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**Dialogue on an optional protocol to the United Nations Declaration on the Rights of
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**Proposing an Oversight Mechanism to Bolster Implementation of the United
Nations Declaration on the Rights of Indigenous Peoples.**

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1. Background and context

States implementation of the UN Declaration on the Rights of Indigenous Peoples is increasingly becoming indigenous peoples' top-tier priority, as opposed to the UN Special Rapporteur on the rights of Indigenous peoples' lone voice in the wilderness. Specifically, while acknowledging that the UN Special Rapporteur (via reports submitted to the UN Human Rights Council) has constantly highlighted the importance of implementing the Declaration since its adoption by the United Nations General Assembly in 2007, a new report by the UN Permanent Forum on Indigenous Issues entitled *The Study on an Optional Protocol to the United Nations Declaration on the Rights of Indigenous peoples*¹ documents a convergence of indigenous peoples' calls for the establishment of some mechanism to review, monitor and report state compliance with the Declaration. The significance of the calls is two-fold: Firstly, they confirm the existence of the Declaration's implementation gap, and secondly, they demonstrate that the existing gap indeed transcends socio-cultural regions.

The Alta outcome document², which came out of a meeting held in Alta-Norway from 11th to 12th of June 2014 and attended by indigenous representatives from all seven indigenous socio-cultural regions for example, not only underscores the calls but also validates the calls' global scope. But what, one may ask, is the implication of the implementation gap in the lives of indigenous peoples to the extent of marshaling global unity to demand its abatement? While the question may sound rhetorical, implementation of the UN Declaration is central to indigenous peoples struggles to "redefine the terms of

¹ Study on the Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism. Available <http://www.un.org/esa/socdev/unpfii/documents/2014/7.pdf> (Accessed December 12th, 2014)

² Available at http://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta_outcomedoc_EN.pdf (Accessed December 10th, 2014)

their survival in international law,”³ and without it, the UN Declaration as a whole “will have little practical meaning in the lives of those it is intended to benefit.”⁴

Based on the importance of implementing the UN Declaration as the backdrop above has outlined, I propose in this brief paper that a need exists for a robust oversight body to bolster its implementation. In comparison to treaty monitoring bodies and the Universal Periodic Review (UPR) Mechanism however, the oversight body I propose in this paper should be more accessible for indigenous Peoples’ active participation. Accordingly, two interrelated questions on which this paper focuses in the next part arise: whether a new United Nations body should be created with a mandate to monitor, review and report on the implementation of the rights of indigenous peoples or whether there is any existing UN body that could do the work of an oversight function.

Both questions merit reflection as they bring to light central issues to consider in recommending an oversight mechanism with potential for global representation. In the third part, this paper contains my views on the model to consider for an oversight body, including its review subjects and admissibility requirements. Concluding remarks appear under part four.

2. Is there any existing UN body that can do the work of an oversight body?

The UN Declaration does not create new sets of rights; instead “the rights affirmed [by the UN Declaration] are simply derived from human rights principles that are deemed of universal application.”⁵ Accordingly, the UN Declaration is firmly founded on the existing human rights instruments, both charter and treaty-based, as reflected in the jurisprudence of regional and international treaty-monitoring bodies. This therefore means that in addition to contextualizing the rights to indigenous peoples situations, the UN Declaration’s other “value addition” has been to avail regional and

³ Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World. 1990 *Duke Law Journal* 660

⁴ S. James Anaya, Ed., *International Human Rights and Indigenous Peoples* (Aspen-Walters Kluwer, 2011) p. 114

⁵ S. James Anaya, “Why there should have to be a Declaration on the Rights of Indigenous Peoples” in S. James Anaya, Ed., *International Human Rights and Indigenous Peoples* (Aspen-Walters Kluwer, 2011) p. 59

international treaty-monitoring bodies with a comprehensive reference tool in their consideration of states' human rights obligations and commitments, specifically on matters relating to indigenous peoples rights. The case of *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council V. Kenya*⁶ exemplifies this point. Although it does not deal exclusively with indigenous peoples rights, the African Commission on Human and Peoples Rights (the African Commission) made reference to the Declaration (alongside other human rights instruments) in reaching its groundbreaking decision in favor of the Endorois indigenous communities.

However, while existing international human rights instruments buttress them, rights contained in the UN Declaration are not only context-specific⁷ to indigenous peoples but also acquire different meanings when applied to indigenous peoples through legal interpretation. Elaborating further on this point, Korir Sing'Oei, A and Jared Shepherd in their comprehensive article *In land We Trust: The Endorois' Communication and the Quest for Indigenous Peoples Rights in Africa* provide: "human rights supervisory bodies have held that property rights, for instance, acquire an "autonomous meaning" when applied to indigenous peoples. Further, while cultural rights are universal to all human beings, they acquire a unique meaning when applied to indigenous peoples."⁸

Accordingly, owing to the context-specific nature of the rights contained in the UN Declaration, and the Declaration's function as a "benchmark to measure the conditions faced by indigenous peoples worldwide, and to motivate and guide states and international action in this regard,"⁹ I am of the view that it needs a specific and robust

⁶ Ruling available at http://www.iwgia.org/news/search-news?news_id=124 (Accessed on December 1st 2014).

⁷ For more on this see para. 70 of the Report of the UN Special Rapporteur on the Rights of Indigenous peoples, S. James Anaya, to the 66th Session of the UN General Assembly

⁸ Sing'oei, K.A. (2010) 'In Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples Rights In Africa '. *Buffalo Human Rights Law Review* 16, (57) 74-75.

⁹ Anaya, supra note. 4 p. 104, See also Anaya, S.J., & Williams Jr., R. (2001) 'The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System'. *Harvard Human Rights Journal* 14, (33) in which authors assert: "One of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special

oversight mechanism to monitor and measure its compliance by states. In this way, requiring States to submit periodic reports for example will simplify efforts to track progress made in the implementation and consequently boost accountability on the part of states. Additionally, a specific oversight body will significantly reduce challenges faced by indigenous peoples when using general supervisory bodies to pursue their context-specific rights. Brief comments on the working of the Universal Periodic Review (UPR) Mechanism can clarify this point further. Bound by the *Universal Periodic Review: information and guidelines for relevant stakeholders' written submissions*¹⁰ issued by the Human Rights Council, Tanzania's indigenous peoples had to submit a report of only five pages, despite having many more issues to bring to the attention of the Human Rights Council. This is because the guidelines restrict submissions to 2815 to 5630 words (three to five pages) undoubtedly in order to accommodate submissions by other stakeholders.¹¹

However, rather than creating a new institution or advocating for an optional protocol to the UN Declaration, mandates of existing international legal frameworks and their associated institutions, particularly those exclusively dealing with indigenous peoples rights could be reviewed with the view to addressing barriers to implementation. Prior to stating why the “existing institutions model” is more useful, it is informative to restate barriers to the UN Declaration's implementation.

In a report to the UN General Assembly, the UN special rapporteur for example cites “lack of knowledge and understanding about the declaration”, as a barrier to its implementation by States. The report adds that:

Implementation of the standards articulated in the declaration first requires an awareness of those standards and their justification by government and United

subjects of concern. A discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.” See. P. 33

¹⁰ Available at <http://www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf> (Accessed on December 21, 2014)

¹¹ *ibid*

Nations actors at all levels, including those actors whose functions and powers touch upon the lives of indigenous peoples.¹²

These comments and a conclusion following them, that a great need exists for educating the public on the issues the declaration seeks to address, resonate well with Professor Dalee Sambo Dorough's comments in a Book Chapter, *The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation*¹³ who is of the view that while the UN Declaration is of particular significance within the UN system as a whole, implementation of its provisions requires human rights education as well as concrete actions by indigenous peoples, the UN and State.

Furthermore, available evidence suggests that even the historic adoption of the Declaration is largely a result of indigenous peoples' efforts to make their plight known through story telling "in recognized and authoritative international standard setting human rights bodies."¹⁴ According to Professor Robert Williams Jr. in his oft-quoted law review article *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World*, "the emergence of indigenous rights in the contemporary international legal discourse is a direct-response to the consciousness-raising efforts of indigenous peoples in international human rights forums."¹⁵ Writing before the UN Declaration was adopted, the author attributes indigenous peoples' narrative powers as having catalyzed international dynamics leading to the drafting of the Declaration. He concludes: "the Declaration provides an important measure of the power of the stories told by indigenous peoples to transform legal thought and doctrine."¹⁶

¹² Report of the UN Special Rapporteur on the Rights of Indigenous peoples, S. James Anaya, to the 66th Session of the UN General Assembly

¹³ Dalee Sambo Dorough, "The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation," in Claire Chartres and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009)

¹⁴ Robert Williams Jr. Supra note. 3

¹⁵ *Ibid.* p. 665.

¹⁶ *Ibid*

Also of note is that while one may correctly associate acceptance by the UN General Assembly, of negotiated amendments to the UN Declaration proposed by the African Heads of States and Governments (the African group) with the successful adoption of the UN Declaration following twenty years of protracted negotiations and one year of voting-deferment, the story remains incomplete without taking into account painstaking awareness rising efforts that preceded the final step by the UN General Assembly. In a Book Chapter *Responding to the Concerns of the African States*, Dr. Albert K. Barume recounts for example, persuasive arguments contained in a technical response note prepared by “a group of sixteen researchers, indigenous leaders and researchers from ten African countries” to respond to African Group’s draft *Aide Memoire* that contained areas of the group’s disagreements with the UN Declaration.¹⁷ Further, the African Commission adopted an Advisory opinion in which it assured the African group that rights contained in the UN Declaration were not at variance with contents of the African charter and the jurisprudence of the African Commission as a whole.¹⁸

The foregoing discussion underscores the importance of awareness rising in the implementation of the UN Declaration as well as the two other processes that preceded it, namely drafting and its adoption by the UN General Assembly. More significantly, the discussion confirms the UN special rapporteur’s assertion that lack of awareness on the content of the Declaration and failure to appreciate its “significant normative weight” and its “foundation in equality and human rights” are the main barriers to its implementation by states. Also relevant to state compliance of international obligations and commitments more generally, but the details of which this paper does not delve into, are what Harold Hongju Koh in an article appearing in the 1996-97 *Yale Law Journal* calls “norm

¹⁷ Albert K. Barume, “Responding to the Concerns of the African States,” in Claire Chartres and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009)

¹⁸ ACHPR (2007) Advisory Opinion of the African Commission On Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the African Commission on Human and Peoples Rights at its 41st Ordinary Session held in May 2007 held in Accra Ghana, Available http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf (Accessed on 10th December 2014).

internalization”¹⁹ as well as what Professors Ryan Goodman and Derek Jinks in their authoritative work *How to Influence States: Socialization and International Human Rights Law*, call “acculturation”.²⁰

Dalee Sambo Dorough and Megan Davis in their report to the UNPFII,²¹ subscribe to the importance of knowledge on the UN Declaration as a catalyst to its implementation, and suggest that “one way to address the paucity of knowledge and the lack of consistency in its implementation is to establish a mechanism to protect, review, monitor and report on the declaration.”²² The authors go on to add: “this mechanism can be empowered through the development of an optional protocol.”²³ While I fully endorse the importance of knowledge-generation in bolstering implementation of the UN Declaration, and the potential for an optional protocol to achieve it, I am of the view that the same results can be achieved through reviewing mandates of existing mechanisms, especially those that deal exclusively with the rights of indigenous peoples.

Compared to an optional protocol, taking advantage of existing mandates is a more useful model in a number of reasons. First, it avoids opening up a new set of potential problems such as the length of time it may take for states to ratify an optional protocol in a manner that gives it a global representation. *The International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries* is the case in point. While it was opened for ratification in 1989, only one country in Africa-the Central African Republic-has ratified it-more than twenty years down the line. In the absence of evidence on legal, administrative and constitutional reforms resulting from widespread awareness on indigenous peoples issues in Africa, these historical accounts suggest that most African States may not ratify an optional

¹⁹ Koh, H. (1996-97) 'Why Do Nations Obey International Law?' *Yale Law Journal* (106) 2599-2659

²⁰ Goodman, R., & Jinks, D. (2004) 'How to Influence States: Socialization and International Human Rights Law'. *Duke Law Journal* 54, (3) 621-703.

²¹ Study on the Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism. Available <http://www.un.org/esa/socdev/unpfii/documents/2014/7.pdf> (Accessed December 12th, 2014)

²² *Ibid* Para 6

²³ *Ibid*

protocol when it is availed for State ratification hence denying it global representation, which the UN Declaration enjoys.

Secondly, taking advantage of existing mechanisms will lead to avoidance of ‘indigenous rights ritualism’, defined to mean a situation in which “States (or other actors) embrace the institutionalized means for advancing indigenous peoples rights but are not concerned with actually realizing their rights.”²⁴ This is a particularly important consideration as it sheds light on the fact that (assuming many enough States will ratify an optional protocol as to give it global representation) ratification does not automatically translate into desired reforms on the grounds. This is because States may ratify it in order to get international credits while resisting to effect required domestic reforms that can benefit indigenous peoples.²⁵

Accordingly, the main focus, in my views, should be having a robust oversight body (by reviewing existing mandates) to review, monitor and report state compliance with the Declaration. In addition to avoiding potential technical pitfalls explained above, (through taking advantage of existing institutions), the oversight mechanism will generate the level of awareness needed to catalyze the UN Declaration’s implementation, while simultaneously creating a sense of accountability on the part of states generally. Accountability will result for example, from periodic state reporting to the institution and issuance by the institution, of concluding observations that outline specific actions required of states. International monitoring/oversight function is also important because, in addition to generating awareness on the UN Declaration, it would make it easy to track implementation progress made at the global level.

Which then, is an existing UN body that could do the work of an oversight body? To answer this question, Luis Rodriguez-Pinero Royo provides very enlightening account

²⁴ See Fleur Adcock, ‘The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A study in compliance ritualism’ (2012) *New Zealand Yearbook of International Law*, Vol. 10 at 97, Quoted in the UNPFII’s Concept Note on Expert Group Meeting Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples, p. 11

²⁵ *Ibid*

of the contemporary factors on which effectiveness of international human rights standards depend:

Drawing from the lessons of the past, international human rights regime has come to realize that the effectiveness of international human rights standards relies on a broad range of techniques and involves a key number of actors that are different and complementary to international bodies...²⁶

In view of the above, it is clear that a single oversight body will need contributions of other bodies and institutions if it is to effectively carry out its functions. Accordingly, success of an oversight mechanism on indigenous peoples rights will hugely depend on contributions of existing mandates. This is particularly so because while the UN Permanent Forum is explicitly tasked under Article 42 of the UN Declaration with the implementation of the Declaration, the UN special rapporteur's mandate include state monitoring.

However, for the purpose of building on the advances made during the world indigenous peoples conference,²⁷ I propose that the UN Expert Mechanism's mandate be reviewed to enable it perform oversight/monitoring function. In particular, the EMPRIP should be able to: consider periodic reports by states with indigenous peoples; issue concluding observations and general Comments; carry out fact-finding missions in connection to specific human rights situations or allegations; and more importantly, serve as a complaints mechanism mandated to receive complaints touching on violation of rights enshrined in the UN Declaration.

²⁶ Luis Rodriguez-Pinero Royo, "“Where Appropriate”: Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration," in Claire Chartres and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009)

²⁷ During the world indigenous peoples conference, the UN General assembly invited the Human Rights Council: "Taking into account the views of indigenous peoples, to review the mandate of its existing mechanism on the rights of indigenous peoples, with the view to modifying and improve the Expert Mechanism so that it can more effectively promote respect for the declaration including by assisting member states to monitor, evaluate and improve the achievement of the ends of the Declaration. See the Outcome document available

While mandating the EMPRIIP to perform monitoring function may sound as a new proposal, indigenous peoples envisaged it during consultations before the EMPRIIP was formed, as reflected by previous draft resolutions proposed by the indigenous caucus.²⁸ Supported by this historical base, the EMPRIIP is also particularly suited for this function because it is part of Special Procedures of the UN Human Rights Council, and consequently does not require state ratification.

3. A model to be considered for an oversight mechanism

In my views, the most important distinction of the indigenous peoples rights' oversight body in comparison to existing treaty monitoring bodies and the UPR, should be easy accessibility and active participation by Indigenous Peoples. This calls for creativity and flexibility in crafting rules governing admissibility requirements, subjects of review and *locus standi* (who can submit complaints); in light of concerns about the workload of unpaid experts, backlog of reports and communications, qualities of expertise and secretarial support raised in the on-going reform process. Below are my suggestions:

Who can submit a complaint?

Indigenous peoples and their organizations including traditional institutions should be able to bring complaints to the attention of the Expert Mechanism on the Rights of Indigenous Peoples, alleging that their home countries have violated one or more of the rights contained in the UN Declaration, and which have not been considered by any other relevant UN human rights body.

Admissibility requirements

To be admissible, a complaint need not be channeled through local justice institutions first, so long as the complainant can give reasonable grounds on the difficulties of accessing domestic remedies.

²⁸ See Isabelle Schulte Tenckhoff and Adil Hasan Khan, 'The Permanent Quest for a Mandate: Assessing the UN Permanent Forum on Indigenous Issues' 20 *Griffith Law Review* 2011

Reporting Procedure and Fact-finding Missions

One of the obligations of states should be submission of reports on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed. This has to be done on a three yearly basis to avoid overworking countries that have numerous treaty monitoring bodies to report to. User-friendly reporting guidelines should also be formulated to guide states. On the occasion of allegations of widespread indigenous peoples rights violations, the Expert mechanism should be able to conduct a fact finding mission and issue recommendations.

4. Concluding remarks

This paper has shown that a need exists for a specific and robust oversight body to bolster implementation of the UN Declaration. This is because, while existing international human rights instruments buttress them, rights contained in the UN Declaration are not only context-specific to indigenous peoples but also acquire different meanings when applied to indigenous peoples through legal interpretation. However, rather than creating a new institution or advocating for an optional protocol to the UN Declaration, the mandate of the EMPRIIP could be reviewed with the view to enabling it to perform monitoring function. This is in line with the gains made during the world conference on indigenous peoples in which the General assembly heeded to indigenous peoples calls and called upon the human rights council to review its mechanism, particularly EMPRIIP so that it can more effectively promote respect for the declaration.

5. Selected References

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