U.N. Special Rapporteur on Freedom of Religion or Belief
Virtual Consultation on Legal Framework:
Indigenous Peoples and the Right to Freedom of Religion or Belief

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Good morning, I am pleased to offer these remarks to the record for Special Rapporteur Shaheed. I am a Religious Studies scholar whose recent published work explores the definitional problems of "religion" as applied to Native American traditions as the definitional problems register in the law.[1] I follow claims Native nations have made to sacred places, practices, knowledge, ancestors, and museum items through and beyond religious freedom law to environmental and historic preservation law, Native specific statutory protections, treaty rights, and Indigenous rights in international law. I conclude that rights we might call *religious*, no less than those we might call *political* or *economic*, are properly folded into rights of self-determination and Indigenous peoplehood.

My final chapter queries the possibilities of the *U.N. Declaration on the Rights of Indigenous Peoples* [the *Declaration*] for raising the standards of protections of Native "religious freedom" under domestic U.S. law, and Kristen Carpenter's excellent review of the book, published in *Harvard Law Review* (April 2021) elaborates more specifically on how the *Declaration* norms could be implemented in domestic US courts, legislatures, and administrative law and policy.[2] I have submitted the chapter in full, as well as Prof. Carpenter's review.

I will leave it to Indigenous experts consulted to detail the particular violations of Native American religious freedom, and I am not qualified to speak extensively beyond the U.S. instance. But I can with confidence relate major findings from my research that directly address the Special Rapporteur's questions circulated in advance for this consultation.

Put simply, the legal framework "freedom of religion or belief" is inadequate as it applies to the full range of Indigenous practices and beliefs that constitute their various religious traditions. "Religious freedom law has, in places like the U.S., demonstrably failed to deliver meaningful legal protection (and in some cases itself authorized further local violations of Indigenous Peoples' rights in pursuit of universal religious freedom). Still, Indigenous Peoples certainly have practices and beliefs that *count* as religion for the urgency and inviolability of their protection. My view is that the *Declaration* offers an important clarification not only of how specifically religious rights of binding international law, such as Art. 18 of the UDHR and Arts. 18 and 27 of the ICCPR, should apply to Indigenous Peoples; the *Declaration* also speaks explicitly and implicitly to the religious or spiritual shape of Indigenous rights to land, culture,

[1] Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton U. Press, 2020); "Native American Religious Freedom as a Collective Right," 2019 *BYU Law Review* 205 (Fall, 2019); "From Substantial Burden on Native American Religious Exercise to the 'Decrease in Spiritual Fulfillment' in the San Francisco Peaks Sacred Lands Case," *Journal of Law and Religion* 30:36-64 (Feb, 2015); "The Sacred and the Profaned: Protecting Native American Sacred Places that Have already been Desecrated" forthcoming 111 *California Law Review* (Spring, 2023)
[2] Kristen Carpenter, "Living The Sacred: Indigenous Peoples and Religious Freedom," 14 *Harvard Law Review* 2103 (2021).

language, knowledge, medicine, and even traditional government. What follows are the major findings of my research.

1. Indigenous People are discriminated against in terms of their freedom of religion or belief, in the United States or elsewhere in the world. This discrimination is particularly acute with respect to Indigenous sacred places -- lands and waters, and communities of non-human life configured as relatives on those places – where access to and integrity of such places are essential to religious practice, belief, and obligation.[3]

2. Indigenous Peoples have disproportionately experienced histories of violations of their freedom of religion, through dispossession of their territories, including sacred places, and have experienced historic and ongoing schemes of forced cultural and religious assimilation at the behest of states, and often in league with religious institutions. In this regard "religion" and even "religious freedom" have been weaponized against Indigenous Peoples and their traditions.

3. As is also the case elsewhere, in the U.S. the legal justification for dispossession and forced cultural assimilation was based on a putative lack of cognizable religion among Indigenous Peoples. The legal Doctrine of Christian Discovery ensconced 15th Century Christian theological presumptions into secular U.S. law, justifying dispossession by theologically assigning absolute title to Christian sovereigns by dint of discovery.[4] Where "religious freedom" issues arose in the context of forced assimilation, they concerned equal access of both Catholics and Protestant institutions to the resources of government Assimilation Policy.[5]

4. Indigenous Peoples' freedom of religion or belief can be compromised in pursuit of legal protection of the freedom of religion or belief of others. In the U.S. for example, Native Americans' religiously necessary access to scarce sacramental plants such as peyote, or eagle feathers, can be jeopardized by extending access to wider and wider circles of interested religious practitioners who are not citizens of Native nations.[6]

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5. While discrimination in terms of Indigenous Peoples' freedom of religion or belief owes to sources that may be many and complex, in no small part it owes to insufficient legal imagination, since what counts as "religion" for legal protections under religious freedom law privileges traditions that, like Protestant Christianity, hinge on individual belief, and where the religious is rather clearly set off from other aspects of culture.

6. "Religion" and what counts as religion are not *given*, but *produced*. They the fruit of an intellectual formation that first took shape in the context of the modern West's colonization of the rest of the world, and as a distinct domain set off from emerging "secular" domains of

[3] U.S. courts have found no "substantial burden" on "religion" or "religious exercise" sufficient to trigger protections for Native American sacred lands under the First Amendment religion clauses (*see* Lyng v. NW Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)), or under the Religious Freedom Restoration Act (1993) (*see* Navajo Nation v. U.S. Forest Service, 535 F. 3d 1058 (9th Cir. 2008) en banc).
[4] Johnson v. M'Intosh, 21 U.S. (8. Wheat.) 543 (1823).
[5] R. Pierce Beaver, *Church, State, and the American Indians* (St Louis, MO: Concordia, 1966).
[6] *See*, for example, U.S. v. Wilgus, 638 F.3d 1274 (10th Cir. 2011);

politics/law, economy, and science.[7] As Winnifred Sullivan has written, the "religion" that has been most legally cognizable has been that which is private, voluntary, individual, textual, and believed, not that which is generally public, obligatory, collective, oral, and characterized most by practice, as are Indigenous religious traditions.[8]

7. Indigenous Peoples' religions can be characterized as primarily collective, not just individual, primarily a matter of practice rather than of orthodox belief, primarily oral, and primarily local, oriented to particular lands and waters in ways that defy full analogies with universal world religions like Christianity and Islam.

8. Indigenous religions need not be mutually exclusive with respect to other religious affiliations: Indigenous people may continue to practice their traditional religions while also practicing Christianity, or Islam, or Buddhism.

9. Indigenous Peoples' *religions* are better understood in terms of duties and obligations, not simply in terms of rights and freedoms. Rights to freedom of religion or belief can be construed more capaciously as rights to traditional religious regulation or obligations to lands/waters, ancestors and future generations.

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10. "Religion" is an imperfect category to encompass the full range of any Indigenous People's traditions, but it remains a powerful tool, especially if engaged as clarified in the U.N. Declaration on the Rights of Indigenous Peoples. This is especially true because formulations of rights to culture, or those of environmental law and other legal schemes, can be weak in comparison to non-derogable rights to religion as ensconced in Art. 18 of the UDHR, Arts 18 and 27 of the ICCPR, and other instruments of international human rights law.

11. Art. 1 of *The Declaration* powerfully insists that such protections for religion in Article 18 of the UDHR and Articles 18 & 27 of the ICCPR, be applied to Indigenous Peoples as collectives, not just as individuals. Arts. 2-5 elaborate Indigenous Peoples' rights to exist as distinct peoples and rights to self-determination in multiple registers: political, legal, economic, social and cultural.

12. Religious rights are thus folded into the affirmation of rights to peoplehood and self-determination. Indeed, the most powerful means to operationalize Indigenous Peoples' religious rights may well be the procedural protections of the Declaration's Art. 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain the **free prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them." Here, Indigenous Peoples can extend or withhold consent on developments that impact their sacred

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[7] David Chidester, *Savage Systems: Colonialism and Comparative Religion in Southern Africa* (Charlottesville: U. Virginia Press, 1996); *Empire of Religion: Imperialism and Comparative Religion* (Chicago: U. Chicago Press, 2014)

[8] Winnifred Fallers Sullivan, *Prison Religion: Faith Based Reform and the Constitution* (Princeton: Princeton U. Press, 2009)*; Ministry of Presence: Chaplaincy, Spiritual Care, and the Law* (Chicago: U. Chicago Press, 2014).

places or other facets of their freedom of religion or belief without having to make a showing that their concerns are "religious" in nature.

13. Specifically religious rights are elaborated in Art. 12 of the *Declaration,* which clarifies how they should apply broadly to include "the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains."

14. Language about Indigenous Peoples' "religious" or "spiritual" interests is not solely confined by the *Declaration* to Art. 12's religious rights. "Religious" or "spiritual" concerns are explicitly integrated in Arts. 11, 25, 32, 34, and 36,

- Art. 11's cultural rights include "the right to maintain protect and develop the past, present and future manifestations of their cultures," including "ceremonies" and "archaeological and historical sites" (typically also places of ancestral and sacred presence). Rights to avowedly dynamic cultural and religious traditions is an important corrective to any requirement that Indigenous Peoples must show their "religious" practices conform to "aboriginal" or sufficiently ancient patterns.[9]

- Art. 11, Sec 2, powerfully provides that states "provide redress … which may include restitution… with respect to their cultural, intellectual, religious and spiritual property taken without their free prior and informed consent or in violation of their laws, traditions and customs." In this regard, past dispossession of Indigenous sacred places, objects, and ancestors can prompt substantive protections such as restitution..

- Similarly, Article 25 affirms Indigenous rights to maintain ongoing "spiritual relationships" with traditional territories, relationships that can extend to lands and waters of which they have been dispossessed. This article clarifies how, for Indigenous Peoples, land rights are not merely secular concerns; they can entail crucial religious or spiritual elements, and that religious obligations may apply at and to lands that are no longer under Indigenous ownership or control.

15. The *Declaration* also implicitly affirms Indigenous Peoples' religious rights in a wide range other articles, including those keyed to traditional language, decision making, medicine, and knowledge.

- Art.13, for example affirms rights to "revitalize, use and develop" Indigenous "languages, oral traditions, [and] philosophies." Most Indigenous religions abide in and through Indigenous languages and oral traditions and many Indigenous Peoples regard threats to the life of their languages as also threats to ceremonial and religious obligations and practice.

[9] In Canada, such a requirement has been incorporated into court interpretations of Aboriginal rights under Sec. 35 of the Constitution Act. *See* Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: U. Toronto Press, 2019).

- Art. 18 affirms Indigenous Peoples rights to maintain and develop their own decision making institutions. Traditional forms of government and law are often syncopated to Indigenous religious practices and beliefs. For example, the Haudenosaunee Confederacy and the diplomatic and governmental protocols of the Longhouse is grounded in their Great Law of Peace and so ceremoniously practiced that Haudenosaunee "religious" observance is implicated in traditional diplomatic and political traditions.

- Art. 24 affirms rights to "traditional medicines" and "health practices," including access and conservation of "vital medicinal plants, animals, and minerals." Some Indigenous "religious" practices, such as those of the Native American Church which regards the Peyote cactus button as a sacrament, hinge on access and lawful use of ceremonial medicines. For others, traditional medicine gathering places are sacred places warranting protection as such.

- Art. 31 clarifies how standards of international intellectual property norms might best apply to Indigenous Peoples. In affirming rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, " including medicinal and traditional ecological knowledge, the *Declaration* affirms rights to control over knowledge and traditions that are often associated with clans, ceremonial societies, or lineages of knowledge that resemble religious institutions in other contexts, and affirm Indigenous control of knowledge, including ceremonial knowledge.

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16. The language of the religious and the spiritual that permeates the *Declaration* can, in my view, be profitably amplified in pursuit of more effective legal protection of Indigenous Peoples freedom of religion, and toward this end, Special Rapporteur Shaheed is urged to continue working with the international bodies engaged in fuller implementation of the *Declaration,* especially the Expert Mechanism on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the Rights of Indigenous Peoples.

17. I add this way of expressing my findings after our virtual consultation. It seems to me that Indigenous religions cross all kinds of categorical boundaries, and thus their effective legal protection must similarly traverse conventional boundaries in three respects that the *Declaration* helps clarify.

1. Conceptual Boundaries

Indigenous religious traditions effectively extend what is conventionally cordoned off as "just religion" to other elements of culture (education, medicine, art, literature, music, philosophy, knowledge), but also to matters of economy and to polity. Consequently protections for "religious" interests will take shape also in terms of these other domains.

2. Spatial Boundaries

Indigenous religious traditions are, as we established, principally local religions focused on ongoing spiritual relationships with specific lands and waters (matters of beliefs, experiences, and ritual practices, but also of ethical obligations). As a result of colonization and dispossession, these relationships extend well beyond currently recognized political boundaries of Indigenous territory (reserves, reservations) to dispossessed traditional territories beyond Indigenous Peoples' control. They also can extend beyond political boundaries of contemporary Nation States.

3. Temporal Boundaries

This was not much discussed in the virtual consultation, but the *Declaration* makes clear that Indigenous traditions engage past, present, and future in crucial respects. First, many provisions of the UNDRIP acknowledge obligations to ancestors and to future generations, and squarely place what might be called "religious" rights in the context of their collective rights to religious self-determination. Secondly, the *Declaration* clarifies that Indigenous peoples' rights to religion and other facets of culture are not locked into a precolonial aboriginal past. There are rights to restitution for past violations and also rights to contemporary and future manifestations of those traditions. This is an important corrective to certain legal frameworks that pertain to aboriginal rights, such as Sec 35 rights in Canada (as I understand them) or in the eligibility requirements for the procedural protections of the National Historic Preservation Act in the U.S. where showings that contemporary practices and beliefs must resemble exactly what they looked like in the deep past, as captured in print typically by non-Indigenous scholars and writers with commitments to their obsolescence.

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