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Urgent Need to Improve the U.N. Standard-Setting Process

Importance of Criteria of "Consistent with International Law and its Progressive Development"

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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Introduction

During the past few years, it has become increasingly clear that there is an urgent need to improve the current U.N. standard-setting process on the rights of Indigenous peoples. Of particular concern is the intersessional Working Group (WGDD) that is presently considering the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

The need for positive changes has been increasingly emphasized by many Indigenous peoples and organizations, as well as non-Indigenous human rights organizations. For example, in March 2004, this was a central theme of a Joint Submission that was made to the Office of the High Commissioner for Human Rights.[1] Again, in May 2005, Indigenous and non-Indigenous organizations raised this same concern in a Joint Statement to the U.N. Permanent Forum on Indigenous Issues in New York.[2]

A principal reason for introducing improvements to the process is that participants at the WGDD are not explicitly required to meet any criteria in proposing changes to the draft *U.N. Declaration*. As a result, some States are seeking amendments to the existing text that would create discriminatory double standards and violate the Purposes and Principles of the *U.N. Charter*. This is especially evident in relation to such core Indigenous issues as the right of self-determination and rights to lands, territories and resources.[3]

One need not consume excessive amounts of time in ensuring that improvements are implemented in the Working Group. However, if reasonable criteria are not introduced, much-needed progress in the WGDD will continue to be impeded by certain States. In

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[1] 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.

[2] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Urgent Need to Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Statement (signed by 53 Indigenous peoples and organizations and non-Indigenous organizations), U.N. Permanent Forum on Indigenous Issues, Fourth sess., 23 May 2005.

[3] See, for example, Grand Council of the Crees (Eeyou Istchee) *et al.*, "Towards a *U.N. Declaration on the Rights of Indigenous Peoples*: Injustices and Contradictions in the Positions of the United Kingdom", Joint Submission to Prime Minister Tony Blair, United Kingdom of Great Britain and Northern Ireland, September 10, 2004.

other words, lack of attention to such procedural aspects can serve to prevent consensus from being reached on crucial substantive provisions in the draft *U.N. Declaration*.

At the U.N. Permanent Forum in May 2005, numerous Indigenous and non-Indigenous organizations jointly recommended three major improvements. Consistent with the proposals of the High Commissioner for Human Rights,[4] they recommended the adoption of "new and dynamic methods of work, with particular regard for the full and effective participation of Indigenous peoples".[5] This should mean, for example, that the informal consultations that have been held within the WGDD be limited to a reasonable number. They should also not function at the same time, so that Indigenous representatives are able to effectively defend and promote their positions in all such discussions.

Further, it was jointly recommended that the "Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as well as other experts on Indigenous peoples' human rights, [be invited] to attend and contribute to the formal or informal sessions of the Working Group".[6] This would help to ensure a more focussed and balanced dialogue in the standard-setting process.

In addition, Indigenous peoples and human rights organizations jointly proposed to the Permanent Forum that the Working Group be urged to

> carry out its mandate, at all times, in a manner that fully upholds the purposes and principles of the *Charter of the United Nations* and is wholly consistent with international law and its progressive development.[7]

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[4] U.N. Commission on Human Rights, *Final report of the United Nations High Commissioner for Human Rights reviewing the activities within the United Nations system under the programme for the International Decade of the World's Indigenous People*, 61st sess., E/CN.4/2005/87, 4 January 2005, p. 8, para. 32.

[5] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Urgent Need to Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Statement, note 2, *supra*, para. 10, recommendation ii).

See also Permanent Forum on Indigenous Issues, *Report on the fourth session (16-27 May 2005)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2005/43, E/C.19/2005/9, p. 12, para. 59:

> The Forum further takes note of the firm belief that the rapid conclusion of a strong declaration on the rights of indigenous peoples is imperative and that *new and dynamic methods of work* inside the United Nations should be explored by those working on indigenous issues.

And at p. 14, para. 74:

> The Permanent Forum recommends that the Commission on Human Rights adopt creative methods of work, with particular regard for the full and effective participation of indigenous peoples, including the appointment of an indigenous Co- Chair of the working group …

[6] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Urgent Need to Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Statement, note 2, *supra*, para. 10, recommendation iii).

[7] *Id*., para. 10, recommendation i).

Since this latter recommendation would benefit from further substantiation, it is the primary focus of this paper.

I. Obligations of U.N. and member States to respect the *U.N. Charter*

As confirmed in the 1993 *Vienna Declaration*, the "promotion and protection of *all human rights* … must be considered as a priority objective of the United Nations in accordance with its purposes and principles".[8] In this regard, the *U.N. Charter* is clear. An explicit Purpose of the United Nations is … to "achieve international cooperation … in promoting and encouraging respect for human rights … for all without distinction as to race, sex, language, or religion".[9]

Further, this obligation of the U.N. to promote "universal respect for, and observance of, human rights" is to be "based on respect for the principle of equal rights and self-determination of peoples".[10] All member States "pledge themselves to take joint and separate action in co-operation with the Organization" to achieve this central purpose.[11]

The international obligation to promote and respect human rights and adhere to other Purposes and Principles in the *U.N. Charter* has been proclaimed at the regional level.[12] Also, in the *Millennium Declaration*, Heads of State and Government reaffirmed their commitment to the Purposes and Principles, declaring that these have "proved timeless and universal. Indeed, their relevance and capacity to inspire have increased."[13] The duty

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[8] 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), reprinted in (1993) 32 I.L.M. 1661, Part I, para. 4.

[9] *U.N. Charter*, Art. 1, para. 3.

[10] *Id.*, Art. 55, para. c.

[11] *Id.*, Art. 56.

[12] See, for example, *Charter of the Organization of American States*, 119 U.N.T.S. 3, *entered into force* December 13, 1951, amended 721 U.N.T.S. 324, *entered into force* Feb. 27, 1990, preamble: "Resolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm".

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, preamble: "*Reaffirming* their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity … and the United Nations".

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, ("Friendly Relations among Participating States"): "We recall that non-compliance with obligations under the Charter of the United Nations constitutes a violation of international law."

[13] *United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2, 8 September 2000, para. 3.

to strictly comply with the Purposes and Principles has also been repeatedly confirmed and elaborated upon by the U.N. General Assembly.

For example, in a 2000 General Assembly resolution, it was made clear that U.N. action in the field [of human rights] "should be based not only on a profound understanding of the broad range of problems existing in all societies but also on full respect for the political, economic and social realities of each of them, in strict compliance with the purposes and principles of the Charter".[14] In particular, the General Assembly requested "all human rights bodies within the United Nations system, as well as the special rapporteurs …, independent experts and *working groups*, to take duly into account the contents of the present resolution in carrying out their mandates".[15]

The WGDD has ignored this resolution of the General Assembly. For the past five years, the Chair of the WGDD has rejected all requests by Indigenous peoples and organizations to introduce criteria that would ensure that its mandate is carried out in a manner that fully upholds the Purposes and Principles of the *U.N. Charter*. Since other related criteria have also been ignored, these will be described under the next heading.

II. Importance of criteria "consistent with international law and its progressive development

Aside from conforming to the Purposes and Principles of the *U.N. Charter*, any proposals to alter the draft *U.N. Declaration* should be "consistent with international law and its progressive development". These latter criteria are well-established in international law.

As recently as April 2005, the U.N. Commission on Human Rights has specifically underlined that "processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations *and international law*".[16] In the WGDD, States should not be proposing norms that fit their domestic situations but which are not consistent with international

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[14] U.N. General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, A/RES/54/174, 15 February 2000, preamble.

[15] *Id.*, para. 6.

[16] U.N. Commission on Human Rights, *Human rights and international solidarity*, Res. 2005/55, 20 April 2005, preamble. [emphasis added]

law.[17] As confirmed by the International Court of Justice, "the fundamental principle of international law [is] that it prevails over domestic law".[18]

States participating in the WGDD cannot invoke their constitutions or other domestic laws in order to avoid including human rights norms in a U.N. Declaration consistent with their international obligations.[19] Rather, in the standard-setting process relating to Indigenous peoples, it was authorized from the outset in 1982 by the Economic and Social Council that "special attention [be given] to the evolution of standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in the situations and aspirations of indigenous peoples throughout the world."[20] This specific approach is entirely consistent with international law and its progressive development.

The notion of "progressive development" is an essential and long-standing standard. It serves to ensure that international and national legal systems remain dynamic and forward-looking. "Progressive development" is especially crucial in the context of human rights standard-setting. Through this approach, new and changing circumstances, values, perspectives and principles – as well as ongoing injustices – can all be effectively addressed.

This notion is used in diverse ways in the *U.N. Charter*.[21] For example, in its studies and recommendations, the U.N. General Assembly, which includes all Member States, is required under Article 13(1)(a) to encourage the "*progressive development of international law and its codification*". A similar affirmation is found in the 1969 *Vienna Convention on the Law of Treaties*.[22]

[17] F. MacKay, "Report on the Organisation of American States' Working Group on the Proposed Inter-American Declaration on the Rights of Indigenous Peoples", Forest Peoples Programme, Washington, D.C., 8-12 November 1999, Conclusion: "… ensuring compatibility with domestic legislation is not a fundamental, or even a relevant, part of setting standards in the field of international human rights; if it were, the Universal Declaration of Human Rights and its progeny would not exist today."

[18] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] I.C.J. 12 (Advisory Opinion of April 26), at p. 34, para. 57.

[19] A. Cassese, *International Law* (Oxford/N.Y.: Oxford University Press, 2001), at p. 166: "International law provides that States cannot invoke the legal procedures of their municipal system as a justification for not complying with international rules."

See also *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), Art. 27 : "A party [to a treaty] may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[20] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its eleventh session* (Chairperson/Rapporteur E.-I. Daes), U.N. Doc. E/CN.4/Sub.2/1993/29, 23 August 1993, p. 4, para. 1.

[21] See Arts. 13(1)(a), 73(b) and 76(b).

[22] *Vienna Convention on the Law of Treaties*, note 19, *supra*, preamble: "Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the

In addition, the *Statute of the International Law Commission*, established by the U.N. General Assembly in 1947, declares that the "Commission shall have for its object the promotion of the progressive development of international law and its codification".[23] Further, when the U.N. General Assembly declared the United Nations Decade of International Law (1990-1999), a main purpose of the Decade was to "encourage the progressive development of international law and its codification".[24] A similar approach is also found in the 1970 U.N. *Declaration on Friendly Relations*, in connection to the principle of equal rights and self-determination of peoples and other international principles.[25]

Within the Inter-American legal system, the 1996 *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law* emphasizes that "it is necessary for the member states to reaffirm their full support for the progressive development and codification of international law".[26] The 2001 *Inter-American Democratic Charter* also refers to the "progressive development of international law".[27]

In relation to environmental protection, the 1975 *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)* declares that participating States are committed to "promoting the progressive development, codification and implementation of international law".[28] With regard to the African Commission on Human and Peoples'

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purposes of the United Nations set forth in the Charter …".

[23] *Statute of the International Law Commission*, established by the U.N. General Assembly, Res. 174(II), 21 November 1947, Art. 1(1).

[24] U.N. General Assembly, *United Nations Decade of International Law*, A/RES/44/23, 17 November 1989, para. 2(c).

[25] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in (1970) 9 I.L.M. 1292, preamble.

[26] *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law*, AG/DEC. 12 (XXVI-O/96), *adopted* at the sixth plenary session, held on June 5, 1996, preamble.

[27] *Inter-American Democratic Charter*, adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, September 11, 2001, preamble.

[28] *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)*, signed by 35 states (including Canada and the United States) on August 1, 1975, *reprinted in* (1975) 14 I.L.M. 1295, Co-operation in the Field of Economics, of Science and Technology and of the Environment (Part 5. Environment): "The participating States will further develop such co-operation by … promoting the progressive development, codification and implementation of international law as one means of preserving and enhancing the human environment".

Rights, a progressive and dynamic approach[29] is authorized in carrying out its diverse mandate. The Commission's mandate includes both standard-setting and interpretive aspects.[30]

Conclusions

Based on all of the above, in relation to the standard-setting process concerning Indigenous peoples' rights, there can be no justification whatsoever for the U.N. and its member States to refuse to explicitly affirm, and adhere to, the Purposes and Principles of the *U.N. Charter*. This is one of the most basic imperatives in international law and is demanded of all States who are members of the U.N. In relation to the human rights of Indigenous peoples, it is unconscionable for some States to apply a different and lesser standard.

Similarly, it would be a discriminatory double standard to refuse to ensure that the norms in the draft *U.N. Declaration* are "consistent with international law and its progressive development". As has been demonstrated in this paper, this is the approach that institutions, such as the U.N., and their member States have embraced at the international and regional level. Moreover, most States accommodate in diverse ways the notion of progressive development within their national legal systems. In this way, new and changing circumstances, ongoing injustices and other challenges can be readily taken into account.

After a decade of effort in the WGDD, it has now become critical that such fundamental criteria be a specific requirement in its normative process. The same is equally true in relation to the OAS standard-setting process concerning Indigenous peoples' rights.

[29] *African Charter of Human and Peoples' Rights*, note 12, *supra*, Arts. 60 and 61. The Commission must not only "draw inspiration" from existing human rights instruments (Art. 60). It must also:

> take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine. (Art. 61)

[30] *Id.*, Art. 45.