

ACCESS TO JUSTICE SUBMISSION

Prepared by the Aboriginal Rights Coalition, Australia, March 10 2014.

BROADER INTERNATIONAL MECHANISMS AND STRATEGIES

Implementation of the Declaration on the Rights of Indigenous Peoples

The *Declaration on the Rights of Indigenous Peoples*, passed in 2007, with overwhelming support from the General Assembly and has since secured endorsement from the four key reluctant States of Australia, the United States, Canada and New Zealand who agreed in 2009-10. While a Declaration, its recognition as customary law establishes an internationally accepted framework of obligations for States to respect the rights of Indigenous peoples. As such States now need to amend their existing State laws to correspond with these international obligations.

States need to restructure their domestic law, constitutions and institutional, legislative and judicial reforms to ensure administrative rules, decision making, policies reparation procedures and the full realisation of Indigenous peoples rights are enacted, recognized and comply with the Declaration.

Self Determination of Indigenous Peoples

Self determination is a fundamental principal for the recognition of Indigenous sovereignty and self governance. State implementation of the *Declaration on the Rights of Indigenous Peoples* must reflect Indigenous peoples rights to autonomy, self determination and self government, as sovereign Nations within their traditional territories. As such it must also respect and enact Indigenous decision making with the occupying Nations on all issues that may impact on their communities, peoples, their lands and waterways or cultural practices. The adaption of occupying States' laws and management of corporate interests must also enforce Indigenous peoples' rights to *Free, Prior and Informed Consent*, which includes the right to say 'no' in determination of access, mining or any other form of proposed development, initiative, strategy or program.

These amendments must secure Indigenous Peoples rights to manage and regulate autonomously the internal affairs according to each Indigenous Peoples' customary laws and their choice and development of their own political and legal institutions.

States are obliged to recognise and safeguard Indigenous peoples' rights to their customary lands, resources and environments. In addition, the right to restitution of lands, territories and control over waterways must be incorporated into these amendments. Where there is a dispute or where lands cannot be returned fair compensation must be instituted.

States must also recognise the rights of Indigenous peoples to their own cultural practice and the maintenance of language and development of educational and media that protect, promote and ensure the longevity of their values and cultural expression.

General Assembly Representation

The recognition of a set number of Global Indigenous representatives at the United Nations General Assembly, reflecting the key international regions, would go some way to specifically reflect those Indigenous peoples that do not wish to go down or independent Nation or the decolonization path.

Such General Assembly positions would provide Indigenous peoples globally with a regionally combined voice at the global nations table, with similar standing to the as smaller nation states.

Participation in Other UN Mechanisms

Indigenous participation in other United Nations mechanisms needs to be facilitated and supported. Within the current ECOSOC Sustainable Development Open Working Group only three indigenous bodies internationally are recognised the structure of this critical engagement to develop Post 2015 Development Goals currently serious constrains Indigenous Peoples input. Many of the Indigenous Groups recognised have significant funding from Government but for less resourced Indigenous participation in the process is seriously hampered. This needs to be addressed as a matter of urgency. There is currently no broad Indigenous Group that those wishing to participate in these processes can join to contribute t this significant area of work for our communities.

Self Identification

Indigenous peoples' rights to identify themselves must e paramount. Occupying Governments have continued to use blood quantum and in some instances historic failures to register Indigenous peoples on colonizing State's books as a means to refuse to recognise Indigenous peoples and their just claims. These are clearly used as tools of genocide in an attempt to limit the number of Indigenous/Original peoples.

In many colonized regions the Indigenous People were consciously targeted in an attempt to breed out the original Peoples and their unique claims to their ancestral lands. These clearly genocidal practices are reflected in policies that attempt to deny the status of those Indigenous Peoples of mixed ancestry, with blood quantum requirements for registered First Nation/Original Peoples dictated by colonial governments. In Hawaii, for example, the US occupation government dictates that less than 50% blood quantum results in loss of entitlements to claim native status.

The Government's Department of Hawaiian Homelands specifies that '*to be considered a native Hawaiian, is defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." This means, you must have a blood quantum of at least 50 percent Hawaiian. This requirement remains unchanged since the HHCA's passage in 1921.*'¹

In Canada, '*Status is a legal definition, used to refer to native Peoples who are under federal jurisdiction. Federal jurisdiction over, "Indians, and Lands reserved for the Indians" was set up in our first Constitution, the Constitution Act, 1867, in section 91(24)...The particular piece of federal legislation that defines Status is the Indian Act, which was created in 1876 and has been updated many times since then. Status then can be held only by those native Peoples who fit the definition laid out in the Indian Act.*'²

While many Original Nations and major universities do not recognize that the political class of 'race' is a biological fact, Indigenous Peoples see this concept of 'race' preventing our laws from being enforced. In the US for example, the epithetical misnomer of 'Indian' is applied to citizens of American descent and the US proclaims that only an 'Indian' can be governed by any Original Nation, regardless of whether that 'Indian' is a citizen of the original nation or not. All those not of American descent are put by the US in a legally enforceable political class called "non-Indian" and they are exempt from laws of Original Nations, according to the US. Thus the socioeconomic classes created by the European notion of race are still promoted and endorsed by the UN, which accepts the

¹ The Department of Hawaiian Homelands, <http://dhhl.hawaii.gov/applications/applying-for-hawaiian-home-lands/>

² *Apihtawikosisân, Got Status? Indian Status in Canada, sort of explained*

² <http://apihtawikosan.com/2011/12/14/got-status-indian-status-in-canada-sort-of-explained/>

sophistry of UN Members who claim title to the resources of Original Nations and the right to govern Original Nations' Peoples based solely on the fact that the governors of Original Nations belong to this purportedly inferior political class of 'Indian', 'Aboriginal' or other such terms.

Establishment of International Adjudication Processes

International rule of law and mechanisms to enforce accepted Indigenous normative rights, as established in the *Declaration on the Rights of Indigenous Peoples* and Indigenous rights to self determination outlined in both the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* that both state in their respective Article 1.

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The absence of international judicial mechanisms that can effectively adjudicate and redress the particular circumstances of Indigenous peoples' human rights must be addressed by the United Nations and the international community.

Access to fair, responsive and accountable international judicial systems is an essential mechanism and means of conflict resolution between Nations, with disparate views, cultural values that have entrenched and severe power imbalances. The contestation of the legitimacy of Nations occupation and dispossession of the Original Indigenous Peoples requires an independent and impartial international process that can facilitate the peaceful resolution of disputes, restitution, just prosecution and reparation that is consistent with international human rights standards.

The *Declaration on the Granting of Independence to Colonial Countries and Peoples*, adopted by General Assembly resolution 1514 (XV) of 14 December 1960, recognizes that the peoples of the world ardently desire the end of colonialism in all its manifestations, and states in its first four Articles:

1. *The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.*
2. *All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
3. *Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.*
4. *All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.*

Full participatory rights are essential to the survival of Indigenous Peoples, their connections to country and their practice of customary custodial responsibilities. Indigenous Peoples have the equal right, as do all other Peoples, to self-determination and rights to our cultural survival, land tenure, security from socio-economic inequality and marginalization.

While the United Nations was born as a collaboration of Member States and Nations on the road to decolonization, some UN Members are still the perpetrators of occupation and imperialism. It is vital to strengthen equitable Indigenous participation at UN and in all of its mechanisms by giving Original Nations the same opportunities for decolonization that other occupied countries have accessed.

The inability of western People to credit Indigenous Peoples with functioning civil governments and laws does not remove their existence. The dehumanization and violence historically perpetrated against Indigenous Peoples continues to dominate Original Nations today. No amount of analysis of western jurisprudence will alleviate this without Indigenous Peoples the recognition and strengthening our own governments.

International recognition of Indigenous rights to self-determination and self-governance requires global mechanisms that support State recognition and means of implementation of Indigenous self-determination. The establishment of an international judicial process to adjudicate peaceful resolution between Indigenous Peoples and occupying States would substantially lessen conflict, poverty, marginalisation, the high levels of incarceration of Indigenous Peoples and would facilitate the a process for fair reparation.

Reparation for Indigenous Peoples

An International judicial mechanism is also crucial to provide impartial and commensurate reparation that is both acceptable and appropriate to the Indigenous Peoples to compensate them for loss of lands and resources that are unable to be recovered. The reparations are also crucial to fund and resource the establishment of Indigenous governance structures, infrastructure, services and programs for Indigenous communities. In addition, reparations for loss of lands, environmental damage to lands and waterways regions polluted, mined or cleared may also fund restoration of these environments.

Further, compensation for specific Government policies and programs that have done substantial damage to Indigenous communities such as the forced removal of children, as a conscious attempt to break the community and its transfer of cultural knowledge and membership to future generations as an act of genocide, require avenues for compensation to those peoples impacted.

Whilst there is a role for 'Truth and Reconciliation' processes that acknowledge a true account of the history of dispossession and attempted genocide practices inflicted on Indigenous/Original Peoples, these processes are only useful if seen to be combined with processes to achieve and implement justice for those Indigenous/Original Peoples and the resolution of conflict and grievances with commensurate reparation.

Stolen Generations

The forced removal of children is one of the cruellest genocidal and destructive practices you can do in attempting to destroy a People. It not only prevents knowledge and culture from being transferred on to the next generation, it leaves the community emotionally devastated with the removed children psychologically damaged. Removal is frequently associated with alcohol and drug abuse, self harm and suicide. The removal of children is one of the most effective means of genocide and was a policy implemented in most colonised territories.

In Canada the residential schools system imposed practices which resulted in the removal of tens of thousands of First Nations children from their homes and communities. The mass removal of First Nations children began with residential school system and was continued by the child welfare system under the policies of the "Sixties Scoop." The Canadian Human Rights Tribunal hearings and

the Truth and Reconciliation Commission found that at least 4000 children died while attending residential schools.³

In the USA between 1850 and 1960, Native American children were forcibly removed from their families and communities and sent to boarding schools in what is now regarded as a policy of assimilation and cultural genocide. Abuse and neglect were widely inflicted on children resident at the schools.⁴

In Australia generations of Aboriginal and Torres Strait Islander children were forcibly removed by the Australian government and church missionaries. The National Sorry Day Committee outlined the reasoning behind these policies as:

*'The reality was that Aboriginal children were being removed in order to be exposed to 'Anglo values' and 'work habits' with a view to them being employed by colonial settlers, and to stop their parents, families and communities from passing on their culture, language and identity to them. The children who were targeted for removal by the authorities of the time, in almost all cases, had one parent that was 'white' and one that was Aboriginal. The objective behind the removal of these children then was often one of racial assimilation.'*⁵

These children, referred to as the Stolen Generation, received low standards of care and education, instead they were trained as farm labourers and domestic servants, being placed in work by the age of 14 years. Many of these children were also sexually and physically abused in both institutional settings and in the families they were placed in.

The Bringing them Home Report of the 1997 '*National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*', noted that almost one in ten boys and just over one in ten girls allege they were sexually abused in a children's institution, while one in ten boys and three in ten girls allege they were sexually abused in a foster placement. These crimes have ongoing impacts on victims who survived rape and the communities they serve and are crimes against humanity as part of structured violence used against Indigenous Peoples as a means of repression.

Implementation of Treaties

Treaties have been accepted and proven international mechanisms between nations to avoid conflict or to negotiate terms to prevent future conflict. Treaties are currently a crucial means for Indigenous Peoples and occupying States to constructively reconcile and provide an avenue for moving forward as a partnership, while recognising the Indigenous Peoples inherent right to self determination.

The honouring of past treaties and negotiation of fair contemporary treaties can enable the peaceful coexistence of Peoples while setting out clear obligations with regard to land, water and resources and how these are to be honoured and respected. For Indigenous Peoples, just treaties can provide a mechanism for redress.

The global history of treaties however also highlights that an international mechanism is required to ensure treaties are not violated but are observed and enforced in good faith and to the full intent as

³ First Nation children in Canada's child welfare system a continuation from residential school era

³ <http://media.knet.ca/node/22795>

⁴ Child welfare approaches for Indigenous communities: International perspectives, p7
<http://www.aifs.gov.au/nch/pubs/issues/issues20/issues20.pdf>

⁵ The National Sorry Day Committee,
<http://www.nsdc.org.au/stolen-generations/history-of-the-stolen-generations/the-history-of-the-stolen-generations>

agreed. When disputes cannot be resolved between the parties of a Treaty there needs to be a competent international body and process that can independently adjudicate a fair resolution and support its enforcement and the fair redress for its Indigenous Peoples. An international judicial body is required to monitor and facilitate the development contemporary Treaties and honouring the implementation of existing Treaties and could address treaty failures.

Stark differences in power relations exist at the national level, where UN Members are responsible for attempted genocide, the decimation of communities and dispossession of ancestral lands, where continuing unilateral policies continue to infringe Indigenous Peoples' fundamental human rights provide clear linkages between violations of treaties and the abuse of Indigenous human rights. At the national level, Indigenous Peoples' capacity to fairly negotiate Treaties with just terms or to pressure for the compliance and enforcement of treaties is seriously compromised. Current international judicial processes by the UN currently ignore treaties between Original Nations and occupying Nations as one of the parties to the treaty simply did not originate in Europe.

While Treaties recognise the nation status of Indigenous Peoples and enacts Indigenous Peoples' internationally recognised rights to self-determination and to '*Free Prior and Informed Consent*', there is difficulty of building partnerships with Indigenous Peoples where states deny the existence of Indigenous Peoples' titles and rights to their lands and waterways. In Australia, for example, the legal fiction of Terra Nullius was used to avoid acknowledging the existence of a continent of People and avoid treaty commitments or any attempt at compensation. Aboriginal People are now calling for a contemporary Treaty between the colonising state and the Indigenous Peoples, to provide an avenue for justice, recognising full allodial land rights, resources to fund self-determination, reparation for lost lands and to provide certainty for our culture.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) recognises in its preamble:

'that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith...that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere...Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among Peoples and the harmony of persons living side by side even within one and the same State'.

Indigenous Peoples have inherent and fundamental rights to their existence and survival as a People on their ancestral lands and in a manner that is sustainable for generations to come. The Special Rapporteur on the Rights of Indigenous Peoples has noted that increasing Indigenous participation in and influence over land tenure, settlement policies, procedures, and outcomes could go a long way in alleviating injustices in relation to a treaty settlement process. However, effective recognition, observance and enforcement of all Treaties is of primary concern, which could be addressed through UN jurisprudence and an international grievance and fair arbitration mechanism to support the enforcement of existing Treaties and the establishment of just contemporary Treaties.

WITHIN THE UNITED NATIONS INDIGENOUS FORUMS

Indigenous Decision Making

In considering the implementation of the Declaration it is essential that these principles it espouses on Indigenous self determination are enacted within the Forums and mechanisms established to

advocate specifically for Indigenous peoples rights. The Permanent Forum on Indigenous Issues and The Expert Mechanism provides ECOSOC with advice on the rights of Indigenous peoples, relevant thematic issues and addresses specific cases of alleged violations of the rights of indigenous peoples. The Human Rights Council currently appoints the Special Rapporteur on the Rights of Indigenous Peoples, the five Experts of the Expert Mechanism and the Forum members in conjunction with state nominations to the Permanent Forum on Indigenous Issues. It is however critical that Indigenous Peoples have a primary voice in the appointment of its Rapporteur, Experts and Forum Members as these are crucial appointments that advocate and investigate human rights abuses of Indigenous peoples.

Given there are current estimates of more than 500 million Indigenous peoples globally, that suffer the consequences of colonization and invasion, and ongoing acts of dispossession and human rights abuses it is critical that there are sufficient number of Indigenous Rapporteurs and resources to adequately investigate the numerous cases of discrimination and abuses globally that demand their attention. The work load is currently onerous and requires the appointment of a second Rapporteur.

Currently there is a requirement for States to provide permission before investigations can occur. This obligation fails in a duty to represent and enable Indigenous peoples to voice their concerns regarding breaches to their human and Indigenous rights. Within Australia, the Government of John Howard denied access to the Special Rapporteur to investigate issues of concern with Aboriginal communities in Australia. The Special Rapporteur needs to be vested with the capacity to undertake full and prompt investigations in all circumstances where Indigenous peoples raise complaints of human rights abuses, including within in belligerent and uncooperative States.

Indigenous Participation

Honouring the principles of inclusiveness through the full, equitable and effective participation, of Indigenous Peoples is a minimum requirement for participatory standards. Equitable participation is essential to support the advancement and advocacy of our inherent right to advocate on behalf of our communities, Peoples and Nations. However, full and equitable participation has been seriously compromised within the Pacific Caucus through the limitation of information to selected individuals and a tightly controlled email 'pacific@lists.riseup.net' list that excludes many Indigenous people of the region. This information is only then accessed if forwarded to the more inclusive 'wcip2014pacific@googlegroups.com' list. The active exclusion of Pacific members seriously compromises the development of Outcome documents, impacting to a compromised global position, proposed World Conference and the legitimacy of the UNPFII and EMRIP.

Consensus Decision Making

Respect for the process of consensus decision making is a key principle among Indigenous peoples, however rules for decision making with the regional Caucus processes so critical to develop work and address themes regionally, have been seriously undermined through a failure to respect the and implement the process Consensus Decision making and respectful discussion required to achieve this.

Previous experience at both the Global Caucus and within the Pacific Caucus have shown serious instances where decision making and participation compromised by a failure to respect the process of Consensus decision making. In the case of the Women's Caucus the Chair in 2012 overruled a decision developed by Consensus through the membership of the Women's Caucus to appoint her own World Conference Advisory Committee over the top of the previously elected Advisory

Committee, which was not enacted, and which thus compromised development work to the World Conference from the Women's Caucus.

The internal operations of the Caucuses are vulnerable to the domination of larger States and government and corporate interference if principles of participation, such as caucus decision making, are not paramount. In 2013, the Chair position of the Pacific Caucus went to an employee of the New Zealand Government.

During the Consultation phase to develop a first draft regional Outcome document the agreed Pacific meeting to be held in Hawaii was not funded through a collusion between a few key participants. Despite attempts to mediate an agreed outcome by holding two Conferences, this process effectively prevented funding of the Hawaii meeting and input from a range of peoples across the Pacific who had register to attend the agreed Conference. At such times of unresolved impasse there needs to be established internal structural processes that can fairly investigate complaints of failure to comply with processes and can adjudicate agreed outcomes.

Further, the key position of drafter of the Alta World Conference Outcome Document was appointed to an Indigenous person who is a publicly paid employee and advocate of a geothermal mining company, therefore removing any sense of independence, objectivity or community accountability and establishing a clear and serious conflict of interest.

It is proposed that an ethics standard be established within the UNPFII, where cases of blatant breach of ethical standards are breached that these can be raised as a formal complaint that can work with the internal investigative and adjudicating processes proposed above to ensure minimum ethical standards are maintained and the advocacy and participation of Indigenous peoples is not compromised.