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Agenda Item 3:
" The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37of the United Nations Declaration on the Rights of Indigenous Peoples)"

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Chairperson, Grand Chief Edward John, Fellow Members of the Forum, Indigenous, state & non-governmental delegations, ladies & gentlemen

CONGRATULATIONS

Heartiest congratulations to the chair, and other members of the bureau on their election, welcome to new member Viktoria Tuulas, and special thanks to Myrna Cunningham, for being a most dynamic chair over the last year. Greetings to the Onandaga and other ancient nations of the New York area.

THE DEATH OF THE DOCTRINE OF DISCOVERY

Let me start by taking a cue from the Arctic Caucus, and discuss the "so-called Doctrine of Discovery". The caucus's arguments are compelling; that the so-called doctrine, being in conflict with basic principles of international human rights law, including the peremptory and non-derogable norm on the absolute prohibition against discrimination. The fact that such doctrines have no moral, nor legal standing today, has also been amply articulated and asserted, and entrenched in several legal instruments, such as in the preambular paragraphs of the UN Declaration on indigenous peoples' rights, and in several decisions of intergovernmental human rights treaty bodies. The doctrine, being a clearly racist exercise in what I call "legal gymnastics", is dead. This Forum would best utilize its time, not to exhume the remains of that doctrine, but to deal with the legacies of that doctrine, which, unfortunately, are very much "alive and kicking", particularly in national laws and policies on land, forest and natural resources, whether contrary to, or in line with, national constitutional provisions.

NATIONAL REGIMES ON LAND & NATURAL RESOURCES

Most national constitutions today declare that the state belongs to its citizens, including indigenous peoples. Therefore, in theory, the lands, territories and natural resources of the states also belong "to the people". The challenge, however, is that, among the population of most states, indigenous peoples in most countries remain on the margins of power, law-making and policy-making. Even where indigenous peoples constitute a significant percentage of the population of the state or its different parts, their economic marginality and the dynamics of competing interest groups and money-oriented party-based electoral politics, result in their exclusion from major policy-making processes. Thus by default, law-making effectively remain as undemocratic exercises of the nature that the jurist, John Austin, called, "the command of the sovereign". *It is therefore vital that states explore different ways to ensure indigenous participation in legislation, policy-making and governance.* Some cogent and contextual observations and recommendations in this regard are contained in a Study conducted under the aegis of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), titled, *Final Study on indigenous peoples and the right to participate in decision-making* (A/HRC/EMRIP/2011/2).

Such participation in law and policy-making is the only way that indigenous peoples and states can develop a partnership, to undo the legacies of these so-called doctrines, including Terra Nullius principles, the Regalian Doctrine and Eminent Domain, and replace them with a more plebeian people's doctrine, including those based upon the customary laws of indigenous peoples pertaining to lands, territories and natural resources. This would be consistent with the provisions of the UN Declaration on the Rights of Indigenous Peoples, and the themes of the now past *International Year of the Indigenous People* and the themes of the first, and the present and ongoing, UN Decade for Indigenous Peoples. These themes proclaim: "A New Partnership"; "Partnership in Action"; and "A Decade for Action & Dignity". We must continue to strive to bring forth action to back those words.

REDRESS MECHANISMS: EXAMPLES FROM THE CHITTAGONG HILL TRACTS, BANGLADESH

Undoing the legacies of the Doctrine of Discovery in many contexts require restitution, compensation and other means of redress for violated land and territorial rights, such as those mentioned in the UN Declaration on the Rights of Indigenous Peoples, particularly in article 28. This article has to be read in conjunction with the provisions of article 27. Article 27 refers to "indigenous peoples' laws, traditions, customs and land tenure systems" in the context of adjudication and recognition. The process is to be "fair, independent, impartial, open and transparent". In addition to Latin America, the Waitangi Tribunal in Aotoroa-New Zealand and the National Commission on Indigenous Peoples in the Philippines, are examples of processes of restitution of alienated indigenous peoples. I am aware that there are huge challenges in faithful interpretation, and in implementation, which I shall not go into. I would like to add a third example, that of the Chittagong Hill Tracts Land Disputes Resolution Commission.

The Land Commission in the Chittagong Hill Tracts, came about on the basis of an accord between the Government of Bangladesh and the indigenous people's party, JSS, in 1997. The CHT Accord was - if I may remind participants here - the subject of a study at this Forum's 10th session (E/C.19/2011/6). Although the law establishing the commission still awaits further amendment to make it conform more faithfully to the provisions of the 1997 Accord, it encompasses several of the principles mentioned in article 27 of the UN Declaration. The commission includes a majority of indigenous persons ("in conjunction with indigenous peoples"; "indigenous peoples have the right to participate in such process"); it is obliged to adjudicate in accordance with the "laws, customs and practices of the CHT"; ("giving due recognition to the indigenous peoples' laws, traditions, customs and land tenure systems"); and its rulings will have the status of that of a civil court of law ("independent"). With regard to impartiality, fairness and transparency (also referred to in article 27, UNDRIP), there are challenges, on account of the dictatorial and discriminatory attitude of the commission's non-indigenous chairperson, but it is hoped that these dysfunctionalities will be addressed through legal amendments and the appointment of a more competent and impartial person as chairperson. Bodies such as the CHT Commissions are crucial for restitution and other redress for violated land rights on account the limitations of adversarial mainstream justice systems, which seldom provide efficacious remedies to indigenous peoples. The Chittagong Hill Tracts is also another example of a crisis of implementation of a modern-day treaty, as also the violation of a historical treaty of the Chakma king with the British East India Company, in 1785.

ASSERTING CUSTOMARY LAW: PEOPLES' LAW VERSUS THE SOVEREIGN'S LAW

Mr Chairperson, I would now like to refer to the important role of customary law in the exercise of indigenous peoples' land and resource rights. Care must, however, be taken that customary law

is not defined or interpreted in a way that reduces it or otherwise undermines it and subsumes it within the larger umbrella of discriminatory and exploitative mainstream legal regimes. The Chittagong Hill Tracts legal system from Bangladesh is an example of an undefined acknowledgment of customary laws of indigenous peoples, which provides an example of legal and juridical pluralism that will hopefully not denigrate the status of customary law, when disputes are actually heard.

REVISING CONSTITUTIONAL LAW & IMPLEMENTING TREATIES, AGREEMENTS & OTHER CONSTRUCTIVE ARRANGEMENTS

Very few national constitutions today contain substantive provisions on indigenous peoples' rights. Unless these constitutions directly and adequately address indigenous peoples' rights, including the negative legacies of discovery-oriented doctrines, the stolen self-government and land rights cannot be undone, or even mitigated. Constitutions are the architectural frameworks of states' visions, goals and objectives, without such structural changes, to add rooms to that house called the state, indigenous peoples will continue to live in the verandahs and outhouses. It is also vital that the history of colonization, conquest and discrimination be directly addressed in constitutions, as provisions such as these, such as the preambular paragraphs of the UN Declaration on the Rights of Indigenous Peoples Indigenous people, set the parameters of, and define the context within which, operative principles, including on non-discrimination and equality, are to be implemented and exercised. The constitution drafting process in Nepal holds some promises. Hopefully, the future study with our Rapporteur in the anchor, of which I hope to be a part, will address some of these issues.

Equally important to constitutional reform are the non-implementation or inadequate implementation of treaties, agreements and other constructive arrangements, such as the Chittagong Hill Tracts Accord that I earlier referred to. There is no United Nations or other inter-governmental process that directly deals with such matters. Many feel that more focussed studies be conducted to explore possible avenues to help states and indigenous peoples dialogue more effectively to implement such instruments. I would urge this Forum to consider such studies.

Thank you.