 1279.

[33] *Id.*, at p. 1298.

[34] *Id.*, at p. 1313.

[35] *Id.*, at p. 283.

[36] The right to redress or reparation is implied in Art. 27, since the text explicitly includes the right to restitution and compensation.