

Permanent Forum on Indigenous Issues

Fourteenth session

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Item 7 of the agenda

Human rights: (a) Implementation of the United Nations Declaration on the Rights of Indigenous Peoples (with specific focus on economic, social and cultural rights)

Speaker: National Chief Perry Bellegarde, Assembly of First Nations

Joint Statement of the Assembly of First Nations; Grand Council of the Crees (EeyouIstchee); Amnesty International; Canadian Friends Service Committee (Quakers); Chiefs of Ontario; Congress of Aboriginal Peoples; First Nations Summit; First Peoples Human Rights Coalition; Indigenous World Association; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women's Association of Canada; Samson Cree Nation; Union of British Columbia Indian Chiefs.

Madame Chair,

The *United Nations Declaration on the Rights of Indigenous Peoples* constitutes a principled framework for justice, reconciliation, healing and peace. Former Special Rapporteur James Anaya has underlined that “implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.”¹

Full and effective implementation of the *UN Declaration* is a critical objective that continues to have both international and domestic dimensions. It is imperative that States, UN bodies and specialized agencies, in conjunction with Indigenous Peoples, address a wide range of challenges, consistent with a human rights-based approach.

There are significant achievements that we all celebrate. Regrettably, there are also substandard actions and omissions – as well as widespread human rights abuses – that serve to undermine Indigenous Peoples' rights and the *UN Declaration*.

Such conduct often entails the very serious challenge of “rights ritualism”. This term can be understood as “a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses”².

States often acknowledge to human rights bodies Indigenous Peoples' rights and related State obligations. They also make positive statements in this Forum to indicate that Indigenous rights are a priority concern. Yet too often States' positions and actions at home or in international negotiations contribute to undermining Indigenous peoples' rights and the *UN Declaration*.

International agencies

Some international agencies are taking seriously their commitments in the *UN Declaration* and other international human rights law. The UN Development Programme (UNDP) “will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration”.³ The UNDP affirms that the “term “indigenous peoples” refers to distinct collectives, regardless of the local, national and regional terms applied to them, who satisfy any of the more commonly accepted definitions of indigenous peoples.”⁴ The Food and Agriculture Organization (FAO) also applies broad criteria in relation to the term “Indigenous peoples”.⁵

In contrast, in October 2014, the use of the term “peoples” was undermined at a Convention on Biological Diversity meeting in Korea. In seeking an informal response from the Office of Legal Affairs on the current use of the term “indigenous peoples”, the CBD Secretariat failed to provide essential documents, which would have been necessary for the Office to make an accurate assessment.⁶ The Conference of the Parties (COP) decided to use the term “Indigenous peoples and local communities” (instead of “Indigenous and local communities”) solely with the proviso that this change would have no legal effect whatsoever within the CBD now or in the future.⁷ Such action contradicts use of the term Indigenous “peoples” in the *UN Declaration*, the Outcome Document⁸ of the World Conference on Indigenous Peoples (WCIP) and other international law.

At the CBD meeting, Canada played a key role in opposing use of the term “peoples” – even though this term is enshrined in Canada’s Constitution and diverse federal legislation. States have no authority to restrict the status of Indigenous Peoples, in order to impair in any way their right to self-determination or other human rights. Such actions constitute racial discrimination.⁹

As we have discussed in previous years, there is an ongoing problem with States using procedural rules of international organizations to undermine Indigenous peoples’ human rights and evade related State responsibilities.¹⁰ Such violations of the rule of law run counter to the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*.¹¹

Bill C-641 and Canada’s “impossible” claims

In Canada a member of the official opposition has introduced a private member’s bill on the *UN Declaration*, Bill C-641 - *United Nations Declaration on the Rights of Indigenous Peoples Act*. The Bill calls on the government, in consultation and cooperation with Indigenous Peoples, to take all measures necessary to ensure that the laws of Canada are consistent with the *UN Declaration*.

This proposed legislation is consistent with the following commitment by States in the consensus WCIP Outcome Document:

We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national

level, including legislative, policy and administrative measures, to achieve the ends of the Declaration and to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service.¹²

This is consistent with the commitment of Canada's Prime Minister in 2012: "And, of course, we endorsed the United Nations Declaration on the Rights of Indigenous Peoples. This reaffirms our aspiration and our determination to promote and protect the rights of indigenous people at home and abroad."¹³

However, the government of Canada opposes Bill C-641, claiming "this proposal is simply **impossible to support** in view of Canada's existing legal and constitutional framework."¹⁴ This contradicts the November 2010 endorsement of the *Declaration*, when the government concluded: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."¹⁵

The central objection of Canada is article 19 of the *Declaration* and "free, prior and informed consent" (FPIC). Canada states that article 19 "would provide first nations with a veto over any sort of legislation or development that concerns them".¹⁶

Government statements on C-641 follow a pattern when spokespersons are addressing the rights of Indigenous peoples. While claiming to support Aboriginal rights, the rhetoric is designed to alarm the public. Little regard is accorded to accuracy or justice.

The term veto is not used in the *UN Declaration*. Veto implies an absolute right or power to reject a law or development that concerns Indigenous peoples, regardless of the facts and law in any given situation. No balancing of rights would occur. No considerations of the rights of others or justice or non-discrimination or good governance would be permitted. Canada then further builds on this imagined frenzy of absolute power and declares: "it would be irresponsible to give any one group in Canada a veto".

In rejecting Bill C-641, the federal government has failed to consider the landmark decision of the Supreme Court of Canada in *Tsilhqot'in Nation*. The Court repeatedly referred to the constitutional right of Aboriginal title holders to give or withhold consent. Such title holders have the right to use and control the land and enjoy its benefits. Such right to control "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders" (para. 76).

In *Tsilhqot'in Nation*, the Supreme Court ruled that, in the absence of Aboriginal consent, "legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title." (para. 92)

At the Committee on World Food Security in Rome last October, Canada would not accept a reference to FPIC without inserting a formal explanation of position in the consensus Report: "Canada interprets FPIC as calling for a process of meaningful

consultation with indigenous peoples on issues of concern to them".¹⁷ Such a view contradicts the policies of the Food and Agriculture Organization,¹⁸ as well as Supreme Court of Canada's rulings that explicitly refer to "consent".

In *Tsilhqot'in Nation* the Supreme Court highlighted Indigenous "consent" in 9 paragraphs; the "right to control" the land in 11 paras.; and the "right to determine" land uses in 2 paras. The Court added that the "right to control" means that the governments and others seeking to use the land must obtain the consent of the Aboriginal title holders unless stringent infringement tests are met.¹⁹ Moreover, the Court ruled that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."²⁰

"Consent" is not limited to Aboriginal title and applies to other Aboriginal rights. As described in 2004 by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, the high end of the spectrum of consultation requires "full consent of [the] aboriginal nation' on very serious issues."²¹

It is disturbing that the government of Canada claims to uphold the Aboriginal rights of Aboriginal peoples and Canada's Constitution, but ignores key rulings of Canada's highest court that favour such peoples.

Recommendations:

1. THAT the Permanent Forum emphasize to States that implementation of the *UN Declaration* provides a common framework for reconciliation, justice, healing and peace.
2. THAT the Permanent Forum encourage UN treaty bodies and mechanisms, as well as the Universal Periodic Review process, to scrutinize the reports and human rights record of States, so as to effectively address **rights ritualism**. This should include ensuring that State claims are systemically compared to the concerns raised by Indigenous peoples and civil society.
3. THAT the Permanent Forum **highlight the unprincipled positions and actions of those States, such as Canada**, that undermine Indigenous Peoples' human rights and the *UN Declaration on the Rights of Indigenous Peoples*. Such conduct prejudices Indigenous peoples globally and serves to weaken the international human rights system.
4. THAT the Permanent Forum and States take steps, in conjunction with Indigenous peoples, to ensure that State **commitments and obligations are not violated in other international forums**, as has occurred at the Convention on Biological Diversity meeting following the World Conference on Indigenous Peoples. A study should be undertaken by the Forum regarding how States are exploiting the weak procedural rules in international organizations to devalue the *UN Declaration* and other international human rights law.
5. THAT the Permanent Forum urge States, in conjunction with Indigenous Peoples, to develop legislation at the national level to ensure that laws are consistent with the *UN*

Declaration. Each State has a prime responsibility and duty to protect, promote and implement all human rights, consistent with the *Charter of the United Nations* and international human rights law.²² All forms of discrimination must be avoided.²³

Endnotes

¹General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 67.

²Hilary Charlesworth “Kirby Lecture in International Law: Swimming to Cambodia. Justice and Ritual in Human Rights After Conflict” (2010) 29 *Australian Yearbook of International Law* 1 at 12-13, where it is added: “Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.”

³United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf>, “Standard 6: Indigenous Peoples”, para. 4 (Respect for domestic and international law). In regard to “Applicable Law”, see the “Overarching Policy and Principles” at p. 5, para. 9: “UNDP will not support activities that do not comply with national law and obligations under international law, whichever is the higher standard ...”

⁴UN Development Programme, “Contribution to the 14th Session of the UN Permanent Forum on Indigenous Issues”, 2015, <http://www.un.org/esa/socdev/unpfii/documents/2015/agencies-info/UNDP.pdf>, at 1, note 1.

⁵Food and Agriculture Organization, “Environmental and Social Management Guidelines”, Rome, 2015, <http://www.fao.org/3/a-i4413e.pdf>, at 54. See generally Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010), <http://www.fao.org/docrep/013/i1857e/i1857e00.htm>.

⁶See Grand Council of the Crees (Eeyou Istchee) *et al.*, “Indigenous Peoples are 'Peoples': Draft COP Decision Violates Treaty Interpretation Rules”, Joint Submission of Indigenous and civil society organizations, Convention on Biological Diversity, Conference of the Parties, 12th sess., Pyeongchang, Republic of Korea on 6-17 October 2014, (9 September 2014), <http://quakerservice.ca/wp-content/uploads/2014/09/COP-12-IPs-are-Peoples-Draft-COP-Decision-Violates-Intl-Rules-GCCEI-Joint-Submission-FINAL-Sep-9-14.pdf>, paras. 7-10, 40-50 and 110-112.

⁷Conference of the Parties to the Convention on Biological Diversity, *Article 8(j) and related provisions*, Decision XII/12, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UN Doc. UNEP/CBD/COP/DEC/XII/12 (13 October 2014), <http://www.cbd.int/decisions/cop/?m=cop-12>, at 15 (*A. Terminology “indigenous peoples and local communities”*).

⁸General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (without a vote).

⁹*International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, (entered into force 4 January 1969), article 1: “... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human*

rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), para. 7: “... the term “*discrimination*” as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*”

¹⁰Grand Council of the Crees (EeyouIstchee) *et al.*, “Undermining Indigenous Peoples' Rights and UN Declaration: Urgent Need for Procedural Reforms in International Organizations”, UN Permanent Forum on Indigenous Issues, Eleventh sess., 12 June 2012, <http://quakerservice.ca/wp-content/uploads/2012/06/IPs-Rts-and-UN-Decl-Need-for-Urgent-Reforms-in-Intl-Organizations.pdf>.

¹¹*Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without vote), para. 2: “We [Heads of State and Government ...] recognize that the rule of law applies to all States equally, and to international organizations”.

¹² Bill C-641, para. 7.

¹³Government of Canada, “Statement by the Prime Minister of Canada at the Crown-First Nations Gathering”, Ottawa, Ontario, 24 January 2012, <http://pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=26&id=4597>.

¹⁴House of Commons, *Debates* (Hansard), 141st Parl., 2nd sess., vol. 147, No. 185, March 12, 2015 at 12083 (response of MP Mark Strahl, on behalf of the federal government).

For an analysis of Canada’s position on this Bill, see Grand Council of the Crees (EeyouIstchee) *et al.*, “Bill C-641 – *United Nations Declaration on the Rights of Indigenous Peoples Act*: A Commentary on the Federal Government’s Response”, 13 April 2015, <http://quakerservice.ca/c641>.

¹⁵ Canada, “Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, 12 November 2010, <http://www.aadnc-aandc.gc.ca/eng/1309374239861>.

See also Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 82 (Conclusions and recommendations): “The United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by Canada, provides a common framework within which the issues faced by indigenous peoples in the country can be addressed.”

¹⁶House of Commons, *Debates* (Hansard), 141st Parl., 2nd sess., vol. 147, No. 185, March 12, 2015 at 12083 (response of MP Mark Strahl, on behalf of the federal government).

¹⁷ Canada, “Explanations of Position of Members Which Requested that They Be Included in the Final Report”, Annex E in Committee on World Food Security, *Report of the 41st Session of the Committee on World Food Security (Rome, 13-18 October 2014)*, CFS 41 Final Report, November 2014, http://www.fao.org/fileadmin/templates/cfs/Docs1314/CFS41/CFS41_Final_Report_EN.pdf, at 39.

¹⁸Food and Agriculture Organization, “Questionnaire to the UN system and other intergovernmental organizations”, Response, Permanent Forum on Indigenous Issues, 29 December 2014: “the Environmental and Social Management Guidelines follow now international standards by incorporating Free, Prior and Informed Consent as a pre condition for any activity affecting indigenous peoples. This is also aligned with the 2010 FAO Policy on Indigenous Peoples.”

See also Food and Agriculture Organization, “Environmental and Social Management Guidelines”, Rome, 2015, <http://www.fao.org/3/a-i4413e.pdf>, at 68 (Annex 8: Framework for Operationalizing Free, Prior and Informed Consent (FPIC): “Deeply rooted in the Human Rights Based Approach, the concept of Free, Prior and Informed Consent has been developed over years ... Free, Prior and Informed Consent is essential for FAO projects in the context of Indigenous Peoples.”

¹⁹*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 76.

²⁰*Ibid.*, para. 86.

²¹*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24.

²²*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144 (9 December 1998) (without a vote), Annex, article 2. See also article 3: “Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights ... is the juridical framework within which human rights ... should be implemented and enjoyed”. General Assembly, *The universal, indivisible, interrelated, interdependent and mutually reinforcing nature of all human rights and fundamental freedoms*, UN Doc. A/RES/66/151 (19 December 2011) (adopted without a vote), para. 6: “recalling that the primary responsibility for promoting and protecting human rights rests with the State”.

Human Rights Council, *The role of prevention in the promotion and protection of human rights*, UN Doc. A/HRC/RES/18/13 (29 September 2011), para. 2: “Recognizes that States have the primary responsibility for the promotion and protection of all human rights, including the prevention of human rights violations, and that this responsibility involves all branches of the State”.

²³General Assembly, *United against racism, racial discrimination, xenophobia and related intolerance*, UN Doc. A/RES/66/3 (22 September 2011) (without vote), para. 9: “the primary responsibility for effectively combating racism, racial discrimination, xenophobia and related intolerance lies with States”.