

Expert Workshop on the Review of the Mandate of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 4 – 5 April 2016

13 March 2016

Response to OHCHR's questionnaire:

Joint written submission by the following Arctic Indigenous Peoples organizations and institutions: Inuit Circumpolar Council (Greenland), Saami Council, Sami Parliament of Finland, Sami Parliament of Norway, Sami Parliament of Sweden, and Sami Parliamentary Council

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

In the outset, it must be underlined that the very reason why States and indigenous peoples are engaged in this process aiming at improving the mandate of and render more effective the working methods of the Expert Mechanism is a wide-spread dissatisfaction with the current mandate and functioning of the Mechanism. There are limitations to the current mandate of the Mechanism, with its exclusive focus on thematic studies determined by the Human Rights Council. This seriously reduces the Expert Mechanism's capacity to produce concrete and valuable outcome. The frustration with the Expert Mechanism was reflected e.g. in the great priority indigenous peoples placed on an amended mandate of the Expert Mechanism in the World Conference process. It is against this background one must understand an answer as to 'the most valuable aspects of the current mandate of the Expert Mechanism.

Up to date, the main working method of the Expert Mechanism has been to produce expert thematic studies, which, in our view have been of limited value. That is not necessarily because of these studies being of poor quality, but rather a result of their general content from which it might be difficult to draw concrete conclusions as to how to improve the situations of indigenous peoples and better the relationship between such peoples and states. It is our experience that that the expert thematic studies have been of little or no use on the ground. Contributing to the concern with the expert studies is that the Expert Mechanism has not always been allowed to identify its own subjects for study. Rather, the thematic themes have been identified by the Human Rights Council, something that partly defeats the Expert Mechanism's role as an expert body. In our view, here is a lesson to be learned when formulating the new mandate of the Mechanism. The new mandate should reflect that the Expert Mechanism is an expert body, which should be allowed to identify its own priority areas, within the broader mandate provided to it by the Council.

Our position is that the most valuable aspect of the Expert Mechanism's current work has been its Expert Advices, which are annexed to its thematic reports, where we perhaps in particular would like to mention its Expert Advice No. 2 on Indigenous Peoples' Participation in Decision Making. Unlike the thematic expert studies, the Expert Advices contain concrete conclusions as to the content of international law, from which are drawn concrete observations and recommendations which, if acted upon, could produce tangible outcomes that serve to improve the situation of indigenous peoples, further their human rights, and improve their relationship with States. It is our position that also under its new mandate, the Expert Mechanism, could build on the practice of Expert Advices. In our view, it would be useful for the Mechanism to, having offered its opinion on an issue on numerous occasions, summarize its finding in an Expert Advice on the topic.

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

It is our view that the Expert Mechanism's role in assisting States to monitor, evaluate and improve the achievements of the ends of the Declaration can only be strengthened in a meaningful manner (i) through the Mechanism engaging directly with States and indigenous peoples, and (ii) if the Expert Mechanism is entrusted to interpret the Declaration with some level of authority.

The articulated position reflects the fact that the Declaration must be understood as an objective benchmark which should guide States' relationship with indigenous peoples globally, at the same time as implementing it will often necessarily require regional and/or country specific solutions.

Moreover, there is a need to facilitate engagement between States and indigenous peoples towards overcoming obstacles to the implementation of human rights, in particular those affirmed in the Declaration.

This principal position leads to the conclusion that the Expert Mechanism should – on a voluntary basis – engage with States and indigenous peoples to assist them in addressing country specific situations in order to find solutions that further the implementation of the Declaration, and constructive arrangements between States and indigenous peoples for the benefit of all. As indicated, offering advice as to how to implement the Declaration necessarily requires the Expert Mechanism to interpret the Declaration (unless a Declaration provision is entirely unambiguous and self-explanatory). As further mentioned, these interpretations must reasonably represent some kind of authority. It is not possible for any expert body to effectively contribute towards the implementation of any instrument if its position as to the mere precise content and scope does not count. Obviously, all need not agree with every interpretation and such disagreements can be voiced and recorded, but on a general level, the Expert Mechanism's interpretations of the Declaration must carry a

certain minimum level of authority. The Mechanism's mandate should enable it to seek, receive, gather and consider from all sources, including states, indigenous peoples and UN mandate holders, among others, including on specific cases and matters of concern for the rights in the Declaration.

In addition to addressing specific situations, the Expert Mechanism should also avail itself to more general reports from States and indigenous peoples on the situation in a specific country – again on a voluntary basis. If accepted by the State and the indigenous people(s) concerned, the Mechanism should respond to such reports with a written statement. Such statements too should represent some level of authority as to how the Declaration is to be interpreted. As mentioned under 1, above, it is our view that the Expert Mechanism summarizes and generalizes its conclusions in an Expert Advice or similar document when it has addressed the same or similar issue on a number of occasions in country specific situations.

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?

With the mandate for the Expert Mechanism that we envision, we see both little risk for overlap between the Mechanism and the Permanent Forum on Indigenous Issues. Human rights are only one out of six mandate areas for the Forum, and it neither addresses country specific situations nor authoritatively interprets the Declaration.

Potential contact areas between the Expert Mechanism and the Special Rapporteur on the Rights of Indigenous Peoples are easier to identify. The Special Rapporteur too, is mandated to address country specific situations. The difference between the two institutions can perhaps be best described as one of composition and working method, where the Expert Mechanism is a collegial body of international legal experts that operates based on consensus whereas the Special Rapporteur is a one person – and thus one position – institution. Another difference is that the Special Rapporteur is a fact-finding institution, whereas the Expert Mechanism is not and thus will have to rely completely on information provided by States and indigenous peoples in all its work.

Despite these differences, the Expert Mechanism and the Special Rapporteur should allow the information they gather and conclusions drawn to feed into one another's work, whenever appropriate. Overlaps should be avoided, whenever possible. We do not view the relationship between the Mechanism and the Rapporteur being much different than elsewhere in the UN's human rights system. Throughout, a number of thematic and country specific Special Rapporteurs gather information that feed into the work of various other UN institutions. Conversely, the Special Rapporteurs also benefit from the work conducted, amass of information, and conclusions drawn by the rest of the UN system in their work.

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

It would certainly be natural for the Expert Mechanism to consider - in addition to information provided by States and indigenous peoples – universal periodic review and special procedures recommendations and treaty body observations, when formulating recommendations as to how to promote human rights of indigenous peoples as well as constructive arrangements between States and indigenous peoples. In doing so, the Mechanism will support States efforts to implement the mentioned recommendations and observations.

But the Expert Mechanism can also impact the *input into* universal periodic review and special procedures recommendations and treaty body observations. As the UN expert body on the rights of indigenous peoples, the Expert Mechanism is in the best position to produce relevant conclusions both as to what is the content and scope of indigenous peoples' rights, and how these are best implemented in a national context to further constructive arrangements between States and indigenous peoples. The mentioned institutions would therefore be wise to seek guidance from the Expert Mechanism when formulating their recommendations and observations.

The Expert Mechanism could also assist States in streamlining their reporting to the universal periodic review, special procedures, and treaty bodies, as far as indigenous peoples are concerned, thus avoiding 'reporting fatigue'.

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?

As is clear from our answer to question 2, above, we believe that greater engagement between States and indigenous peoples is key factor when it comes to further the implementation of the Declaration. As a consequence, much of our answer to that question applies in this context as well, *mutadis mutandis*; necessary changes need to take place.

In addition, as the Expert Mechanism, based on country specific situations, reaches conclusions as to the more precise content and scope of the rights enshrined in the Declaration, and in particular as those are synthesized in Expert Advices or other similar document, this will offer guidance, inspiration, and ideas also to States and indigenous peoples that have not directly engaged with the Mechanism as to how to overcome obstacles to the implementation of indigenous peoples' rights.

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

In our view, the number of members of the Expert Mechanism could still be five.

We believe, however, that, given the new mandate of the Mechanism, there are good reasons to place higher requirements as to the qualifications of the members. It is our position that in order to qualify as a member of the Mechanism; candidates should have documented expertise on international law, including international human rights law. This is absolutely necessary should the Mechanism's interpretation of the Declaration be accepted to have some level of authority, as explained above; we believe it is imperative for the success of the work of the Mechanism.

In order to further promote the qualitative work of the Expert Mechanism, and respect for its conclusions among States and indigenous peoples, we believe that it might be worthwhile contemplating additional structural measures to ensure relevant competence among the Mechanism's membership. One idea could be to render the Presidents of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on Economic, Social and Cultural Rights permanent members of the Mechanism. That would bring the added value of ensuring that the Mechanism's conclusions feed into the work of the treaty bodies.

Regarding EMRIP's working methods, please see in the outset 2, above.

Further as to working methods, provided that under the new mandate, a substantial part of the Expert Mechanism's work will be in response to country specific situations, it is our view that the Mechanism should be in position to respond to these within a reasonable time-span. This argues for that the Mechanism should convene at least twice annually. The sessions need not, however, span over a full working week. In this context, one should note that the Expert Mechanism's new working methods in all likelihood will change the nature of its sessions considerably. In our view, the sessions should still be open to observers, but presumably, there will be less of a need for the Mechanism to receive interventions from the floor. And if a country specific situation is being addressed, and the involved State and indigenous people(s) request that the meeting be conducted behind closed doors, such a request should probably in most instances be respected.

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