

Permanent Forum on Indigenous Issues

Eleventh session

Agenda item 3: Discussion on the special theme for the year: “The doctrine of discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples)”

Statement by the Arctic Caucus

Thank you, Mr. Chairperson.

On the issue of the so called doctrine of discovery, the Arctic Caucus first wishes to underline that there *is* no such thing. It is true that some states resort to legal positivism and - although conceding that *terra nullius*, discovery, and other similar doctrines - cannot be justified, still maintains that be that as it may, these doctrines have nonetheless resulted in law, that is still valid today. Thus, these states posit, whatever rights the indigenous people may once have possessed, these rights have been extinguished.

But while this may be the position of some states, it cannot be validated by international law. A contemporary understanding of the right to non-discrimination does simply not allow that indigenous peoples' property right to land can be extinguished, when no other peoples' land can be. On the contrary, the UN Declaration on the Rights of Indigenous Peoples Article 26, treaty body jurisprudence and case law from all major international human rights institutions have confirmed that indigenous peoples hold property rights to land traditionally used, which have the same legal status as all other property rights to land. Thus, the doctrine of extinguishment does not exist. Its relevance is confined to those that study history of law.

But not only do indigenous peoples hold property rights to lands continuously used. Recent developments in international law affirms that indigenous peoples also have the right to have lands once used, but that been taken without consent, returned. All three UN Treaty bodies that address indigenous rights on a regular basis - the CERD Committee, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee - have held that indigenous peoples have the right to have lands and natural resources taken returned, or, when this

is not possible, have rights to other forms of redress. The same right of course also follows from UNDRIP Article 28, which proclaims that territories that an indigenous people has traditionally used, but which have subsequently been taken without its consent, shall be returned. Once returned, the indigenous people hold property rights to the territory in question. Only when restitution is at all not feasible is other forms of compensation a relevant option. The right to restitution too, has been confirmed by extensive case law. To use just two examples, in *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court on Human Rights held that indigenous peoples that have involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, have the right to recover them. If that is not possible, the state must surrender alternate land, of equal size and quality. In the same vein, in the *Endorois Case*, the African Commission on Human and Peoples' Rights held that indigenous peoples that have unwillingly left their traditional lands maintain property right thereto unless the land has lawfully been transferred to third parties in good faith. If the land has been thus transferred to third parties, the African Commission decided, the indigenous people has the right to restitution of the land, or to obtain other lands of equal size and quality. In other words, no longer are states allowed to positivist legal interpretations of laws adopted during an era when doctrines such as those of terra nullius and discovery were the norm. International law demands that states rectify past wrongs caused by such doctrines.

Mr. Chairperson, the clear position of international law leads the Arctic Caucus to conclude that it is *not* relevant for the Permanent Forum to engage in further studies of the doctrine of discovery. Rather, than studying past practices that clearly do not constitute law today, the Forum should engage in concrete work aiming at promoting indigenous peoples' rights to lands and natural resources under contemporary international law.

Therefore, the Arctic Caucus submits the following recommendations for the Permanent Forum's consideration:

Considering that in order to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples it would be appropriate to establish a voluntary international mechanism to receive and consider communications from indigenous peoples claiming that their rights to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired have been violated;

Decides to, at its 14th session, present a draft Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples, outlining a proposed structure and mandate for an international mechanism tasked with overseeing the implementation of indigenous peoples' rights to lands, waters and natural

resources, based on communications submitted by States and indigenous peoples;

Recommends that States, in order to fulfill their obligations to demarcate territories indigenous peoples' have traditionally used, establish national judicial institutions tasked with identifying such areas to which indigenous peoples have established ownership and usufruct rights to lands, waters and natural resources;

Recommends that States, in cooperation with the indigenous peoples concerned, establish national committees consisting of State and indigenous peoples' representatives with the aim of reaching agreements on the content and scope of such indigenous peoples' rights to lands, waters and natural resources not fully determined by indigenous peoples' property rights to land, such as the scope of benefit-sharing rights and the relationship between indigenous peoples' property rights to land and competing industrial activities;

We thank you, Mr. Chairperson.