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Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples

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Theme 1: Why is an optional protocol required in relation to the Declaration? Is there an Implementation Gap?

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1. Introduction

The first theme of this expert group meeting poses the question of why an optional protocol is needed in relation to the United Nations Declaration on the Rights of Indigenous Peoples. A subsidiary question is whether there is an implementation gap. The first question is substantially premised on accepting that, yes, there is an implementation gap.

In my remarks I would like to first highlight the existence of an implementation gap and identify some of its features, and then I will go on to evaluate the proposal for an optional protocol as a means to bridge that gap, in light of the capacities and limitations of existing international mechanisms. Finally, I will argue that, more so than a new formal complaint procedure, which has been associated with the optional protocol proposal, what is needed are enhanced capacities within the international human rights system for technical advisory services and awareness raising aimed at assisting and influencing local actors to build patterns of compliance and initiatives of implementation.

2. Is there an implementation gap?

I believe it can hardly be debated that there exists on a global scale a wide gap between the standards expressed in the Declaration and their implementation. We cannot help but recall that the development and adoption of the Declaration was motivated by growing awareness of the historical and ongoing deprivation of the rights of indigenous peoples throughout the world. The Declaration was meant to clarify what those rights are and to provide impetus to overcome their historical deprivation in order to see those rights realized in indigenous peoples' everyday lives. In a fundamental sense, the Declaration owes its existence to the gap that has prevailed and continues to exist between indigenous peoples' rights and in their effective enjoyment.

Adoption of the Declaration was a great achievement in that it consolidated a consensus among States, indigenous peoples, the United Nations system and others about the basic content of indigenous peoples' rights, upon a foundation of commitment to respect and protect fundamental human rights. At the same time, it highlighted the need for legal and

policy reforms and other action, both at the domestic and international levels, in order for the conditions of indigenous peoples to be brought into line with that now-achieved consensus about their rights.

The Declaration, along with the broader international human rights regime of which it is part, requires that States not just subscribe to the articulated rights but they ensure and establish a domestic legal order in which the rights are respected protected and fulfilled. The Declaration requires that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration" (art. 38). This general mandate is further elaborated on in other provisions, with specific affirmative measures required from States in connection with almost all the rights affirmed in the Declaration.

Participants in the expert group meeting can no doubt give numerous examples of situations in which the rights of indigenous peoples as expressed in the Declaration are not being respected and in which there is an absence of domestic legal protections of the kind called for by the Declaration. In many, if not most cases, the infringement of indigenous peoples' rights and the absence of adequate protection for those rights are systemic within the States in which they live.

In my work during two terms as the United Nations Human Rights Council's Special Rapporteur on the rights of indigenous peoples, I came across numerous situations, in numerous countries, in which the conditions of indigenous peoples and the relevant domestic legal and policy regimes were far from what the Declaration aspires to establish. I was confronted by many instances of infringements of indigenous peoples rights in relation to lands and resources, especially in the context of extractive industries.[1] A persistent problem I found was the absence of domestic legal protections for those rights and, in many cases, the existence of legislation and regulatory practices that were inconsistent with those rights.

[1] See A/HRC/18/35, paras. 22-80.

In my last report to the General Assembly in my capacity as Special Rapporteur, I expressed fear "that the wide gap between the rights mentioned in the Declaration and its effective implementation will persist, leading to a certain complacency and acceptance of that condition by dominant actors and within the United Nations system." As I emphatically cautioned, "this cannot be allowed to happen."[2]

3. Is a new optional protocol mechanism needed?

The insufficiency of existing mechanisms

It is clear that the proposal for an optional protocol rests on the view that the capacities of the current system of international mechanisms that are relevant to indigenous peoples fall short of what is needed at the international level to bridge the implementation gap. Three United Nations mechanisms exist with mandates specific to indigenous peoples, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur on the rights of indigenous peoples. Each of these mechanisms works in one way or another within their respective mandate spheres to advance implementation of the Declaration on the Rights of Indigenous Peoples.

The concept note for this expert group meeting identifies various additional existing mechanisms within the United Nations and regional human rights systems that are relevant to indigenous peoples and that indigenous peoples have used to bring attention to their concerns, including the United Nations treaty bodies, the Human Rights Council's universal periodic review procedure, the African and inter-American human rights institutions, and International Labour Organization (ILO) mechanisms. Even though these other mechanisms do not have mandates that are explicitly linked to the Declaration on the Rights of Indigenous Peoples, they in fact have functioned to varying degrees in recent years to advance rights that are incorporated in the Declaration, in keeping with the broad human rights foundations and interdependent character of those rights.[3]

[2] A/68/317, para. 58.

[3] See S. James Anaya, *The Human Rights of Indigenous Peoples*, in Catarina Krause and Martin Scheinin (eds), International Protection of Human Rights: A Textbook (Turku: Institute for Human Rights, Åbo Akademi University, 2000), pp. 301, 316–328.

Despite important advances made by the existing mechanisms in raising awareness about indigenous peoples' concerns, providing guidance on how to address those concerns and setting important precedents, the implementation gap has persisted. I therefore readily accept and affirm that existing capacities within the international human rights system are insufficient.

Nonetheless, it must be asked whether the best way to address this insufficiency is to create an altogether new mechanism, or whether instead the objectives behind the proposal for an optional protocol can better be met by strengthening and expanding upon the capacities of the existing mechanisms. And if a new mechanism is required, what should its characteristics be?

In this connection, consideration of an optional protocol must be joined with the discussion of an expanded mandate for the Expert Mechanism on the Rights of Indigenous Peoples, a discussion put in motion by the General Assembly when it adopted in September 2014 the outcome document of its high-level plenary meeting known as the World Conference on Indigenous Peoples. In paragraph 28 of the outcome document the General Assembly "invite[s] the Human Rights Council, taking into account the views of indigenous peoples, to review the mandates of its existing mechanisms, in particular the Expert Mechanism on the Rights of Indigenous Peoples … with a view to modifying and improving the Expert Mechanism so that it can more effectively promote respect for the Declaration, including by better assisting Member States to monitor, evaluate and improve the achievement of the ends of the Declaration."[4]

The limited utility of a new complaint procedure under an optional protocol

In my understanding, the proposal for an optional protocol, much as the proposal for expanding the mandate of the Expert Mechanism, focuses on the creation of a new procedure to receive and adjudicate complaints of alleged breaches of indigenous peoples' rights, in particular rights to lands and resources. I am skeptical, however, of the

[4] G.A. Res. 69/2 (2014), para. 28.

utility of yet another complaints mechanism, unless the new mechanism is devised to have features of engagement with States, indigenous peoples and others significantly beyond those of existing complaint procedures.

Before expanding upon what such features might be, I would like to reiterate that a number of complaint procedures connected with United Nations, ILO and regional institutions are already available to indigenous peoples and have been used to adjudicate their complaints, including for violations of rights to lands and resources, in many cases successfully and in keeping with the standards established by the Declaration on the Rights of indigenous Peoples. A deficiency of these procedures is that they are optional or limited to the States that have ratified the relevant treaties. But in its conception the proposed optional protocol relating to the Declaration will be similarly limited.

It should be also noted that the Special Rapporteur on the rights of indigenous peoples has a mandate to examine and communicate on complaints of violations of indigenous peoples' rights. During my two terms as Special Rapporteur, I examined, communicated with government, indigenous peoples, and others, and reported on dozens of cases.[5] In many of these cases I issued detailed observations and recommendations and in several I conducted site visits specifically to investigate the complaints. Most of these cases involved complaints of violations of rights over lands and resources. This work, however, was constrained by the limited support resources available to me, a problem that is common to all existing international human rights mechanisms.

It may be argued that a new complaint mechanism under an optional protocol that is specifically linked to the Declaration on the Rights of Indigenous Peoples would have greater relevant expertise and authority to address indigenous issues than existing treaty-based procedures, and that it could better and more systematically funnel attention to those issues within the framework of the Declaration. Further the new mechanism, which would presumably be constituted by a collegial body of experts rather than a single

[5] See, e.g. Report on observations on communications sent and replies receiver by the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/27/52/Add.4; Communications sent, replies received and observations, 2012-2013, A/HRC/24/41/Add.4.

individual, would have greater resources at its disposal and its decision would carry more weight as compared to the Special Rapporteur.

I find some merit in these arguments. Still, the establishment of a new complaint procedure may produce duplication that is difficult to justify, and the problem of limited resources for the effective functioning of existing mechanisms is not remedied by the creation of a new one.

Moreover, even if adequately resourced, a new complaint mechanism may provide limited added value to the existing system of complaint mechanisms, especially relative to other, potentially more effective types of engagement with relevant actors. This is because a new complaint procedure, with the features of formality typically associated with the denomination of optional protocol, would likely tend toward the same "rights ritualism" that has limited the utility of existing international human rights complaint procedures. As explained in the concept note, the idea of "rights ritualism" as applied in this context refers to formal processes in which States willingly engage and by which they are able to espouse formal adherence to human rights norms without effective local implementation of the norms.

As referenced in the concept note, Professor Hilary Charlesworth has demonstrated how the formal complaint and reporting procedures within international human rights institutions are prone to such rights ritualism. In particular, rights ritualism can be seen throughout the United Nations system of treaty-monitoring bodies. States are parties to treaties and participate in reporting and complaints procedures, but change on the ground is exceedingly slow, even in the face of specific recommendations or findings of rights violations by the treaty-monitoring bodies, unless accompanied by domestic action that exerts influence on local actors.

The same can be said of the regional systems. Indigenous peoples have achieved major victories in several decisions concerning lands and resources by the Inter-American

Commission on Human Rights,[6] the Inter-American Court of Human Rights,[7] and the African Commission on Human and Peoples' Rights.[8] These decisions established significant precedents that the have helped strengthen international standards on indigenous peoples' rights to lands and resources, and the have placed the indigenous peoples involved in the cases on a stronger footing than they were before. Yet almost all of these decisions have still not been implemented after several years.

In my own work as Special Rapporteur under a mandate of the Human Rights Council, I was witness to, and indeed I enabled, a good deal of rights ritualism, especially through the mandate's established procedure for examining complaints. With each of the cases I examined through the procedure, I would transmit the allegations of rights violations in an official letter to the government concerned, laying out the details of the allegations and the relevant provisions of the Declaration on the Rights of Indigenous Peoples and other applicable instruments. In most cases the government would reply through a formal diplomatic note, often with detailed information laying out its version of the facts and human rights responsibilities, but rarely admitting any wrongdoing or committing to doing anything different. Through such exchanges governments were able to portray cooperation with the Human Rights Council's system of special procedures, while usually avoiding immediate substantive changes in behavior.

I became increasingly conscious of such rights ritualism and tried to overcome it by the use of multiple avenues of engagement beyond formal procedures. To be sure, setting forth my inquiries, observations and recommendations in formal documents was an essential component of engagement with the multiple actors concerned as well as with the broader public. I found, however, that my work as Special Rapporteur to advance compliance with international standards in particular cases was most effective when I

[6] E.g., *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002); *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004).

[7] E.g., I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. Series C No. 79; I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, Series C No. 146; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Judgment of June 17, 2005, Series C No. 125; I/A Court H.R., *Case of the Saramaka People. v. Suriname*, Judgment of November 28, 2007 Series C No. 172.

[8] E.g., ACHPR, Case 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (February 2010).

went outside of formal exchanges of views and information and engaged informally with State officials in a problem solving, cooperative manner, especially when I was able to do so to engage local actors.

All this is not to suggest that international complaint procedures are unimportant. To the contrary, they provide avenues for victims of human rights abuses to be heard, with the possibility of at least a moral victory that itself can have significant restorative effects. The decisions that result from complaint procedures can forge important precedents and jurisprudence about the content of rights, as has occurred with the jurisprudence of United Nations and regional bodies on indigenous land and resource rights – although establishing new jurisprudence has become progressively less important with the accumulation of jurisprudence on indigenous rights and the adoption of the Declaration on the Rights of Indigenous Peoples. And no doubt such favorable decisions can be an important factor, although rarely a singular one, in actually bringing about change, as indigenous peoples have experienced on a number of occasions.

By and large, however, experience has shown that something different and more than what a formal international complaint procedure can offer is required to genuinely enhance international capacities to effectively advance implementation of the Declaration.

4. The need for a mechanism that better assists and influences local actors

Necessarily, implementation of the standards of the Declaration requires compliance with those standards by the authorities whose responsibilities bear upon the lives of indigenous peoples. Ultimately, it is those authorities, working at the domestic level within their respective spheres of competency, whose compliant behavior and action are required to bring about implementation. Needed reforms in administrative practices, policies and legislation can only come about by executive and legislative action at the domestic level; and where the exercise of judicial authority bears upon indigenous peoples rights, implementation of the Declaration requires judicial decision making consistent with its terms.

Thus, in order to effectively contribute to bridging the implementation gap, any international mechanism must ultimately have some measure of influence, albeit indirect, on those domestic authorities whose decision-making affects indigenous peoples at the local level. The question is how is that influence best achieved.

The limitations of formal international complaint procedures that we have seen are related to the structure of the broader system of international law, policy and institutions, which strongly favors local decision making on local matters. International human rights law and policy establish norms that are to condition local decision-making, but those norms are generally not susceptible to being imposed by command that runs contrary to locally prevailing preferences.

Professor Harold Koh is at the forefront of a stream of interdisciplinary scholarship that furthers understanding about how nations "obey" international law. That scholarship shows how obedience ordinarily comes from multidimensional processes of norm internalization, validation and application that engage local actors, rather than by command by an external authority.[9]

The foregoing suggests that, to be effective in advancing implementation of the standards of Declaration on the Rights of Indigenous Peoples, international mechanisms must catalyze local dynamics toward local acceptance and application of those standards. Existing international human rights mechanisms are in some ways functioning to that end, but as we have seen they are insufficient and, especially when mired in rights ritualism, are inadequate.

As I explained in my last report to the General Assembly as Special Rapporteur, implementation of the Declaration is impeded by a lack of understanding by government officials operating at the local level and other local actors about the standards of the Declaration and their governance implications. Lack of awareness is compounded by misconceptions – such as the deeply flawed notion that the Declaration somehow privileges indigenous peoples – and these misconceptions can generate resistance to the

[9] See, e.g. Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

recognition of indigenous peoples' rights. Lack of awareness and misconceptions invariably extend to the general public, enabling a political climate of indifference or worse towards indigenous peoples' and their rights. Then there is the sheer complexity of the domestic legal, policy and regulatory reforms that the Declaration calls for, especially in regards to lands and resources.[10]

As I found and repeatedly emphasized during my terms as Special Rapporteur, much more needs to be done to raise public and official awareness at the local level about the rights of indigenous peoples as enshrined in the Declaration, and to orient and assist domestic policy and law makers to generate practices and regulatory regimes that are in keeping with the Declaration. Also needed is support for indigenous peoples at the local level to effectively engage with governments and other actors whose functions bear upon their rights.

In my view, much more so than a new complaint procedure, what are needed in terms of new institutional arrangements is a robust program of awareness raising about indigenous peoples and their rights, aimed at the relevant government officials as well as the general public, along with an effective and well–resourced program of technical advisory services. The latter should be established with the expertise and capacity of engagement to so that it could assist governments and indigenous peoples with the development of needed regulatory reforms and remedies for rights violations, consultations over those reforms and other government action affecting them, and other matters relevant to the effective realization of indigenous peoples' rights.

As least some elements of these programs could be developed within existing international mechanisms and agencies, in many cases building upon existing programs. Or it may be that an entirely new mechanism would best facilitate the development of such initiatives. I will leave the complex discussion about that to another day, or perhaps to further discussion during the expert group meeting.

[10] See A/68/317, paras. 57-80.