"Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements"

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Recommendations for Action-Oriented Mechanisms for Treaty Implementation, Enforcement, and Dispute Resolution

Owe Aku International Justice Project

The views expressed in this paper do not necessarily reflect those of the OHCHR.

Owe Aku International Justice Project works under the guidance of the Black Hills Sioux Nation Treaty Council. The Black Hills Sioux Nation Treaty Council ("BHSNTC") is the traditional governing authority of the Lakota Oyate, a sovereign nation with a distinct territory, language, culture and system of governance. Owe Aku International Justice Project is responsible to the Black Hills Sioux Nation Treaty Council in implementing the 1851 and 1868 treaties between the Lakota Oyate and the United States of America.

The 1851 Treaty, Article 5, states, in pertinent part, that "Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described…" The 1868 treaty specifically defined the rights of non-Lakota people in the territory of the Lakota Nation: [the United States] also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the [defined territory]; or without the consent of the Indians, first had and obtained, to pass through the same…" The 1868 Treaty between the two nations also makes it abundantly clear that "No treaty for the cession of any portion or part of the reservation herein described which may be held in common, shall be of any validity or force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same…" Nonetheless, in 1870, the United States of America, in violation of the treaties it made with the Lakota Oyate in 1851 and 1868, unilaterally established the Indian Appropriation Act which stated that, in effect, no longer would treaties be made with Indian peoples as independent, sovereign nation but this Act specifically preserved treaties made prior to 1870. Nonetheless, in violation of Article VI of the U.S. Constitution which states treaties are the "supreme law of the land," and the internationally binding status of said treaties, the United States has illegally confiscated land and resources for the past 142 years.

We bring you warm greetings on behalf of our people. Thank you for this opportunity to present recommendations regarding ways in which to foster discussion between Indigenous representatives and State counterparts regarding treaty implementation and interpretation, dispute resolution, and the inherent sovereignty of the Lakota Nation evidenced by the treaties in order to fulfill the human rights of Indigenous peoples.

Chief Oliver Red Cloud, Oglala Band of the Lakota Nation, Itancan, Black Hills Sioux Nation Treaty Council

June 27, 2012

Therefore, we respectfully submit the following:

Whereas the Lakota Oyate has participated in the United Nations system since 1977 as a sovereign nation,

Whereas The Lakota Nation had an important role to play in conceiving of the UN Study on Treaties, Agreements, and Other Constructive Arrangements" ('Treaty Study') and providing case studies that led to the positive conclusions about the international nature of Indigenous nations' treaties,

Acknowledging that the purposes and principles of the Charter of the United Nations to promote peace and order are *consistent with Lakota law and tradition,*

Acknowledging that the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, is a fundamental principle of international law enshrined in the Charter of the United Nations, in the International Covenant on Economic, Social and Cultural Rights, in the International Covenant on Civil and Political Rights, as well as the Declaration on the Rights of Indigenous Peoples,

Acknowledging also that fulfillment, in good faith, of legal obligations not in contradiction of the Charter of the United Nations, including the principle of *pacta sunt servanda* (agreements must be kept), enshrined in the Vienna Convention on the Law of Treaties, is considered a preemptory norm of international law (*jus cogens*),

Affirming the international character and binding validity of treaties entered into between States and indigenous nations,

Recognizing the ongoing violations by some States of internationally binding treaty obligations owed to indigenous peoples, violations of customary international law, and the ongoing violations of international human rights law and the obligations arising out of international human rights treaties,

Recognizing that indigenous peoples have suffered from historic injustices as a result of, inter alia, our colonization and dispossession of our lands, territories, and resources arising from the repeated and continuous violations by States of their treaty obligations,

Recognizing that some States find it contradictory to their interests of occupation, colonization, resource extraction, and domination to acknowledge the nature of the legally binding international treaties they made with Indigenous peoples,

Recognizing that some States, due to their interests in colonization and occupation of Indigenous territories, are reluctant to provide effective means of redress by which indigenous peoples can assert their collective rights under international law, arbitrate and resolve treaty disputes, and recognize the international personality of indigenous nations,

Considering the persistent conflict that exists between indigenous and non-indigenous sectors of society as a result of State reluctance to adequately address and resolve treaty disputes in accordance with the principles of free, prior, and informed consent to be inconsistent with the purposes and principles of the Charter of the United Nations.

Emphasizing that, in the words of the High Commissioner for Human Rights, "the cross-cutting nature of human rights" and that "whether we are talking about peace and security, development, humanitarian action, the struggle against terrorism, climate change, or the environment, these challenges cannot be addressed in isolation from human rights."

Recalling that the North American Indigenous Peoples Caucus's recommendations in 2011 to the Permanent Forum on Indigenous Issues noted that it is critical that work on treaties within the United Nations move forward and not marginalize the significance of the treaties concluded with Indigenous nations by diminishing the conclusions and recommendations of the final report of the study written by Miguel Alfonso-Martinez,

Recalling that the North American Indigenous Peoples Caucus also recognized that while the Expert Mechanism on the Rights of Indigneous Peoples has accepted the report of the Second Seminar on the Treaty Study, other avenues to implement the recommendations of the Treaty Study must also be pursued including the International Court of Justice.

Emphasizing that the process of negotiation and consent inherent in treaty-making is the most suitable way of not only securing effective indigenous contribution towards to recognition and restitution of Indigenous rights and freedoms, but also establishing the practical mechanisms to facilitate existing treaty implementation and approach conflict resolution,

Convinced that existing state mechanisms, either administrative or judicial, are ineffective and unable to adequately resolve indigenous peoples' aspirations for redress,

Owe Aku IJP with the guidance of the BHSNTC Makes the Following Recommendations:

State Governments

1. States must respect all treaties between Indigenous nations and States. Conflict resolution processes must be developed with the free, prior, and informed consent of the indigenous peoples concerned, integrate indigenous legal norms, and recognize the collective nature of the rights of indigenous peoples.

2. States must develop educational programs to educate the general public on indigenous peoples' treaties and correctly define the history of indigenous peoples' relationships within the family of nations.

4. States must adhere and implement all human rights instruments to which they are a party. States must also comply with requests and recommendations made by international human rights treaty bodies, such as CERD, and declare the competence of such bodies to hear and resolve human rights claims brought by both States and individuals.

5. As State violations of treaties with Indigenous nations often result in violations of international human rights law, non-violating States must take positive action to facilitate implementation of and respect for such treaties to enforce violating States to comply with their ergo omnes obligations (rights are owed to all) under international human rights law.

6. States must implement and enforce treaties with Indigenous nations as a means of complying with their human rights obligations under international law.

7. Pursuant to the duty to promote human rights, such as the right of peoples to self-determination, not only in relation to their own peoples but vis-à-vis all peoples, States must utilize the procedures of ICERD (articles 11-13) that set out elaborate procedures for the establishment of an ad hoc Conciliation Commission to adjudicate and resolve claims of one State Party against another for failure to comply with Convention provisions. The ICCPR (articles 41-43) sets out similar mechanisms for resolution of inter-state human rights claims which could be used as a means of enforcing treaties between States and Indigenous nations.

8. States must refrain from using hostile, ambiguous and misleading language like "modern treaties" which is a misnomer aimed at further abrogation and domestication of historical, binding international treaties between States and sovereign indigenous nations. Further attempts by States to redefine international law and standards unilaterally constitute violations of that law subjecting the violating State to all enforcement mechanisms available to the United Nations including economic sanctions, UN observers and other appropriate action by the Security Council.

United Nations Bodies

9. We call upon the UNCHR to request that ECOSOC seek an advisory opinion from the International Court of Justice in relation to the application and enforcement of treaties and agreements between States and indigenous peoples.

10. We call upon the General Assembly to adopt a resolution seeking an advisory opinion from the ICJ in relation to the application and enforcement of treaties and agreements between States and indigenous peoples.

11. We call upon the United Nations Human Rights Commission and United Nations treaty bodies to draw upon existing best practices and encourage the creation of new action-oriented mechanisms for resolving disputes arising from:

(a) Violations to treaties between invading "settler nations" and Indigenous nations and taking into account the importance of transparent, equitable, and participatory avenues of redress, monitoring, arbitration, and mediation.

(b) Violations to the principles and standards protecting the rights and responsibilities of Indigenous peoples over their lands, territories, and resources as set forth in the Declaration on the Rights of Indigenous Peoples and other international laws and standards.

(c) Willful and purposeful actions by member nations violating the right to free, prior, and informed consent of Indigenous peoples as set forth in paragraphs 10, 11, 19, 28, and 29 of the Declaration on the Rights of Indigenous Peoples.

12. Such action-oriented mechanisms must be independent, balanced, inclusive and transparent and must have the ability to recommend to the United Nations and its agencies actions designed to enforce, enhance,

highlight and publicize its conclusions in order to pressure violating member nations to comply with international law with respect to Indigenous peoples.

13. Such action-oriented mechanisms must also include ways and means of ensuring participation of indigenous peoples' governance institutions and traditional forms of government independent of member nations' colonizing institutions such as the Indian Reorganization Act governments.

14. We call upon the UN Treaty Section of the Office of Legal Affairs to locate, compile, register, and publish all treaties between Indigenous peoples and States.

15. We call upon OHCHR to provide technical and financial support to assist Indigenous peoples with their negotiations and claims in relation to treaties.

16. The Human Rights Committee noted in its General Comment No. 12 that although the reporting obligations of all State Parties pursuant to article 40 of the ICCPR include detailed explanations regarding the right to self-determination contained in article 1 of the Covenant, many States ignore article 1. Therefore, we call upon the Human Rights Committee to demand that States describe their present level of compliance with the inalienable right to self-determination in order to determine how treaty implementation and enforcement might facilitate compliance with international human rights law.

Indigenous Peoples

17. We call upon Indigenous peoples to disseminate treaty education curricula and promote ongoing efforts to document, research, and preserve oral histories, traditional knowledge, and the cultural understandings of the treaties negotiated by their peoples.

18. Utilizing the existence of historical treaties as evidence of State practice and opinio juris (conviction that the practice is obligated by law) of the independent sovereignty of Indigenous nations, we call upon Indigenous peoples to petition the UN General Assembly and the UN Security Council for UN recognition for their respective Indigenous nations.