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Permanent Forum on Indigenous Issues

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Agenda items 4 (a) and (b)

Human rights:

- (a) **Implementation of the United Nations Declaration on the Rights of Indigenous Peoples**
- (b) **Dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs**

Follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs

1. Pursuant to article 38 of the United Nations Declaration on the Rights of Indigenous Peoples, the Permanent Forum reiterates its invitation to States to provide the Permanent Forum with substantive information on the implementation of the Declaration and an assessment of the effectiveness of the Declaration at the national and local levels.
2. The Permanent Forum recommends that States incorporate adequate information on the implementation of the Declaration in their core reports to the human rights treaty bodies.
3. The Permanent Forum recommends that the relevant treaty bodies take into account the Declaration and urges States to include information regarding its implementation also in their reports to the universal periodic review.
4. The Permanent Forum recommends that States establish, where it does not already exist, a national dialogue with indigenous peoples on human rights, based on the Declaration.
5. The Permanent Forum recommends that the Secretary-General provide adequate human and financial resources for the purpose of meeting the requirements of articles 41 and 42 of the Declaration as they apply to the Permanent Forum.



6. The Permanent Forum recommends that all United Nations agencies, funds and programmes, as well as the African Commission on Human and Peoples' Rights, integrate relevant provisions of the Declaration into their policies, programmes, projects and strategies.

7. The Permanent Forum recommends that States support the creation of indigenous language and cultural studies centres in universities and encourage universities to provide permanent teaching positions for indigenous peoples in those study centres; urges States to adopt a policy of free university tuition for all indigenous peoples; encourages those universities that have not already done so to establish designated places and scholarships for indigenous students; and encourages the United Nations Educational, Scientific and Cultural Organization to support those initiatives where applicable.

8. The Permanent Forum adopts general comment No. 1 (2009), entitled "Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples" (see annex).

9. The Permanent Forum recommends that all States apply the principles of general comment No. 11 (2009) of the Committee on the Rights of the Child entitled "Indigenous children and their rights under the Convention".

10. The Permanent Forum recognizes the cultural significance and medical importance of the coca leaf in the Andean and other indigenous regions of South America. It also notes that coca leaf chewing is specifically banned by the Convention on Narcotic Drugs (1961). The Permanent Forum recommends that those portions of the Convention regarding coca leaf chewing that are inconsistent with the rights of indigenous peoples to maintain their traditional health and cultural practices as recognized in articles 11, 24 and 31 of the Declaration, be amended and/or repealed.

11. The Permanent Forum takes note of the 2009 report of the International Labour Organization (ILO) Committee of Experts on the Application of Conventions and Recommendations, particularly the general observation and the nine individual observations on implementation of ILO Convention No. 169 on indigenous and tribal peoples. The Forum welcomes the increased attention paid by the Committee to ILO Convention No. 169 and calls upon the Committee to fully incorporate the United Nations Declaration on the Rights of Indigenous Peoples in its individual observations as a source of interpretation of the Convention.

12. The Permanent Forum notes that the observations adopted by the Committee of Experts incorporate relevant parameters for the implementation of the Convention by States parties in good faith. The Permanent Forum also observes that in five instances, the Committee demanded that State parties provide additional reports for the Committee at its next session, instead of in 2013, as originally planned. Those requests for advanced reports illustrate that, in a number of countries, serious obstacles still exist in relation to the enjoyment of indigenous peoples' fundamental rights, as affirmed in ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

13. In this connection, and in respect of articles 41 and 42 of the Declaration, the Permanent Forum trusts that, at its next session, the Conference Committee on the Application of Standards of the International Labour Conference will pay due attention to the cases of violation of ILO Convention No. 169, which have been

signalled by the Committee of Experts, in the light of the Declaration, and urges States to respond promptly to the reports of the Committee of Experts.

14. The Permanent Forum recommends that an appropriate form of coordination should be explored between the Committee of Experts and the Forum regarding the implementation of ILO Convention No. 169. The Permanent Forum reiterates the need for a mechanism of coordination to also be established between the ILO supervisory mechanisms and indigenous peoples, which may include the establishment of an ad hoc committee consisting of indigenous representatives or experts.

15. The Permanent Forum commends the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples for his efforts on behalf of indigenous peoples around the world and recommends that he continue his work in conformity with the principles he has established.

16. The Permanent Forum welcomes cooperation with the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples, which is to be conducted in order to ensure maximum complementarities of efforts.

17. The Permanent Forum calls on States to consult with indigenous peoples in a manner that fully respects their obligations under the Declaration and fully responds to the goals, needs and rights of indigenous peoples in the development and design of relevant legislation.

18. The Permanent Forum reiterates its previous recommendations that those States that have not already done so adopt or endorse, where applicable, the convention on the rights of indigenous peoples, ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

19. The Permanent Forum welcomes the effort of the Association of Southeast Asian Nations (ASEAN) to establish its human rights mechanism and offers its expertise and cooperation in this matter. The Forum recommends that the mechanism be called the “ASEAN Human Rights Commission” and that the commission explicitly recognize indigenous peoples in its terms of reference. We look forward to a strong “ASEAN Human Rights Commission”, with full investigatory and implementation powers, which uses the United Nations Declaration on the Rights of Indigenous Peoples as its framework in dealing with indigenous peoples issues. The Forum also recommends that the commission establish a committee on indigenous peoples in addition to its proposed committees on migrant workers and women and children.

Annex

General comment No. 1 (2009)

“Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples”

Article 42 as basis for a new function

1. The purpose of the United Nations Declaration on the Rights of Indigenous Peoples is to constitute the legal basis for all activities in the areas of indigenous issues. The task of the Permanent Forum on Indigenous Issues in the years to come, following the historical adoption of the Declaration by the General Assembly on 13 September 2007, will be to act within its capacity to transform the Declaration in its entirety into living law. Implementation to the living law will have been fulfilled when the indigenous peoples achieve practical results on the ground.

2. The Declaration built a new foundation for the rights of indigenous peoples. At the same time, the Forum was assigned an extended mandate with a new function based on article 42, which stipulates that:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

3. The goal of this general comment is to determine and detail, to some extent, what the obligations of the Forum are, as laid down in article 42 of the Declaration and how the Forum can fulfil those obligations. In order to determine and detail such obligations and actions, one must clarify the legal understanding of the article. This must be discussed on the basis of the status of the Declaration as an international law instrument of a human rights character.

4. The Forum is the only United Nations body expressly mentioned in the article. This wording emphasizes that the Forum, as a United Nations body particularly created for indigenous issues, has a responsibility to realize the purpose of the article.

5. The Forum was established pursuant to Economic and Social Council resolution 2000/22. As an advisory body to the Economic and Social Council, the Forum has so far had six mandated areas, namely indigenous issues related to economic and social development, culture, environment, education, health and human rights. Even though the Forum is a subsidiary body of the Council, the General Assembly can, as the global body within the United Nations system, extend and strengthen the mandate of the Forum. Article 42 introduces a new function and responsibility, which should be read in the light of the article as a source of international law.

The legal character of the Declaration

6. The Declaration is the most universal, comprehensive and fundamental instrument on indigenous peoples rights. It is the legal framework of the Forum, together with resolution 2000/22 of the Economic and Social Council. The Declaration is not a treaty and it accordingly does not have the binding force of a

treaty. However, this does not at all mean that the Declaration is without any legally binding effect. The adoption of any human rights instrument by the United Nations aspires to some binding force. The binding value of the Declaration must be seen in the wider normative context of the innovations that have taken place in international human rights law in recent years.

7. The Declaration forms a part of universal human rights law. The basic principles of the Declaration are identical to those of the main human rights covenants. In this way the Declaration affirms, in its article 3, the right of indigenous peoples to self-determination, in terms that restate the common provisions of article 1 of the two 1966 international covenants. The human rights treaty bodies will need to refer to the Declaration, as their practice already indicates, whenever dealing with indigenous rights. The Declaration is not the instrument of a specialized agency that binds only the State parties, but is a general instrument of human rights.

8. The Declaration is a human rights standard elaborated upon the fundamental rights of universal application and set in the cultural, economic, political and social context of indigenous peoples. It should be applied on this basis regardless of how each State voted in the General Assembly or their subsequent position. One may debate how many of the specific rights in the Declaration are human rights according to the core human rights instruments. The human rights nature of the Declaration, seen as a whole, is certainly so marked; this should be a main element when interpreting the document and when deciding the working methods of the Forum in the context of article 42.

9. The Declaration is an instrument having been drafted through a procedure that has conferred upon it a special status as a declaration. It was developed during a decade of negotiations between representatives of States and representatives of indigenous peoples, “negotiations” being a word used several times by State representatives. This long-lasting procedure resulted in a document expressing a broad common ground, which has now also been endorsed by the General Assembly. Even though it is not formally an agreement, in reality, the document is by way of its creation an instrument almost universally agreed upon. In this way, the Declaration is part of a practice that has advanced a growing “rapprochement” between declarations and treaties.

10. The various articles may be part of binding international law, based on other instruments or customs, independent of their inclusion in the Declaration. The human rights envisaged in the Declaration are the same human rights that have been recognized for the rest of humankind, but there has been no need to produce a special declaration on the rights of non-indigenous peoples. A number of the articles are based on the human rights covenants and other conventions, or they may already today have the quality of customary law by virtue of policies implemented in national jurisdictions. As expressions of international customary law, they must be applied regardless of the nature of the document in which they are stated or agreed.

11. The voting of the General Assembly, which proves that a great majority of the international community stands behind the Declaration, is a significant factor when determining the legal strength of the Declaration. Article 38 of the Statute of the International Court of Justice, stating the sources of international law that the Court shall apply, includes among them “the general principles of law recognized by civilized nations”. The Declaration is formulated on “principles of law”, having

“rights” as the main concept, and the worldwide adherence to the Declaration, with the small and shrinking group of negative States, may soon be considered as a fulfilment of the criterion of the “civilized nations”.

12. The combined effect of these elements gives the Declaration a growing legal status. It might be argued that the Declaration in its entirety already has acquired the status of being part of binding international law. In any way, this is the case already for a number of the articles.

13. The understanding of the Declaration here described shall form the basis on which the Forum is going to undertake its activities. The Forum has already included an item on the Declaration on its agenda.

The effect of article 42

14. This new function assigned to the Forum pursuant to article 42 is far-reaching. The formulas of the provision are of a twofold nature.

15. In the first place, the Forum shall promote not only respect for but also “full application” of the Declaration. This implies that the Forum shall work to promote the incorporation of the Declaration into national legislation as well as its application in the national courts and administrative decisions of the various countries.

16. Second, the Forum shall follow up “the effectiveness” of the Declaration, that is, to see whether the realities (“law in action”) are in conformity with the written law and decisions (“law in books”), and if not, take necessary actions to close the implementation gap.

17. This new and extensive responsibility does not, in the wording of the article, correspond with any authority to accomplish what is required in this regard. The authority of the Forum will accordingly have to be decided by way of a reading of article 42 on the basis of the Declaration as a whole. In this process of interpretation one has to rely on some principles or guidelines that are within the spirit of the Declaration.

18. Some accepted guidelines for interpretation will in this case be the workings of the Forum so far, the purpose of article 42 and the normal way of protecting human rights within the United Nations system.

19. The present working arrangement of the Forum has to be a starting point for the reading of the new article. The purpose of article 42 is to contribute to the effectiveness of the Declaration, and the reading of the Article should therefore give preference to working methods for the Forum that are oriented towards substantial results for the indigenous peoples as rights holders. Looking to the normal way of protecting human rights within the United Nations system will also find support in the wording of the article, where the Forum is placed on a par with other bodies of the United Nations.

20. When the Permanent Forum develops working methods for fulfilling its new article 42 responsibility, one should accordingly look to the system established for other rights of a human rights character. The treaty bodies of the human rights conventions should be regarded as models for the Forum.

21. This interpretation implies an authority to arrange dialogues with States regarding application of the Declaration and, thereafter, to follow up on its effectiveness by making conclusions relating to each State's behaviour in the context of the Declaration, containing criticism on implementation gaps and demands for reforms. This interpretation furthermore implies that States have a duty to respond to a demand by the Forum for dialogue on the Declaration. Article 42 does not expressly empower the Forum to summon States to appear in the meetings of the Forum and answer the questions put by the members. The Forum may accordingly decide for practical and political reasons not to put this conclusion to the test in the beginning and, rather, advance along a voluntary road in relation to the States.

22. These dialogues should have information provided by Governments on their national policies and practices as a principal basis. Creative ways should be developed for the substantive preparation of dialogues, such as dispatching to States a questionnaire regarding implementation. Such reports on indigenous peoples will need to be produced according to article 38 of the Declaration, in consultation and cooperation with indigenous peoples. Information from indigenous peoples organizations, from various non-governmental organizations and from Forum members must also be included as important supplementary material. The aim would be to organize a formally structured and substantially constructive dialogue followed by concluding remarks from the Forum.

23. The Forum shall integrate the Declaration into its recommendations on the six substantive mandated areas of its work as well as in its work under the special theme for the relevant sessions and its ongoing themes and priorities. In doing so, the Forum should consider not only the articles of the Declaration but also the preambular paragraphs.

24. The Forum shall, as one of the three United Nations mechanisms with specific mandates to address indigenous peoples, collaborate and coordinate its work with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, and with the Expert Mechanism on the Rights of Indigenous Peoples, in order to ensure maximum complementarity of efforts. These three mechanisms have the challenge of promoting the application and the effectiveness of the Declaration throughout the bodies and agencies of the United Nations.

25. The Forum shall, according to article 42, look to the Declaration as a set of superior norms that ought to be effectively applied in all national jurisdictions. Thereby, the Declaration will gain in the workings of the Forum a superior status in relation to national law. Moreover, it is the duty of the Forum to spread this view all over the world.