

Thirteenth Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII)

12-23 May 2014, UN Headquarters, New York, NY

Agenda Item 3: Discussion on the Special Theme for the year: "Principles of good governance consistent with the UN Declaration on the Rights of Indigenous Peoples: articles 3 to 6 and 46"

Joint Intervention of The American Indian Law Alliance, the Seventh Generation Fund for Indigenous Peoples, Native Children's Survival, Tonatierra, American Indian Community House, Rigoberta Menchú Tum Foundation, Flying Eagle Woman Fund for Peace, Justice, and Sovereignty, Southern Diaspora Research and Development Center, United Methodist Women, Spiderwoman Theater, Morning Star Foundation, WESPAC Foundation and the Connie Hogarth Center for Social Action.

May 12, 2014

Presented by Ms. Tonya Gonnella Frichner, Esq. (Onondaga Nation)

Madame Chair,

1. We wish to offer this statement addressing Article 46 of the United Nations Declaration on the Rights of Indigenous Peoples, considering the Special Theme of this year's Thirteenth Session of the UN Permanent Forum on Indigenous Issues (UNPFII): "Principles of good governance consistent with the United Nations Declaration on the Rights of Indigenous Peoples: articles 3 to 6 and 46." We reviewed territorial integrity and the right to self-determination (SD) applying the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (DFR) (A/RES/2625(XXV)) and the 1993 Vienna Declaration and Programme of Action (VD) (A/CONF.157/23), both are accessible online.

Article 46: Territorial Integrity

2. AILA's documented position on Article 46 is that it attempts to serve as a "caveat" to the UNDRIP. AILA's positions were affirmed in paragraphs 12 and 24 of the *"Decisions and Recommendations of the North American Indigenous Peoples' Caucus to the 13th Session of the United Nations Permanent Forum on Indigenous Issues and to other bodies and fora, as appropriate."* (E/C.19/2014/CRP.2) The provision set forth in the UNDRIP Article 46 must be interpreted in the entirety of the UNDRIP. UNDRIP Article 46 is not a stand-alone article and every individual article of UNDRIP must be interpreted within the overall context of the UNDRIP. No article shall be interpreted in such a way as to contravene the overall purposes of the

UNDRIP or undermine the function of any other article. Thus, Article 46 shall not be read as an obstacle to ongoing efforts to achieve the goals set forth in other articles and in the UNDRIP as a whole. Article 46 must be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. Indigenous Nations' and Peoples' right to our own territorial integrity needs to be taken into consideration.

3. On its face, Article 46 of the UNDRIP would be the first time that an international instrument attempts to extend the deterrence against violating the territorial integrity and political unity of states to a people. The Article 46 of the UNDRIP is regarded by some as attempting to tip the balance in favor of states between the principles of the self-determination of peoples and the territorial integrity of states. However, the existing international law framework has already been clearly established and supports the right to self-determination of peoples. The equality of all peoples and the principle of the peremptory norm of non-discrimination when examining the application of the right to self-determination in the context of the principle of Territorial Integrity must be recognized.

4. Furthermore, Article 46 of the UNDRIP contains three sections and must be read as a whole. Article 46, Section 1 says the UNDRIP does not authorize or encourage any action which would dismember or impair territorial integrity or political unity of states. This does not prohibit efforts to negotiate mutually acceptable methods for achieving self-determination for Indigenous Peoples. Article 46, Section 2 strengthens this reading, by stating that the rights set forth in the UNDRIP shall be subject only to "*limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary...*" In other words, the concern with territorial integrity in section 1 is bound by the limitations in section 2. Section 3 adds yet another layer of constraints on the interpretation of the article, binding Article 46 by "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." As Article 46 must be read in the entirety of the UNDRIP, so also Article 46, Section 1 is not stand-alone within the entirety of Article 46.

5. We further propose that Article 46 must be interpreted alongside the international instruments that have previously addressed the right to self-determination of peoples and the territorial integrity of states: the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (DFR); and the 1993 Vienna Declaration and Programme of Action (VD). Both instruments, the DFR and the VD, authoritatively state the balance between the principles of the right to self-determination of peoples and the territorial integrity of states. It is necessary to remember that Article 46 and the territorial integrity of states are not isolated and must be interpreted in light of self-determination in the whole of UNDRIP as well as the peremptory norm of non-discrimination. Indigenous Nations' and Peoples' right

to our own territorial integrity should be considered in any discussion of our right to self-determination and the territorial integrity of states.

6. The 1970 DFR, after giving a scrupulously balanced treatment of the two principles of the right to self-determination and the territorial integrity of states. In its Preamble:

- a. *Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.*

7. The DFR goes on to declare, from page 123 of the General Assembly report of the Twenty-Fifth Session:

- a. *By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*
- b. *Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter [...]*

8. The 1993 Vienna Declaration and Programme of Action serves as the outcome document of the World Conference on Human Rights held in Vienna, June 14-25, 1993. The VD was developed with the participation of Indigenous delegates. Indigenous Peoples emphasize that our rights need to be interpreted in the context of the principle of non-discrimination.

9. The VD states in Section I, number 2:

- a. *Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.*

10. Section I, number 2 of the VD goes on to cite the DFR, stating:

- a. *In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*

11. As stated earlier, Article 46 of the UNDRIP would be the first time that an international instrument attempts to extend the deterrence against violating the territorial integrity and political unity of states to a people. The DFR applies the deterrence to states only and not to peoples. Both the DFR and the VD make clear that the deterrence is carefully balanced by the right to self-determination of peoples. Moreover, Article 46 must be interpreted in the context of the international legal principle of non-discrimination, not only a principal but a peremptory norm of international law. Some states wish to use Article 46 of the UNDRIP to further extend the deterrence to peoples, attempting to tip the balance away from peoples and in favor of states.

Territorial Integrity and the Right to Self-Determination

12. The importance of the right to self-determination cannot be overstated and if that right is violated, this violation will have an impact on the rights of Indigenous Peoples and Nations now and onto the seventh generation coming. It is important to note the evolving strength of the right to self-determination, which has developed over decades. The UNDRIP provisions will continue driving cultural, political and legal transformations. UNDRIP's normative nature allows Indigenous Peoples to focus on invoking the provisions of the UNDRIP.

13. Recognizing the effect of extractive industries on Indigenous Peoples and our right to our lands, territories and resources, we recommend that extractive industries, corporations and business enterprises, operating or seeking to operate in Indigenous territories, endorse the United Nations Declaration on the Rights of Indigenous Peoples and operate in accordance with its principles.

States Claim A New Form of Self-Determination

14. Part of UNDRIP's normative substance is the right to self-determination. This broadest of all human rights legitimizes the other rights we fought for, and we must vigilantly defend its scope. The United States, for one, maintains that the right to self-determination applies to Indigenous Peoples on an exceptional basis only (see

the U.S. government statement, "*Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*," December 2010 which can be accessed online). The United Kingdom, (in the UN General Assembly at the adoption of the UNDRIP in 2007) in a variation on the same theme, holds that Indigenous Peoples are entitled to the right to self-determination, but in a unique or *sui generis* form which it calls "self-government." Bolstering the United Kingdom conclusion, the U.S. claimed in the UN General Assembly at the adoption of the UNDRIP in 2007, that the UN had only intended for UNDRIP to proclaim that Indigenous Peoples are entitled to a new right of "self-government," and not to the right to self-determination.

15. In the "*Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*," the U.S. presented a new form of the right to self-determination, more as the right to "internal self-determination" rather than how it is stated in Article 3 of UNDRIP as well as Article 1 of both Human Rights Covenants. The international law of the right of self-determination is a unitary one that has not been subdivided into internal and external components in either conventional or customary international law. The U.S. cannot have crafted a lesser degree of self-determination for Indigenous Peoples than for other peoples without violating the Charter of the United Nations which states in Article 1, Number 2, "*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.*" To counter these states' positions, Indigenous Peoples need to clearly insist that we are among the "peoples" the 1966 Human Rights Covenants speak of.

15. We believe, given that the UNDRIP is the product of some two decades of negotiations, and considering the UNDRIP's importance for Indigenous Peoples and Nations, as well as the broader human rights agenda, that the importance of the UNDRIP cannot be overstated. The adoption of the UNDRIP demonstrates the GA's important role in setting international standards.

Territorial Integrity of Indigenous Nations

16. We submit that Indigenous Peoples have our own territorial integrity. It is important that we are able to pass through our own boundaries, to maintain our own territorial integrity. This is part of our inherent right to self-determination as affirmed in UNDRIP Articles 3 and 4, as well as our right to maintain and strengthen our distinct institutions as affirmed in Article 5, and in order to maintain our nationality as defined in Article 6. Our borders cross into each other, and Indigenous Peoples have always took the position that infrastructures such as good governance serves Indigenous Peoples and other governments, our goals are the same as yours, and protecting our territorial integrity serves us both. We have our own borders and we have been dealing with border crossing issues for millennia.

17. Our right to maintain relationships across international borders is fully affirmed in Article 36 of the UNDRIP. Indigenous Peoples have our own borders all across the globe, they tend to be more fluid than the borders of states. Dividing lines detrimentally affect us on a daily basis not only the Haudenosaunee, but all Indigenous peoples of Turtle Island and beyond. We extend our hand in support to our relatives who also experience the same restrictive movements. We wish to highlight the Report of the ninth session from the Permanent Forum on Indigenous Issues, 2010 (E/2010/43-E/C.19/2010/15) paragraph 98:

The Permanent Forum recommends that the Governments of Canada and the United States address the border issues, such as those related to the Mohawk Nation and the Haudenosaunee Confederacy, by taking effective measures to implement article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that indigenous peoples divided by international borders have the right to maintain and develop contacts, relations and cooperation with their own members as well as other peoples across borders.

Report of the International Expert Group Meeting on the Theme “Sexual health and reproductive rights articles 21, 22 (1), 23 and 24”

18. We note the “Report of the international expert group meeting on the theme “Sexual health and reproductive rights: articles 21, 22 (1), 23 and 24 of the United Nations Declaration on the Rights of Indigenous Peoples” (E/C.19/2014/8) paragraph 25 which details some of the very serious barriers facing Indigenous women and youth in their ability to access healthcare and reproductive healthcare. We would add that the issue of crossing state borders as an additional barrier facing Indigenous Peoples in our ability to access healthcare.

Treaties, Agreements and Other Constructive Arrangements

19. Upholding treaties and our right to self-determination are precisely what drove Indigenous Peoples to seek out international fora in the first place, in the hopes that international law could and would help our Nations and Peoples retain or regain control of the homelands that shaped Indigenous Peoples’ distinctive identities. We are reaffirming our right to self-determination as clearly established under international law. We also reaffirm our right to our Indigenous Peoples’ and Nations’ right to territorial integrity.

20. Therefore Madame Chairwoman, we would respectfully request that the UN Permanent Forum on Indigenous Issues consider the following recommendations:

Recommendations

21. Reaffirming the recommendation made by the Report of the ninth session from the Permanent Forum on Indigenous Issues, 2010 (E/2010/43-E/C.19/2010/15) paragraph 98, we respectfully recommend: The governments of Canada and the United States address the USA-Canadian Border Issues and to take effective measures to implement Article 36 of the UNDRIP which affirms that: "*Indigenous peoples...divided by international borders, have the right to maintain...contacts, relations and cooperation...with their own citizens as well as other peoples...*" We encourage and support an expert group study on borders and their effect on Indigenous Peoples and Nations, conducted by the Permanent Forum on Indigenous Issues and to include all papers and documents found in the archives of Indigenous Peoples' past work.

22. Recommending that extractive industries, corporations and business enterprises, operating or seeking to operate in Indigenous territories, endorse the United Nations Declaration on the Rights of Indigenous Peoples and operate in accordance with its principles.

Thank you.