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**Expert Group Meeting**

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

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**Submission of Suhas Chakma<sup>1</sup>**

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## **I. Executive summary**

The establishment of a new “oversight mechanism” in the United Nations requires clarity of purpose and scope of application. In addition to explaining the same, this paper also provides specific suggestions on the establishments of an oversight mechanism on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

### ***Clarity of purpose:***

Whether the proposed oversight mechanism is to be mandated to monitor implementation of the UNDRIP by the States or to adjudicate individual complaints above the national justice system against breaches of the selective issues of the UNDRIP, or both, is not clear. The questionnaire uses the words “complaints body” and “review”.

If the purpose of establishing complaints body is to adjudicate breaches of the UNDRIP akin to consideration of individual complaints by the UN Treaty Bodies, there is no escape from the rigours of enacting a new treaty by the UN.

Though the analogy is inappropriate as the UNDRIP is not a treaty, it is pertinent to mention that the UN Committee Against Torture was mandated to review implementation of the UNCAT by the State parties<sup>2</sup>, undertake country visit to inquire into systematic practice of torture in the territory of the State party,<sup>3</sup> and adjudicate on ‘individual communications’<sup>4</sup>. Yet, the UN had to adopt an Optional Protocol to the UNCAT “to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment” i.e. the Sub-Committee on Prevention of Torture. A legally binding treaty appears to be the minimum requirement to accept the competence/jurisdiction of an oversight body.

### ***Scope of application:***

The scope of any oversight mechanism should be on the entire human rights instrument i.e. UNDRIP in this case. However, both the study and Concept Note are replete with references to three elective issues i.e. “in particular for claims and breaches of indigenous

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<sup>2</sup>. Article 19 of the UNCAT.

<sup>3</sup>. Article 20 of the UNCAT.

<sup>4</sup>. Article 22 of the UNCAT.

peoples' rights to lands, territories and resources at the domestic level". Considering that these three issues are the most contentious issues of the Declaration having direct bearing on national politics of majority countries and on which jurisprudence either does not exist or extremely conservative/restrictive, prioritisation of these issues does not serve the intended purpose. It may discourage many member States including those who espouse the UNDRIP.

***Suggestions on the establishments of an oversight mechanism on the UNDRIP:***

***1. A Convention on the Rights of Indigenous Peoples***

If there is indeed no shortcut or escape from the rigours of enacting a new treaty by the UN to establish an oversight mechanism, either Experts Mechanism on the Rights of Indigenous Peoples (EMRIP) or the Permanent Forum on Indigenous Peoples (PFII) can be authorised to draft a "Convention on the Rights of Indigenous Peoples". The Treaty Body for this proposed Convention can monitor implementation of the same and adjudicate breaches<sup>5</sup>, if so authorised.

***2. Possibilities of the existing mechanisms relating to indigenous peoples for monitoring implementation of the UNDRIP and adjudication of breaches***

If the prevailing situation in the United Nations is not conducive for starting the process of drafting a "Convention on the Rights of Indigenous Peoples" or if such a Convention drafting process were to mean weakening the UNDRIP, the question remains whether there is any possibility to monitor implementation of the UNDRIP and to adjudicate complaints of breaches of the UNDRIP by the existing mechanisms relating to indigenous peoples without going through the rigours of enacting a treaty by the UN.

This author is of the considered opinion that the same remains within the realms of possibility, not necessarily with the same legal force as that of a treaty, by all the existing mechanisms relating to indigenous peoples together, without any exclusive preference for any of the mechanisms.

The following suggestions may be considered:

***i. Monitoring implementation of the UNDRIP***

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<sup>5</sup>. Please note that all the UN Treaty Bodies are not authorised to adjudicate individual complaints.

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With respect to monitoring implementation of the UNDRIP, the following suggestions may be considered:

SR on IPs: When the Special Rapporteur on the Rights of Indigenous Peoples undertakes a country visit, the country report should be prepared assessing implementation of the UNDRIP (article-wise or group of articles taken together). There is no prohibition to prepare the report in such a format. The previous reports of the Special Rapporteur on country visit to Canada, Panama and Peru were excellent but did not directly or specifically review implementation of the UNDRIP by these States. The current Special Rapporteur can explore the possibilities to review implementation of the UNDRIP during her country visit starting with the forthcoming visit to Paraguay.

PFII: The Permanent Forum on Indigenous Issues (PFII) can amend its agenda to include interactive dialogue with the States on the implementation of the UNDRIP in their respective countries during its Annual Sessions. The States which are supposed to voluntarily accept the jurisdiction of a complaint body should be inclined to participate in such a dialogue.

EMRIP The EMRIP like the PFII can amend its agenda, subject to approval by the UN Human Rights Council, to include interactive dialogue with the States on the implementation of the UNDRIP in their respective countries. The States which are supposed to voluntarily accept the jurisdiction of a complaint body should be inclined to participate in such a dialogue.

The PFII and EMRIP can coordinate to work out modalities of such a review, periodicity of such a review and avoidance of duplication.

**ii. Complaints body to consider breaches of the UNDRIP**

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SR on IPs:

The mandates of the Special Rapporteurs which can receive complaints are the most interesting. The SRs have no legal restrictions to intervene including on any specific complaint including those pending before the national judiciary or those which have been already decided by the highest national court, provided the decisions of the national Courts, *inter alia*, are not in conformity with the international human rights law. For example, it is not uncommon for the SRs or the UN High Commissioner for Human Rights to censure the national courts for criminalizing sexual orientation. The opinion of the SRs can be detailed.

The importance of the observations of the SRs on specific cases shall be no less important than the Concluding Observations of the Treaty Bodies, which are recommendatory too. The Rapporteurs can also follow up the recommendations made more frequently than the Treaty Bodies.

These suggestions may be considered keeping in mind that the number of States accepting the jurisdiction of the UN Treaty Bodies on individual complaints and actually implementing the decisions of the Treaty Bodies, remain extremely limited.

PFII & EMRIP:

The resolutions mandating PFII does not restrict the Permanent Forum to issue communiqué/statement either to welcome any positive initiative by the States relating to the UNDRIP or to express concern against, prima-facie or ex-facie, breach of the UNDRIP throughout the year. Within this framework, the PFII should be able to express its opinion in emblematic cases too. This shall require necessary innovation in the working methods and decision making processes.

## II. Submissions with respect to the questions raised in the Concept Note

### 1) Why is an optional protocol required in relation to the UN Declaration? Is there an implementation gap?

1.1 Even if the answers were to be in affirmative, the question shall still be whether existing rules of procedures or practices of the UN allow adoption of an optional protocol to a Declaration.

1.2 At present, adoption of an Optional Protocol to any declaration, both for further elaboration of the said Declaration or creating a monitoring mechanism of the same, is unheard of in the UN system or in the system of any other regional inter-governmental organisation. The normative interpretation of international law that a Declaration is morally binding and a convention/treaty is legally binding cannot be overlooked in the pursuit of building the case that the UNDRIP is legally binding and therefore justifies an Optional Protocol for an oversight mechanism, and/or to upgrade the “diminished status” of the Declaration because of the continued reference to it as “non-binding or merely aspirational”.<sup>6</sup> There is no doubt that many Declarations including the UNDRIP have been made legally binding by enacting specific domestic law to give its effect at national level and/or “reliance” placed on such Declarations in the jurisprudence of many national courts and regional human rights mechanisms. However, the distinction between what is legally binding (treaty/convention) and what is morally binding (declaration) for the purpose of ensuring compliance of the member States of the UN cannot be ignored.

1.3 That “at least certain provisions of it (UNDRIP) constitute general principles of international law and customary international law norms or peremptory norms” may not necessarily make a compelling case for adoption of an optional protocol to establish an oversight mechanism without going through the rigours of enacting a Treaty. This statement equally implies that certain principles may not “constitute general principles of international law and customary international law norms or peremptory norms” and an oversight body is to be established for the entire Declaration rather than certain selected provisions.

1.4 The idea of an optional protocol to the UNDRIP as “*a voluntary or optional mechanism to serve as a complaints body*” appears alluring but certainly not convincing, among others, because of the following:

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<sup>6</sup>. Report of the UN Special Rapporteur on the Rights of Indigenous Peoples to the General Assembly, A/68/317 dated 14 August 2012.

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First, whenever a State ratifies a treaty/convention and accepts the legal obligation under the said Treaty including adjudication of individual complaints by the concerned UN Treaty Body, it does so voluntarily.

Second, the voluntary or optional nature of the proposed mechanism shall be limiting the application of the UNDRIP worldwide. How many States will voluntarily accept a “complaints body” is a matter of conjecture but the opinion/position of the member States on the UNDRIP is certainly not encouraging. Therefore, the question about the usefulness of such a complaint’s body, if the number of countries which shall accept voluntarily the jurisdiction and competence of such a “complaints body” were to remain extremely low, ought to be considered. If the negative position of the member States on the UNDRIP is to be read with selective emphasis on “lands, territories and resources”, the most contentious issues of the UNDRIP and national politics of many countries and on which there are no strong jurisprudence, it may appear that the proposed complaints body is “dead on arrival”. The idea of an optional protocol for the entire UNDRIP shall be hard to sell; the idea of an optional protocol to adjudicate breaches of “rights to lands, territories and resources” is unlikely to find any buyer.

- 1.5 An optional protocol to the UNDRIP to establish a complaints body may not ignore its possible implications in the UN system including on the UN Declaration on the Rights of Minorities and the UN Declaration on Human Rights Defenders.

## **2) What are the limitations of the current international human rights law system in regard to monitoring of rights? Does it encourage ‘rights ritualism’?**

2.1 The limitations of the international human rights law system are well-known at least to those participating in this Experts Seminar.

2.2 “Rights ritualism” is antithetical to the idea of a new complaints body. It is an academic perception, not necessarily true reflection of the experiences of human rights practitioners on the ground. The progress in standard setting on human rights by the UN and realisation of the same are incremental, and the impact of the UN mechanisms on national constitutions, national laws,

jurisprudence and public policies relating to human rights are too enormous and significant to be dismissed as “rights ritualism”.

**3) What are some of the problems with the implementation of the UN Declaration pertaining to lands, territories and resources?**

3.1 Focusing only on the implementation of the UN Declaration pertaining to lands, territories and resources is self-defeating. There is a need for inclusive approach, and the prioritisation of certain rights over the others in the UNDRIP ought to be ignored if one were to be serious about a new mechanism or improvement of existing mechanisms, voluntary or otherwise.

**4) What are the models to consider for an oversight mechanism? Who would be subject to review and what would the admissibility requirements be?**

4.1 The concept note prepared by the Secretariat of the PFII provides an overview of the UN and regional oversight mechanisms. It amply makes clear that there is indeed no model for an oversight mechanism for a Declaration at the UN or regional level, much less about certain provisions of the UNDRIP such as “rights to lands, territories and resources at the domestic level”.

4.2 The question of admissibility without any further details about the oversight mechanism appears abstract and at this stage, premature and preposterous.

**5) What are the lessons that can be learned from other mechanisms?**

5.1 Please refer to serial no. ii(4).

**6) Is there any existing UN body that could do the work of an oversight body?**

As stated at the outset, the clarity of purpose/mandate of an oversight body is indispensable. At present, there is no UN body specifically mandated either to review and monitor implementation of the UNDRIP or to adjudicate complaints against breaches of the UNDRIP.

The mandate given to “the United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level” to promote respect for and full application of the UNDRIP and follow up the effectiveness of this Declaration under Article 42 of the UNDRIP does not necessarily include the power to monitor/review implementation of the UNDRIP and adjudicate complaints of breaches of



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the UNDRIP. The UN Human Rights Council while establishing the Experts Mechanism on the Rights of Indigenous Peoples did not even include any reference to Article 42 of the UNDRIP. Paragraph 28 of the Outcome Document adopted at the high level plenary meeting (World Conference on Indigenous Peoples) essentially seeks to address this serious lapse, even though a cursory reading of Article 42 of the UNDRIP makes it clear that EMRIP as a UN body already has the requisite mandate.**[Ends]**