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INTERNATIONAL EXPERT GROUP MEETING

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

27-29 January 2015

(1) “Why is an optional protocol required in relation to the Declaration?”, (4) “What are the models to consider for an oversight mechanism? Who would be subject to review and what would the admissibility criteria be?”, and (5) “What are the lessons that can be learned from other mechanisms?”

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1. Introduction; The relationship between an optional protocol and paragraph 28 of the World Conference on Indigenous Peoples outcome document

1.1 When indigenous peoples floated the idea that an oversight mechanism be created to monitor states' achievements in implementing the UN Declaration on the Rights of Indigenous Peoples (the "UNDRIP" or the "Declaration") at the 12th session of the UN Permanent Forum on Indigenous Issues (the "Permanent Forum" or the "Forum"), the "optional protocol" format/term was opted for without exaggerated consideration. From the outset, there was flexibility as to the form and name of the mechanism, as long as it had the mandate to offer views on how to what extent an individual state is in compliance with the rights enshrined in the UNDRIP.

1.2 On 15 September 2014 the UN General Assembly (the "UNGA") adopted the outcome document of the high-level plenary meeting of the General Assembly, also known as the World Conference on Indigenous Peoples (the "WCIP").¹ Paragraph 28 of the WCIP outcome document invites the Human Rights Council (the "HRC") to review the mandate of among other mechanisms the Expert Mechanism on the Rights of Indigenous Peoples (the "EMRIP"). The recommendation is rather broad and open-ended. Notwithstanding, at least from the indigenous point of view, the expectation is that the process that have been initiated through WCIP outcome document paragraph 28 will result in a proposal being presented by the HRC on how the EMRIP can be remodelled into an oversight mechanism for the UNDRIP, with the capacity to assess and monitor the progress individual states have made in meeting the ends of the Declaration.

1.3 Against the backdrop of the fact that a concrete UN process under the auspices of the HRC has now been initiated with the potential of creating an oversight mechanism for the UNDRIP with the capacity to assess and monitor the progress individual states have made in meeting the ends of the Declaration, it appears rather pointless to have a separate discussion on the creation of an optional protocol to the Declaration under the auspices of the Permanent Forum. In this context it should be noted that it was abundantly clear in the WCIP negotiations that (i) the term "optional protocol" is loaded and will not be accepted by many states, and (ii) budget implications imply that there will not be acceptance for creating a new body to oversee the implementation of the Declaration. Rather, should an oversight mechanism be created, it must be achieved through amending the mandate of an existing mechanism, without major budget implications.

1.4 Against the backdrop of the above, this pre-sessional paper addresses a potential amended mandate of the EMRIP which would transform it into an oversight mechanism for the UNDRIP, rather than an optional protocol as such.

2. Theme (1): Why is an oversight mechanism required in relation to the Declaration?

2.1 At the outset, one can note that already at the time of the adoption of the UNDRIP, the need for a mechanism which could assess progress made in implementing the Declaration was foreseen. This recognition is reflected in UNDRIP Article 42, which provides that:

¹ A/RES/69/2.

«The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.»

Member States have thus already committed to ensure that the UN system can effectively implement the UNDRIP. That the UN system shall contribute to meeting the ends of the Declaration is further underscored in UNDRIP Article 41.² What remains to do is to identify the mechanism that is best suited to fulfil this mandate.³

2.2 Soon, a decade will have passed since the UNDRIP was adopted. As time passes, states, indigenous peoples, and international legal experts within and outside the UN system have increasingly expressed concern that not enough is done to further the implementation of the Declaration. This is clearly reflected in the WCIP outcome document, whose common thread is an aspiration to accelerate the implementation of the rights enshrined in the UNDRIP. (See, in addition to the already mentioned paragraph 28, for instance paragraphs 3, 4, 7, 8, 20, 21, 29 and 31.) This aspect of the WCIP outcome document in turn responds to a frustration among indigenous peoples that not enough is done to implement the Declaration, as expressed in the outcome document of the Global Indigenous Preparatory Conference to the WCIP, also known as the Alta Declaration.⁴ The main message in this document is also a call for increased efforts to realize the rights enshrined in the UNDRIP. Moreover, like the WCIP outcome document, the Alta Declaration identifies the establishment of an UN oversight mechanism to review, monitor, and assess progress made in implementing the UNDRIP at the national level as the most effective means to achieve this end.

2.3 The concerns expressed above have been echoed by previous Special Rapporteur on the Rights of Indigenous Peoples (SRIP), Professor James Anaya. In carrying out his mandate, Anaya conducted many country visits and communicated extensively with indigenous peoples and states. He thereby observed a “lack of knowledge and understanding about the Declaration, the values it represents or the deep-seated issues confronting the indigenous peoples that it addresses”.⁵ According to the SRIP, a crucial task is to raise awareness about the Declaration among government actors and others. In particular, the SRIP notes that continued reference to the UNDRIP as “non-binding or merely aspirational” accords the Declaration a “diminished status” and rationalizes “a diminished commitment to its terms”.⁶ The SRIP elaborates that to simply say that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if they are called “declarations”, a denomination usually reserved for standard-setting resolutions of profound significance.⁷

² In this context, see also UNDRIP preambular paragraph 20.

³ In this context, one should not be too pre-occupied with the explicit reference to the Permanent Forum in UNDRIP Article 42, as EMRIP did not exist at the time of the adoption of the Declaration.

⁴ A/67/994, annex.

⁵ A/68/317, para. 78.

⁶ *Ibid.*, para. 60.

⁷ *Ibid.*, para. 61.

2.4 The WCIP outcome document, the Alta Declaration, and the observations by the SRIP among many others bears witness of that several years after its adoption, way too little has been accomplished when it comes to implementing the UNDRIP. It is thus evident that existing UN mechanisms lack the capacity to effectively contribute to a realization of the rights contained in the UNDRIP, and thereby fail to fulfil the commitment made in its Articles 41 and 42. James Anaya was probably as effective as a SRIP can be. Notwithstanding, his own reports are evidence of that the SRIP mandate can nonetheless only to a limited extent contribute to the effective implementation of the UNDRIP. Neither can this role be effectively carried out by the Permanent Forum. Human rights are only one of the Forum's six mandate areas, so only a few of the Forum's members may be experts on human rights. The majority should be experts within other fields. In addition, the Permanent Forum is a somewhat "politicized" body, as its experts are nominated by states and indigenous peoples, rather than being selected in accordance with the procedures established in HRC Resolution 5/1, paragraphs 39-53. Also, the primary objective of the Permanent Forum is to provide guidance to the rest of the UN system on indigenous issues, and not to monitor what is done to implement the UNDRIP at the national level, something that has become abundantly clear on the few occasions when the Forum has endeavored to address country specific situations. Indeed, the fact that the Permanent Forum at its 13th session presented a study on an optional protocol to the UNDRIP⁸, and decided to devote this Expert Meeting to that issue, in itself underlines a recognition within the Forum that it and the other existing mechanisms cannot adequately contribute to the implementation of the rights enshrined in the Declaration. Neither can the EMRIP fulfil this role, under its current mandate, which is to provide thematic expertise to the HRC in the form of studies and research-based advise⁹, and not to monitor what is done to implement the UNDRIP at the national level.

2.5 The above points to a considerable gap in the UN system's efforts to effectively implement the UNDRIP. What remain to do is to identify how to best fill this gap. In doing so, one can note that when it comes to implementing the UNDRIP, most progress has arguably been made in relation to the land and natural resource rights. One major factor behind this development is presumably that property rights lend themselves well to adjudication. In other words, in instances of dispute, indigenous peoples and states can turn to a third, objective, party, to get clarification as to the scope and content of the right in question.

2.6 The added value of having a third objective party offering its opinion in cases where views among states and others differ as to whether human rights have been properly interpreted and implemented is also reflected in the fact that it is standard practice to establish such bodies to oversee State Party implementation of rights enshrined in the major human rights treaties. Naturally, a mechanism established to further the realization of the rights contained in the UNDRIP will by definition not be a treaty body. But that is not the point here. What is relevant in this context is that the treaty body practice bears witness of a general recognition that the most effective way to promote the effective implementation of human rights is the establishment of a third independent party that can offer country specific observations as to how well that country has succeeded in implementing human rights it has committed to respect and promote. As states have committed to further the rights enshrined in the UNDRIP, most recently in multiple

⁸ See E/C.19/2014/7. This pre-sessional paper in part draws from the Permanent Forum's own study on an optional protocol, authored by Forum members Megan Davis and Dalee Sambo Dorough.

⁹ HRC Resolution 6/36, para. 1 (a).

provisions in the WCIP outcome document, an independent expert body to oversee the assess and monitor progress made in implementing the rights contained in the Declaration should be established.

2.7 In sum, the most efficient way for states to live up to the commitment they have made in UNDRIP Articles 41 and 42 is to establish a UN body consisting of independent experts, to monitor and assess progress made in implementing the UNDRIP, at the national level.

3. Theme (5): What are the lessons that can be learned from other mechanisms?

3.1 As mentioned, it is standard practice to establish oversight mechanisms for human right treaties, but that is not to say that such mechanisms are necessarily reserved for human rights conventions. There are precedents of various forms of oversight mechanisms being established to monitor compliance with formally non-legally binding instruments.

3.2 For instance, the Economic and Social Council instituted the communication procedure of the Commission on the Status of Women long before the adoption of the Convention on the Elimination of All Forms of Discrimination against Women,¹⁰ and the subsequent establishment of the Committee on the Elimination of Discrimination against Women. Also the predecessor to the HRC, the Commission on Human Rights, instituted a number of mechanisms for the purposes of advancing human rights. As one example of a non-treaty-based oversight mechanism that the Commission on Human Rights established, reference can be made to the Working Group on Arbitrary Detention.¹¹ The mandate of this Working Group, whose mandate has been extended by the HRC,¹² is to consider individual complaints based on a number of articles of the Universal Declaration of Human Rights. As yet another example of an oversight mechanism instituted by the Commission on Human Rights, one can mention the Working Group on Enforced or Involuntary Disappearances.¹³

3.3 The most recent, and perhaps for the present purposes most interesting, example of an oversight mechanism established to monitor compliance with a formally non-legally binding instrument is the reporting and monitoring mechanism established under the auspices of the UN Forum on Forests (UNFF). At its 7th session in 2007, the UNFF adopted the Non-Legally Binding Instrument on All Types of Forests (the Forest Instrument). Since then, one key task of the UNFF has been to monitor and assess progress made in implementing the Forest Instrument at the national level. This monitoring is based on recognition that the successful implementation of the Forest Instrument requires national reporting by countries to help assess progress, identify needs, and promote a more effective sharing of experiences and best practices. For these purposes, the UNFF Secretariat has developed a streamlined reporting format to ensure simple and accurate voluntary national reporting to the UNFF focusing on implementation of the Forest Instrument.¹⁴

¹⁰ Res. E/76 (V).

¹¹ Res. 1991/42.

¹² Res. 6/4 and subsequent resolutions.

¹³ Res. 20 (XXXVI).

¹⁴ UNFF9 Omnibus Resolution Item 3, para. 1.

3.4 As seen, the monitoring and assessing mechanisms referred to above take many forms and variations. Some of them may differ somewhat in composition, mandate, and structure compared with the oversight mechanism for the UNDRIP which would be created through a revision of EMRIP's mandate in accordance with WCIP outcome document paragraph 28. But that is hardly the point. What is relevant here is (i) that the UN system is at present not doing enough to meeting its commitment to implement the UNDRIP wherefore some form of oversight mechanism to further that end must and should be established, (ii) that it is no way a novelty to establish an oversight mechanism for a formally non-legally binding instrument, and (iii) when deciding on establishing an oversight mechanism for assessing and monitoring efforts to implement the Declaration at the national level, one should naturally opt for the most efficient such body. In doing so, one should bear the SRIP's observation in mind that the distinction between «binding» and «non-binding» international legal instruments is not as clear cut as is sometimes portrayed. Therefore, it is reasonable – although it is crystal clear that the oversight mechanism for the EMRIP will by definition not be a treaty body - to nonetheless allow oneself to be guided by the structure, composition, and mandate of the oversight mechanisms that assess and monitor compliance with the major human rights treaties, as these are generally held to be the most effective means to further the realization of human rights.

4. Theme (4): What are the models to consider for an oversight mechanism? Who would be subject to review and what would the admissibility criteria be?

Mandate and working methods

4.1 The above has concluded that the most efficient way to enhance implementation of human rights is an oversight mechanism that is mandated to receive country specific information and allowed to offer objective advice as to how well the country in question is doing when it comes to upholding human rights. EMRIP's mandate should be amended accordingly. EMRIP should be allowed to receive information from indigenous peoples, their representative, institutions, communities, individuals, and organizations, as well as from states, on progress made in implementing the rights enshrined in the UNDRIP, at the national level. Based on the information received, EMRIP should assess and monitor to what extent such progress has been made.

4.2 EMRIP should act upon communications by indigenous peoples. EMRIP's conclusions should be conveyed through country specific reports, after having received information from both the state and the indigenous people. In addition, having addressed potential violations of the same right enshrined in the UNDRIP, EMRIP should issue general observations on that right. In addition, Member States that recognize the competence of the Expert Mechanism also undertake to submit reports to the Expert Mechanism on progress made in achieving the ends of the Declaration, on a regular basis; the Expert Mechanism shall study the reports submitted by the Member State and transmit to the Member State any such comments as it may consider appropriate in response to the report. The regular reporting requirement can be said to respond one part of the mandate that got lost when EMRIP replaced the previous Working Group on Indigenous Populations (the "WGIP"). In addition to engaging in standard-setting, the WGIP was mandated to "review developments pertaining to the promotion and protection of human

rights and fundamental freedoms of indigenous peoples”.¹⁵ Clearly, it will greatly assist EMRIP to review, assess, and monitor progress made in promoting and protecting the human rights and fundamental freedoms of indigenous peoples as enshrined in the UNDRIP if states report regularly on efforts made to further the rights contained in the Declaration.

4.3 EMRIP should no longer produce any thematic reports of the present kind.

Monitoring should occur only on a voluntary basis

4.4 States participation in the reporting procedure should be voluntary. States lending themselves to EMRIP’s monitoring should be optional. They must not be compelled to engage. Cooperation and partnership should define the work of EMRIP. In its work, the EMRIP should strive towards a proactive process that would prompt attention and, eventually, dialogue and negotiations by the parties concerned rather than take a punitive approach. EMRIP should provide an informal, voluntary process or pathway for parties to resolve disagreements in a cooperative environment in order to reach a mutually acceptable resolution. The outcomes should ultimately ensure implementation of the right enshrined in the Declaration and further protect and promote the rights of indigenous peoples. This approach gives participants greater control over the outcomes and is more likely to lead to successful and sustainable solutions.

Admissibility

4.5 Indigenous peoples, their representative institutions, communities, individuals, and organizations, as well as states, should be allowed to file communications with the EMRIP. Given the voluntary nature of the reporting system, only indigenous peoples recognized as such by states, as well as communities and individuals belonging to and organizations representing the people, should be allowed to file communications.

All available domestic remedies must have been exhausted before a communication is submitted to the EMRIP.

The communication must be filed within six month following the exhaustion of all available domestic remedies.

The communication must contain an arguable claim of a violation of one or more rights enshrined in the UNDRIP, i.e. the communicator must make it likely that a human rights violation has indeed occurred.

4.6 In addition to the more formal admissibility criteria outlined above, it is clear that the EMRIP will have to employ a somewhat more informal screening process in order to maintain a reasonable workload. (As is outlined below, it is not realistic to heavily expand upon EMRIP’s present resources.) EMRIP should therefore be allowed to deem inadmissible communications that do not contain an allegation of a serious human right violation, and that do not concern a principally important issue. Allegations of structural or systematic human rights violations should be prioritized, as well as violations of core rights such as the right to self-determination

¹⁵ Economic and Social Council Res. 1982/34.

and land and natural resource rights. As mentioned, to further manage its workload, EMRIP could also establish a praxis, drawing from UN treaty bodies, where it adopts General Observations after having considered a number of country specific communications addressing similar concerns.

Composition, meetings, and meeting calendar

4.7 The number of members of EMRIP can continuously be five. However, as the mandate of EMRIP is amended, the selection criteria for the members need to be amended as well. As the explicit mandate of the new body is to monitor and assess the situation on the ground against the backdrop of the rights enshrined in the UNDRIP, the members of the new mechanism should have documented knowledge of international human rights law, preferably with a particular insight into indigenous peoples' rights. Being of indigenous origin need not be a merit. To ensure the quality of membership of the EMRIP, as well as to elevate the status of the body, it might be advisable to render the at any given time sitting Presidents of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination "born" and permanent members of the EMRIP, wherefore only three additional experts need to be appointed.

4.8 At present, EMRIP meets for five working days each year. The amended mandate of the EMRIP will presumably increase the workload of the body. This argues for that EMRIP's annual working days should be increased. However, due to budget implications, it is unlikely that a serious increase in meeting days will be accepted. Still, it is reasonable that EMRIP be allowed to meet for six days each year. To ensure that it will not take unreasonable time for EMRIP to respond to communications and state reports, EMRIP should hold two tree-day sessions each year. To guarantee that communications are addressed within reasonable time, EMRIP should further be provided with a permanent full-time secretary, who can acknowledge receipt of communications and state reports and forward these to the EMRIP members in preparation of the meetings.

4.9 The fact that EMRIP is transformed into a more treaty body similar mechanism means that it will not hold sessions in the way it presently does. EMRIP's dialogue with Member States and indigenous peoples should still as a general rule be open to observers, who may even be allowed to engage in the dialogue, at EMRIP's discretion. Upon request by either the Member State under review or the communicator, however, EMRIP's meeting should be closed.

[Annex]

Human Rights Council Resolution XX/XX, Expert Mechanism on the Rights of Indigenous Peoples

The Human Rights Council,

Bearing in mind paragraph 6 of General Assembly resolution 60/251 of 15 March 2006, and paragraph 84 of the annex to Human Rights Council resolution 5/1 of 18 June 2007,

Recalling that, at its sixty-first session, the General Assembly adopted in its resolution 61/295 of 13 September 2007 the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter “the Declaration”),

Bearing in mind Human Rights Council resolution 6/16 of 28 September 2007,

Also bearing in mind Human Rights Council resolution 6/36 of 14 December 2007,

Recalling in particular, that at its sixty-ninth session, the General Assembly adopted its resolution 69/2 of 15 September 2014, where it invites the Human Rights Council to review the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (hereinafter “the Expert Mechanism”), 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 achievements of the ends of the Declaration,

Considering, that in order to achieve the purposes of the Declaration and the implementation of its provisions it would be appropriate to enable the Expert Mechanism to receive and consider communications from Member States as well as from indigenous peoples, their representative institutions, communities, individuals, and organizations for the purposes of assisting Member States to monitor, evaluate, and improve the achievements of the ends of the rights set forth in the Declaration,

1. *Decides* to modify and improve the mandate of the Expert Mechanism so that it can more effectively promote respect for the Declaration;

(a) A Member State may recognize the competence of the Expert Mechanism to receive and consider communications from indigenous peoples, their representative institutions, communities, individuals, and organizations, who wish to submit information to the Expert Mechanism as to progress made by the Member State in achieving the ends of the Declaration; no communication shall be received by the Expert Mechanism if it concerns a Member State which has not explicitly recognized this competence of the Expert Mechanism, nor shall the

Expert Mechanism receive communications from an indigenous people or its representative institution, or from groups, individuals, or organizations that are member of or represent that people if the Member State does not recognize the population as an indigenous people with the capacity to file communications with the Expert Mechanism; Member States that recognize the competence of the Expert Mechanism also undertake to submit reports to the Expert Mechanism on progress made in achieving the ends of the Declaration; the first such report shall be submitted within one year following the Member State's recognition of the competence of the Expert Mechanism and thereafter every fourth year; the Expert Mechanism shall study the reports submitted by the Member State and transmit to the Member State any such comments as it may consider appropriate in response to the report;

(b) Indigenous peoples, their representative institutions, communities, individuals, and organizations who allege that one or more rights enshrined in the Declaration have been violated may submit a written communication to the Expert Mechanism for its consideration provided that all available domestic remedies have been exhausted and that the communication is submitted within six months following the exhaustion of all available domestic remedies;

(c) The Expert Mechanism shall bring any communication submitted to it to the attention of the concerned Member State and provide the Member State the opportunity to comment upon the communication;

(d) The Expert Mechanism shall consider communications received in the light of all written information made available to it by the communicator and by the Member State concerned; in its work, the Expert Mechanism should contribute to dialogue between the Member State and the communicator, assisting them to resolve disagreements in a cooperative environment, in order to find partnership and consensus solutions amicable to both sides, and should avoid taking a punitive approach; the Expert Mechanism shall forward its views to the Member State concerned and to the communicator;

(e) The Expert Mechanism shall hold inadmissible a communication which is anonymous, or which it considers to be incompatible with the provisions of the Declaration, or that does not contain an arguable claim of a violation of one or more rights enshrined in the Declaration;

(f) The Expert Mechanism may hold inadmissible communications that address issues that lack principal importance and that only contain allegations of minor violation of one or more rights enshrined in the Declaration;

(g) The Expert Mechanism may, having repeatedly issued its view on the same provision in the Declaration, summarize its conclusions in a General Observation on that provision;

2. *Also decides* that the Expert Mechanism shall consist of five independent experts, whereof one shall be the President of the Human Rights Committee, one the President of the Committee on the Elimination of Racial Discrimination, and the other three be selected in accordance with the procedures established in paragraphs 39 to 53 of the annex to Council resolution 5/1;

3. *Further decides* that the members selected in accordance with the procedures established in paragraphs 39 to 53 of the annex to Council resolution 5/1 shall serve for a three-year period and may be re-elected for one additional period;

4. *Decides* that, within its mandate, the Expert Mechanism should determine its own methods of work, although the Expert Mechanism shall not adopt resolutions;

5. *Also decides* that the Expert Mechanism shall meet twice annually, for in total up to six days;

6. *Further decides* that the meetings of the Expert Mechanism shall be open to the participation, as observers, of States, United Nations mechanisms, bodies, and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant national bodies, academics and experts on indigenous issues, non-governmental organizations in consultative status with the Economic and Social Council; the meeting shall also be open to indigenous peoples' representative institutions as well as to indigenous organizations whose aim and purpose are in conformity with the spirit, purposes and principles of the Charter of the United Nations, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the rules of procedure of the Human Rights Council, which will provide for the timely information on participation and consultation with States concerned; upon request by either the Member State whose progress in achieving the end of the Declaration is being assessed and monitored, or the communicator, the Expert Mechanism's meeting should be closed;

7. *Requests* the Secretary-General and the United Nations High Commissioner for Human Rights to provide all the necessary human, technical, and financial assistance to the Expert Mechanism for the effective fulfillment of its mandate.

[adopted without a vote]

XXth meeting

XX June 2015

