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Presentation on: the Arctic Council and its recent initiatives; and the international human rights standards specifically responsive to the distinct cultural context of Indigenous peoples

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INTERNATIONAL
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INTRODUCTION

I would like to thank the organizers for the invitation to this expert workshop. In response to the invitation, I plan to address the Arctic Council and its recent initiatives; the international human rights standards specifically responsive to the distinct cultural context of Indigenous peoples, and a few of the points under agenda item 3.2.

The main point of this presentation is the need to view Aboriginal Subsistence Whaling in relation with all of the other economic, social, cultural, political and spiritual dimensions of Arctic Indigenous peoples' rights. Such rights are now affirmed in a comprehensive fashion in a number of international human rights instruments, including the International Labour Organization's *Indigenous and Tribal Peoples Convention, 1989* ["ILO 169"] and the *UN Declaration on the Rights of Indigenous Peoples*.

ARCTIC COUNCIL

The Arctic Council and its activities have a direct impact on the topic of Aboriginal Subsistence Whaling and the IWC generally. The fact that Indigenous peoples, through their Permanent Participant status, have been able to effectively occupy both an intellectual and political space within this inter-governmental regime in order to comprehensively promote and protect their rights and interests, is highly significant.

When the eight circumpolar Arctic states were drafting the rules of procedure, I argued that Indigenous peoples should have equal status to that of member states, including voting

rights.¹ Unfortunately, this proposal was not aggressively pursued by Inuit leadership, at the time. Though Permanent Participant representatives do not have the formal right to vote, they have extraordinary influence over all issues for consideration due to the consensus decision-making approach of the Arctic Council. So, in a de facto sense, the Permanent Participants do have a vote. It is also important to acknowledge that the ICC enjoys an esteemed reputation within the Arctic Council due to their constructive engagement, display of diplomacy and willingness to collaborate and cooperate with all other stakeholders, including member states.

Indeed, the role of the Alaska Eskimo Whaling Commission, KNAPK and other Indigenous peoples active in the work of the IWC is similar to that of Permanent Participants and certainly complementary. And, though the Arctic Council Indigenous Peoples' Secretariat could be resourced more abundantly, Permanent Participant status may be a useful future model for the IWC in order to further the implementation of the right of Indigenous peoples to participate in decision-making in all matters that affect their rights.²

Furthermore, the Arctic Council's emphasis on sustainable development and environmental protection, in their broadest terms, are in full alignment with the objectives of this workshop on Aboriginal Subsistence Whaling. Their diverse array of working groups and research activities intersect in multiple ways with the purposes and principles of the IWC.

¹ D. S. Dorrough, "Indigenous Peoples and the Law of the Sea: the Need for an Arctic Perspective," in Davor Vidas & Willy Østreng, eds., *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999) at 424.

² Article 18, UN Declaration on the Rights of Indigenous Peoples: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

I would now like to highlight a few of the recent Arctic Council initiatives relevant to Indigenous whaling activities. The Arctic Council has adopted a range of recommendations under their Arctic Marine Shipping Assessment program, including Recommendation II[c], which provides for safeguarding, inter alia, cultural uses and environmental elements of the Arctic Ocean from the impacts of marine shipping. This, of course, includes whales as a specie as well as the significant economic, social and cultural dimensions of Inuit whaling.

Furthermore, Recommendation II[g] addresses “ship noise, disturbance and strikes in Arctic waters” and includes substantive collaboration with the IWC and the International Maritime Organization [IMO] in order to achieve this objective.

In addition, when the United States recently assumed chairmanship of the Arctic Council, they announced their desire to highlight Arctic Marine Protected areas [cultural significance] and Arctic Marine Cooperation [primarily in relation to research] under the broad theme of “Arctic Ocean Safety, Security & Stewardship.” ICC representatives have stated that they welcome these initiatives, however, with some caveats. Nevertheless, both topics are relevant to the exercise and enjoyment of Indigenous human rights and the management of Aboriginal Subsistence Whaling by respective Indigenous communities.

INDIGENOUS HUMAN RIGHTS STANDARDS

Like the worldview of Indigenous peoples, human rights are inter-related, inter-connected, indivisible and inter-dependent. In addition, they are universal as well as inalienable...and cannot be destroyed or extinguished. There is also a constant tension between the rights and interests of others and therefore, human rights are not absolute.

It is important to recognize the diverse cultural characteristics of Indigenous peoples across the globe. And, the main objective for developing international minimum standards³ [by the United Nations and other inter-governmental organizations] is the establishment of an international human rights framework that specifically responds to the distinct cultural context of Indigenous peoples.

ILO C169

The International Labor Organization Convention No. 169, adopted in 1989 after a two year revision process, is the only international treaty specifically addressing the rights of Indigenous peoples. It has been ratified by 22 member states, including Denmark. Since the 2007 adoption of the UN Declaration, the ILO and legal scholars have acknowledged that C169 must now be read in relation to the UN Declaration. I will not go into the specific provisions of ILO C169, but only highlight Article 23. This article affirms the linkage between culture, subsistence economy, economic self-reliance, and sustainable and equitable development. I would urge the members of the ASW working group and IWC member states to apprise themselves of these legally-binding provisions and to incorporate them into all of their future work.

As the ILO itself has affirmed, ILO 169 should be read together with the *UN Declaration*. This is especially important, since at the time that this Convention was adopted the ILO indicated that it was “outside the competence of the ILO” to take a position for or against the

³ UN Declaration Article 43 The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

right of self-determination.⁴ This foundational right was subsequently affirmed by the UN General Assembly in the *UN Declaration*.

UN Declaration on the Rights of Indigenous Peoples

The principle of self-determination is affirmed in the United Nations Charter and the right to self-determination is explicitly affirmed in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as within Article 3 of the UN Declaration on the Rights of Indigenous Peoples. Furthermore, many legal scholars have expressly affirmed that the right to self-determination is a pre-requisite to the exercise and enjoyment of all other human rights.

The Covenants make an important reference to natural wealth and resources, which corresponds with the provisions of the UN Declaration pertaining to the rights of Indigenous peoples to their lands, territories and resources. And, the explicit language of Article 2 – “In no case may a people be deprived of its own means of subsistence” goes to the heart of the traditional economies of Indigenous peoples, which is the essence of Article 20 of the UN Declaration.

Naturally, this article is related to various other UN Declaration provisions concerning our profound relationship to the environment [Article 25], the integrity and productive capacity of the environment [Article 29], traditional knowledge [Article 31], and the development and use of our lands, territories and resources [Articles 20, 23, 26 and 32]. All of these provisions are fundamental elements of the right to self-determination. Such an understanding is

⁴ International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, para. 42.

consistent with the inter-related nature of human rights and the linkage between the exercise of the right to self-determination and the right of Indigenous peoples to own, use, develop and control their lands, territories and resources. In this way, one must interpret every provision of the UN Declaration in the context of the “whole of the UN Declaration and other international human rights law”, including the UN Declaration’s overall spirit and intent.

I should also comment on the UN Declaration and general international law and customary international law. It is indisputable that “customary norms concerning indigenous peoples and their pull toward compliance” are a reality in the context of the contemporary international legal order. Though the whole of the UN Declaration cannot be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are bound to comply with.

According to the International Law Association, “the relevant areas of indigenous peoples’ rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies. However, it would be inappropriate to deal with these areas separately...the rights just listed are all strictly interrelated...to the extent that “the change of one of its elements affects the whole”.⁵ This ILA expert commentary sheds light on

⁵ "Rights of Indigenous Peoples," Principal contributor to the Final Report as Member of the ILA Committee on Rights of Indigenous Peoples, Report of the Seventy Fifth Conference, Sofia, Bulgaria, International Law Association (London: International Law Association, 2013) and at <http://www.ila-q.org/en/committees/index.cfm/cid/1024>

the existence of customary international law provisions embedded in the Declaration, which then establishes significant binding legal obligations of states, including the members of the IWC.

There are a host of other significant international legal developments particular to Indigenous peoples. The recent General Assembly Resolution outlining *The Future We Want* underscores the linkage between culture, and the role and rights of Indigenous peoples and sustainable development, food security, and environmental sustainability. It is important to note that this GA resolution devotes an entire section to Oceans and Seas, which obviously intersects with the work of the IWC and this workshop. Time does not allow for all other developments to be comprehensively elucidated. However, I urge IWC members to be mindful of the numerous existing and emerging human rights standards, related jurisprudence, and corresponding state duties and obligations.

Allow me to briefly comment on a few of the workshop agenda topics. First of all, I would like to applaud the work of the Chair of the ASW Working Group, who took the initiative to summarize the “commonalities from the presentations by native hunter representatives” in his September 15, 2014 Report.

In regard to the “evolution of Indigenous societies”, it is important to recognize that all societies are undergoing “evolution”. However, to suggest that “evolution” somehow alters the distinct cultural characteristics, corresponding collective and individual human rights, and the

ability of Inuit whaling community members to practice their way of life does not make them any less Inuit. Nor should this notion trigger any attempt to diminish their rights.⁶

I wholeheartedly agree with the conclusions of August and Marie Krogh [the Nobel prizewinner in Physiology and Medicine from Denmark in 1920], who studied the diet and metabolism of East Greenland Eskimos at the turn of the century and from the results, declared them to be 'the most exquisitely carnivorous people on earth'.⁷ For a majority of Inuit and other Arctic Indigenous peoples, this sentiment remains true.

There is no question that harvesting and hunting in Arctic and sub-Arctic Indigenous communities remain a legitimate order of economy; “subsistence” remains a vital element of Indigenous survival. The Indigenous order of economy and corresponding Indigenous human rights are directly linked to “nutritional considerations” and the question of “local versus outside food”. For a majority of rural Arctic Indigenous communities, “local food” provides not only food security, but also economic integrity, social organization, cultural customs and practices, and important spiritual values and institutions. An important footnote to this matter is the fact that “outside food” remains extremely expensive in rural areas. Likewise, on the question of the “role of cash”, it is important to recognize the inevitable force that it has come to play in the North. However, its use does not diminish the “indigeneity” of Inuit or other Arctic Indigenous peoples. And, similar to the concern of the IWC to promote safety and efficiency, it is important to recognize the necessity of cash to do so. However, it must not be

⁶ UN Declaration Article 45 Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

⁷ Nutrition Panel Report, Reports of the International Whaling Commission, Special Issue 4, Cambridge 1982

overplayed against the backdrop of the fundamental human rights of Indigenous whaling communities.

Therefore, any future decisions or policy determinations concerning Indigenous whaling communities cannot pivot solely on questions of “nutritional values”, local versus outside food, the role of cash and other similar indicators. In order to advance food security and nutritional values within Indigenous communities, all other dimensions of Indigenous lifeways must be taken into consideration. In 1982, the Cultural Anthropology Panel⁸ stated:

“The complex of whaling and associated activities is perhaps the most important single element in the culture and society of north Alaskan whale hunting communities. It provides a focus for the ordering of social integration, political leadership, ceremonial activity, traditional education, personality values, and Eskimo identity...

I would submit that the conditions have not dramatically changed in thirty three (33) years, which reflects only a moment in the history and minds of the Inuit.

In relation to “need and need statements”, I would agree with the Native hunters who presented their views in 2014 on the matter by indicating that “Establishing requirements for standardized needs statements is not warranted and, if pursued, should be done with great caution.”⁹

Finally, on the matter of “Commercialism”, it is crucial to recognize that there is a major distinction between exploitation of a resource in a market economy and the taking of whales for minimal sale as a food item in the small markets of coastal Inuit communities – where I’m certain that in many cases the cost of whaling and the return on purchase by, in particular, Inuit elderly women and men who desire to eat their Native food but who cannot manage a whale

⁸ Cultural Anthropology Panel, Reports of the International Whaling Commission, Special Issue 4, Cambridge 1982

⁹ IWC/65/ASWRep01 Rev1, ASW Agenda item 5.1, 15/09/2014.

hunt, is either a wash or minimal in terms of “profit”. I trust that this will be more accurately elaborated upon by the experts invited to address Greenlandic Inuit whaling activities.

CONCLUSION

In conclusion, because of the distinct status and rights of Indigenous peoples, the establishment of a particular category of recognition for their direct participation in the overall organization of the IWC should be considered in the future. In this regard, the Arctic Council and the Permanent Forum on Indigenous Issues may serve as constructive examples *to build upon*.

On August 31st in Alaska, President Barack Obama offered closing remarks to the GLACIER conference, which involved ministers from over 20 countries and other high level participants. He emphasized the need for urgent, collective action to curb the adverse impacts of climate change and repeatedly referenced Indigenous communities that have and will continue to feel its effects firsthand.

In regard to the IWC and its future actions, especially in light of climate change, there is a greater urgency to protect Aboriginal Subsistence Whaling and a greater urgency to establish robust standards to do so. To assist in the preparation of such standards, the direct participation of Inuit [and other Indigenous peoples concerned] must be recognized and respected. In this way, the IWC will help to ensure the future of Aboriginal Subsistence Whaling in the Arctic and elsewhere, in a manner that upholds the fundamental human rights of Indigenous peoples and is consistent with their distinct cultural context.

Indigenous peoples, including the Inuit, have made a positive contribution to the body of international human rights law, not only for their benefit but for the benefit of humankind.

To date, the IWC's Aboriginal Subsistence Whaling working group and the engaged Indigenous peoples' representatives have done exceptional work to maintain Indigenous whaling. I trust that the IWC and its member states, through the ASW Working Group, will rely upon this same body of international human rights law to guide its work well into the future. A future that will always recognize and respect Aboriginal Subsistence Whaling. Quyanaq.