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March 14, 2016

## **Designing an Expert Body to Implement and Monitor the United Nations Declaration on the Rights of Indigenous Peoples**

*Written contribution to inform the OHCHR Expert Workshop on the Review of the Mandate of the Expert Mechanism on the Rights of Indigenous Peoples, April 4-5, 2016*

SUBMITTED BY THE ALLIANCE OF TRIBAL COALITIONS TO END VIOLENCE, CITIZEN POTAWATOMI NATION, CONFEDERATION OF SOVEREIGN NANTICOKE-LENAPE TRIBES (INCLUDING THE NANTICOKE LENNI-LENAPE TRIBAL NATION, THE LENAPE TRIBE OF DELAWARE, AND THE NANTICOKE INDIAN TRIBE), INDIAN LAW RESOURCE CENTER, MASHANTUCKET PEQUOT TRIBAL NATION, METIS NATION, SOUTHWEST INDIGENOUS WOMEN'S COALITION, ST. REGIS MOHAWK TRIBAL COUNCIL, STRONG HEARTED NATIVE WOMEN'S COALITION, INC., TONAWANDA SENECA NATION, UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND, AND THE WOMENSPIRIT COALITION

### **1. What are the most valuable aspects of the current mandate of the Expert Mechanism on the Rights of Indigenous Peoples?**

As a subsidiary body of the Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples is mandated to provide the Council with thematic expertise on the rights of indigenous peoples. This expertise, however, is provided only in the manner and form requested by the Council, generally only through the production of studies and research-based advice to the Council. These studies are not widely circulated or distributed to member states or relevant UN bodies, and they lack the necessary follow-up procedures to ensure any significant implementation of their findings. The Expert Mechanism also lacks coordination with other UN bodies and entities involved in human rights promotion and protection, including the treaty bodies and the special procedures of the Human Rights Council, and does not participate in the annual meeting of mandate holders.

As the mandate is currently formulated, the Expert Mechanism does not have the ability to seek information on its own accord nor to undertake studies on its own initiative. It does not have the authority to offer advice or suggestions to the Council unless it is within the scope of

work as set out by the Council. However, a valuable aspect of the Expert Mechanism is the participation of member states and indigenous peoples' organizations, among others, in its annual sessions. The method of work enables the direct participation of indigenous peoples' representatives in the annual sessions as well as direct communications and information-sharing with the Expert Mechanism and among indigenous peoples' representatives and member states.

## **2. How can the Expert Mechanism's role in assisting States to monitor, evaluate, and improve the achievement of the ends of the Declaration be strengthened?**

The Expert Mechanism does not now have any role or mandate to assist States except where it may be included as part of a request from the Human Rights Council.

It is generally understood that human rights instruments like the United Nations Declaration on the Rights of Indigenous Peoples have little effect unless there are steps taken to monitor and implement their provisions. An improved and strengthened mandate for the Expert Mechanism is necessary for promoting compliance with the Declaration and realizing the rights of indigenous peoples. To be more effective and ready to assist states to monitor, evaluate, and improve the achievement of the ends of the Declaration, the mandate of the Expert Mechanism will need to be significantly broadened, and as a natural result, its composition and working methods should be reformed.

As it currently exists, the Expert Mechanism's limited mandate does not allow for any coordination with, or assistance to, states unless specifically requested by the Council. Even so, the reformed body must be able to do more than assist individual states or develop state-specific reports and advice. At minimum, the mandate of the reformed body must be strengthened to enable it to receive information and prepare reports with recommendations for actions by relevant actors such as states and the Human Rights Council, regarding respect for promotion of rights in the Declaration. The body should be strengthened to enable it to invite, gather, seek, receive, and consider information from all sources including states, indigenous peoples, United Nations bodies and agencies, and non-governmental organizations about developments relating to the rights in the Declaration, and to encourage states and indigenous peoples to work cooperatively to find solutions to issues. The body should be relieved of its duty to provide thematic studies at the request of the Human Rights Council, but it should have the authority to conduct studies on its own initiative and in response to information received from states, indigenous peoples, or other relevant parties, and to conduct country visits. The body should also be able to provide expert advice and recommendations to states regarding the development of domestic legislation and policies relating to the rights of indigenous peoples.

There is also a strong need to further promote and implement the Declaration at the international level. The body should be able to take note of and make reports on recurring or global problems, such as the need for indigenous land demarcation and titling processes. The body must work at all levels to encourage states, international agencies, businesses, and others to carry out their human rights obligations concerning indigenous peoples, in accordance with Article 42 of the Declaration. In this respect, the body should have the authority to issue general observations or comments to address widespread or systemic issues. Such general observations and comments would provide states, international agencies, businesses, and indigenous peoples

with expert views and analysis of the Declaration and discussions of possible means for achieving its objectives at both the national and global levels. These general observations would, among other things, share information and best practices and propose solutions to global problems affecting indigenous rights. Authority to issue general observations should include the review of new developments regarding indigenous peoples' rights. The new mandate should include the authority to issue interpretations of the Declaration as well as opinions and general guidance about its application.

However, a new or separate reporting requirement for states should not be required or considered. It is not clear that adding another reporting requirement would significantly enhance implementation and compliance with the Declaration.

It is important that the body integrate a gender perspective throughout its work. Consistent with Articles 21 and 22 of the Declaration, the body should pay particular attention to the rights and special needs of indigenous women and children and guide states and monitor measures taken by them, in conjunction with indigenous peoples, "to ensure indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination." The body should also provide technical assistance to the United Nations High Commissioner for Human Rights to intensify United Nations efforts to prevent and eliminate all forms of discrimination and violence against indigenous peoples and individuals, especially women and children.

### **3. Do you have any suggestions to strengthen the Expert Mechanism's collaboration with other bodies and mechanisms working on the rights of indigenous peoples?**

A reformed mandate for the Expert Mechanism should see the body transition from an advisory role to the Human Rights Council, into a more agile, independent, expert body able to seek and gather information and to make recommendations and reports regarding violations of human rights and the promotion of the Declaration. The new implementing and monitoring body will need to work and act collaboratively with other bodies and mechanisms whose work touches on the rights of indigenous peoples, in order to improve respect for indigenous rights, to encourage and foster implementation at state and international levels, and to achieve the objectives of the Declaration.

To effectively monitor and improve respect for the Declaration, the reformed body should have broad authority to act collaboratively with other human rights bodies, special mandate holders, and mechanisms by, among other things, issuing joint observations and recommendations on issues related to the rights of indigenous peoples. Cooperation and collaboration will not only enable effective work by the body, it will ensure efficient work, in that duplicative work would not be undertaken. Because of the UN's commitment to intensify efforts to prevent and eliminate all forms of discrimination and violence against indigenous women,<sup>1</sup> and because of the call of Article 22 of the Declaration that "particular attention be paid to the rights and special needs of indigenous ... women ... in the implementation of the Declaration," the reformed body also should cooperate and collaborate closely with the Special

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<sup>1</sup> G.A. Res. 69/2, ¶ 18, U.N. Doc. A/RES/69/2 (Sept. 22, 2014).

Rapporteur on violence against women, its causes and consequences, and the Commission on the Status of Women.

To achieve better collaboration, coordination, and awareness across the UN system, the body should be called on to report annually to the Human Rights Council, the General Assembly, and other relevant bodies and mechanisms.

#### **4. Do you envision a role for the Expert Mechanism in supporting States in the implementation of Universal Periodic Review, treaty body and special procedures recommendations relating to the rights of indigenous peoples?**

The work of existing treaty bodies and special procedures, as well as the Universal Periodic Review is important to monitor states' compliance with their international human rights obligations, including the application of these rights to indigenous peoples and individuals. There are many treaty body recommendations relating to the rights of indigenous peoples in need of implementation and follow-up by relevant treaty bodies and mechanisms. The reformed body could be empowered to make recommendations on how to implement existing treaty body recommendations, as well as to disseminate widely such recommendations and reports, especially to indigenous peoples' representatives and institutions. Yet, states should not be obligated to report periodically to the reformed expert body. The intention to strengthen the body is not to create another complaint or periodic review process, but to enable the independent body to be responsive and to act quickly, efficiently, and effectively, to achieve the ends of the Declaration.

#### **5. How could a new mandate for the Expert Mechanism contribute to greater engagement between States and indigenous peoples to overcome obstacles to the implementation of indigenous peoples' rights?**

An implementing and monitoring body for the Declaration, with a clear and robust mandate, will be helpful in contributing to greater engagement between states and indigenous peoples to overcome obstacles in the implementation of indigenous peoples' rights under the Declaration. Challenges to engagement between indigenous peoples and states in implementing the Declaration include an overall lack of awareness of the meaning of the Declaration, a lack of resources, and a lack of capacity to address barriers to implementation of the Declaration.

To address these challenges, the reformed body must be provided the budget necessary to effectively carry out its work. The additional independent experts and the enhanced mandate will necessitate an increase in funding for the body, though the experts should, to the extent possible, use creative working methods to enhance the efficiency of their work. The Secretary-General and the Office of the High Commissioner should also provide the necessary human, technical, and financial assistance to overcome remaining obstacles to implementation.

The public meetings of the expert body should include the participation of states, indigenous representatives, and others. Information-sharing and the resulting exchanges of views could encourage greater engagement and dialogue on issues of concern.

## **6. Do you have any comments or suggestions concerning the composition and working methods of the Expert Mechanism?**

An enhanced, broadened, and improved mandate with implementing and monitoring functions will necessarily require structural reform and updated working methods. The reformed body will play an important role in protecting and promoting the rights of indigenous peoples, and it must have a sufficiently robust structure, composition, and working methods to enable it to perform its new duties most effectively.

The Expert Mechanism is made up of five independent experts selected and appointed in accordance with paragraphs 39 to 53 of the annex to Council resolution 5/1.<sup>2</sup> To meet the demands of its improved mandate, the reformed body will likely require at least ten independent experts, both indigenous and non-indigenous, and of balanced geographical and gender representation. Other bodies with similar mandates have anywhere from 10 to 25 expert members.

The selection and appointment process should be consistent with Council Resolution 5/1 and it should also give due regard to experts of indigenous origin. Members should be appointed by the President of the Human Rights Council on the basis of their recognized competence and experience in the field of human rights, high moral standing, and independence and impartiality. Members should serve in their personal capacity. The selection process should involve both member states and indigenous peoples' representatives and institutions, and candidates should be identified on the basis of broad consultations with states and indigenous peoples, their governments, representative institutions, and organizations, taking into account the diversity and geographical distribution of the indigenous peoples of the world.

The Expert Mechanism meets just once per year for five days which includes participation from all stakeholders. These working methods must be strengthened. To effectively perform its improved mandate, the body will need to meet more than once annually, but its practice of permitting open and inclusive participation should remain. It is recommended the body of experts meet at least three times a year for at least six weeks, or thirty working days, each year, either in Geneva or New York, or at such other place as the new body decides, in accordance with the existing financial rules and regulations of the United Nations. The frequency of meeting dates should be flexible depending on the mandate and workload of the experts.

As an implementing and monitoring body, the reformed body should be efficient and workable, that is, productive and cost-effective. The current term for experts is three years. This term should be reconsidered in light of the new improved mandate. In order for the reformed body to effectively function as a monitoring and implementing body, a longer term is required. A term of four years is suggested. Terms should be staggered in order to preserve continuity and to prevent a loss of ground for ongoing reports and projects. Five of the ten experts should be chosen by lot to serve an initial term of two years. There should be a rotating Chair. The body shall be responsible for establishing any additional rules of procedure and methods of work to perform its mandate.

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<sup>2</sup> Human Rights Council Res. 5/1, ¶¶ 39-50, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007).

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