Expert Mechanism on the Rights of Indigenous Peoples
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Agenda Item 4: Study on indigenous peoples and the right to participate in decision-making

Joint Statement of Grand Council of the Crees (Eeyou Istchee); Inuit Circumpolar Council; Assembly of First Nations: International Alliance of Indigenous and Tribal Peoples of Tropical Forests/Alianza Internacional de los Pueblos Indígenas y Tribales de los Bosques Tropicales; International Indian Treaty Council (IITC); Na Koa Ikaika KaLahui Hawaii; First Nations Summit; Union of British Columbia Indian Chiefs; Network of the Indigenous Peoples-Solomons (NIPS); Federation of Saskatchewan Indian Nations; Treaty 4 Chiefs; Innu Council of Nitassinan; Kus Kura S.C.; Haudenosaunee of Kanehsatà:ke; Kakisiwew Treaty Council; Ochapowace Cree First Nation; Cowessess Cree First Nation; First Peoples Human Rights Coalition; Canadian Friends Service Committee (Quakers); Center for World Indigenous Studies; KAIROS: Canadian Ecumenical Justice Initiatives.

Speaker: Ellen Gabriel

Greetings to all members of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and distinguished delegates.

1. Indigenous peoples and human rights organizations welcome this opportunity to contribute to EMRIP's current study on Indigenous peoples and the right to participate in decision-making.

2. In regard to this essential issue, we wish to thank EMRIP for the August 2010 "Progress report" that was submitted last year to the Human Rights Council and for the advance version of the "Final study", dated 23 May 2011. We appreciate the diligence and commitment of John Henriksen and Jannie Lasimbang in elaborating on the many dimensions of this human right.

3. The focus of this Joint Statement is on "Participation in regional and international forums and processes", which is a distinct issue in both EMRIP reports. Regretfully, crucial concerns raised at last year's session have not been addressed.

4. In international forums and processes, unfair procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. Such procedures require redress. Otherwise, the substantive rights of Indigenous peoples will continue to be adversely affected.

5. There are a growing number of international processes that significantly affect Indigenous peoples and our human rights. Multilateral *environmental* processes, in particular, are falling far short of international standards relating to Indigenous peoples' participatory rights.

6. Such environmental processes pertain to key international instruments. These include, *inter alia*, the *Nagoya Protocol* on access and benefit sharing arising from the use of genetic resources; *Convention on Biological Diversity*; *United Nations Framework Convention on Climate Change*; and *Stockholm Convention on Persistent Organic Pollutants*.

7. In such environmental processes, a recurring problem is that the "full and effective participation" of Indigenous peoples is not being respected in practice. States claim that Indigenous peoples are not Parties to international conventions. However, member States have a duty to respect their human rights obligations under the *Charter of the United Nations* and other international law. There is no blanket exception for environmental agreements.

8. Such international obligations require States to respect, protect and fulfill the human rights of Indigenous peoples. In regard to the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), States made solemn commitments to consult and cooperate with Indigenous peoples "to achieve the ends of this Declaration". Too often, States in environmental processes are not respecting the minimum standards in UNDRIP – even though it is a consensus international human rights instrument.

9. As affirmed by UN treaty bodies, Indigenous peoples are peoples with the right of self-determination under international law. This status and right provide a foundation for, and reinforce, our human right to full and effective participation. This standard is affirmed in UNDRIP. It is also confirmed at the international and regional level, by a diverse range of human rights bodies, specialized agencies and special rapporteurs.

10. In his July 2010 Report on the *Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People*, Secretary-General Ban Ki-moon emphasized to the General Assembly that one of the five objectives of the Second Decade is:

> Promoting *full and effective participation* of indigenous peoples in decisions which directly or indirectly affect their lifestyles, their traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives ...

11. The Secretary-General added:

> ... participation in intergovernmental work is a core element ... of the Second Decade and a fundamental human rights norm in international law, firmly enshrined in international human rights instruments. The United Nations Declaration on the Rights of Indigenous Peoples reconfirms this norm and analyses its meaning as it pertains to indigenous peoples.

12. International environmental processes generally establish their own rules of procedure, with little or no meaningful input of Indigenous peoples at each stage. Indigenous peoples continue to face serious impediments in such procedures that prevent them from exercising "full and effective participation".

13. In the Programme of Action for the Second International Decade, the first of the five objectives calls for "Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects". Too often, such collaboration is not being achieved.

Deficiencies in the *Nagoya Protocol*

14. Past and ongoing experiences relating to the *Nagoya Protocol* can be instructive in illustrating some of the challenges that Indigenous peoples face in various international processes. A detailed Joint Submission was sent to EMRIP entitled "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights".

15. The importance of achieving an effective international regime on access and benefit sharing is beyond question. In relation to Indigenous peoples, such a regime must include a principled framework that fully safeguards our human rights and respects our right to full and effective participation.

16. In regard to the *Protocol*, substantive injustices have been facilitated by procedural injustices. Substantive injustices include, *inter alia*, the following:

    • Indigenous peoples' human rights concerns were largely disregarded, contrary to the Parties' obligations in the *Charter of the United Nations*, *Convention on Biological Diversity* and other international law;

    • progressive international standards, such as UNDRIP, were not fully respected – despite the obligation in the *Protocol* that it be implemented "in a mutually supportive manner with other international instruments";

    • repeated use of ambiguous and questionable phrases, such as "subject to national legislation" and "in accordance with national legislation" is not consistent with the requirement that national legislation be *supportive* of the "fair and equitable" objective of benefit sharing;

    • the phrase "indigenous and local communities" is used throughout the *Protocol*, even though "indigenous peoples" is the term now used for such peoples in the international human rights system. Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;

• in regard to access and benefit sharing of genetic resources, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination;

• "established" rights might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling. This would be a gross distortion of the original intent. Massive dispossessions could result globally from such an arbitrary approach inconsistent with the *Convention*.

17. Procedural injustices include, *inter alia*:

• The procedural dimensions of Indigenous peoples' right to "full and effective participation" were not respected during the negotiations of the *Protocol* and this standard was omitted in the final text;

• Indigenous peoples were not permitted to table any proposed amendments to the draft Protocol, unless supported by at least one Party. This same "rule" was imposed at the first meeting to implement the *Protocol* (6-10 June 2011);

• in relation to the formulation and adoption of national legislation and other measures in the future, the democratic requirement of "full and effective participation" of Indigenous peoples remains virtually unaddressed;

• the standard of "full and effective participation" of Indigenous peoples was omitted from a text being discussed at the June 2011 meeting to implement the *Protocol*. Indigenous representatives were not allowed to comment on this omission when final revisions were being made. Yet there are over 60 references to this standard in related decisions of the Conference of the Parties (COP), many of which address implementation of the *Protocol*;

• representatives of Indigenous peoples were explicitly excluded, when key provisions relating to UNDRIP and "established" rights to genetic resources were negotiated in closed meetings;

• despite the substantiation in detailed submissions, Indigenous peoples' concerns of discrimination in the *Protocol* remain unaddressed; and

• some States exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and applying the *lowest common denominator* among the Parties' positions.

18. A further problem is the lack of financial support for Indigenous peoples to adequately participate in past negotiations and current implementation of the Protocol. The CBD voluntary fund was not sufficient to ensure that adequate numbers of Indigenous peoples had

the capacity to prepare for and attend the negotiations on the Protocol. The same problem continues in the implementation stage.

19. Far too few Indigenous peoples are actually represented. There continues to be an inadequate number of representatives at the meetings to ensure proper research and timely development of positions. There is also an insufficient number of spokespersons at the negotiations table, with the necessary technical and legal expertise on a wide range of matters.

20. In the 2011 *Report on its tenth session*, the Permanent Forum on Indigenous Issues addresses some of the above concerns. The Report reiterates that the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the Convention on Biological Diversity, the World Intellectual Property Organization and the International Maritime Organization should facilitate indigenous peoples' participation in their processes. In this regard, the Forum states:

> The Permanent Forum recognizes the right to participate in decision-making and the importance of mechanisms and procedures for the *full and effective participation of indigenous peoples* in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.

21. In the climate change negotiations, policies and programmes are being implemented with little regard for the participation and other rights of Indigenous peoples. The Cancun Agreements make some reference to "full and effective participation" of Indigenous peoples, but this standard is not being met. At stake are the human rights and security of present and future generations – as well as their lands, territories and resources.

22. The Permanent Forum Report urges the United Nations, its organs and specialized agencies, as well as all States, to adopt at all levels a "human rights-based approach" on environment, development and other issues. As underlined in the Report:

> At the international, regional and national level, the human rights of indigenous peoples are always relevant if such rights are at risk of being undermined. ... They must be respected in any context specifically concerning indigenous peoples, from environment to development, to peace and security, and many other issues.

23. In the same report, the Permanent Forum "reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples' rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples." The "established rights" approach in the *Protocol* is rejected:

> Consistent with the objective of "fair and equitable" benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only "established" rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.

Conclusions and recommendations

24. Indigenous peoples' human rights and related State obligations are not being effectively affirmed and integrated in multilateral environmental agreements. Too often, international environmental forums and processes operate in a framework that lacks a human rights-based approach.

25. Human rights standards and principles – such as full and effective participation of Indigenous peoples, equality and non-discrimination, and State accountability – are not being adequately incorporated. Such essential issues could be better dealt with, if the right of Indigenous peoples to participate in decision-making were fully respected. Through procedural fairness, unjust power relations between States and Indigenous peoples could be redressed.

26. Since many of these shortcomings are in part the result of procedural deficiencies, the Expert Mechanism on the Rights of Indigenous Peoples should revise the advance version of its Final Report on the right to participate in decision-making.

27. International human rights standards are too often cast aside in the interests of obtaining consensus. Such actions are not compatible with State obligations in the *Charter of the United Nations* and, more generally, international law. There is a tendency to excessively reinforce State sovereignty, while unjustly circumscribing Indigenous peoples' rights.

28. In most international environmental processes, there is no rigid legal obligation for Parties to achieve consensus. Consensus can show a unity of purpose, but it loses its significance if achieved at the expense of human rights.

29. It is deeply troubling that, in regard to UNDRIP, it took only one State (Canada) to exploit the practice of consensus in the negotiations so as to lower standards in the *Protocol*.

30. During the standard-setting process on the *UN Declaration on the Rights of Indigenous Peoples*, the Chair of the working group on UNDRIP made it clear that any consensus would include both States and Indigenous peoples. While achieving consensus was desirable, no strict requirement was imposed. State and Indigenous representatives had equal rights to make interventions and propose text.

31. In regard to revising its study, EMRIP should consider, *inter alia*, the following when addressing Indigenous peoples' participation in international and regional forums and processes:

    i) **Human rights-based approach.** It is essential to incorporate a human rights-based approach in such forums and processes, consistent with international human rights law. In this context, many processes addressing environment and development issues are in need of basic reforms.

ii) **Right to participate.** Whenever Indigenous peoples and their rights are involved, their right to participate in decision-making must be respected, protected and fulfilled consistent with UNDRIP and other international human rights law. At all stages, the exercise of such right must ensure the full and effective participation of Indigenous peoples.

iii) **Free, prior and informed consent (FPIC).** Indigenous peoples' right to FPIC is a crucial aspect of self-determination and, therefore, an essential element in international and regional negotiations. In particular, FPIC serves to ensure that prejudicial or substandard provisions are not imposed on Indigenous peoples.

iv) **Indigenous peoples' Treaties.** In such forums and processes, the Treaty rights of Indigenous peoples must be fully respected. Treaties between States and Indigenous peoples are of international concern, responsibility and character. Such status and qualities are reinforced by the human rights content of such Treaties.

v) **Consensus not always legitimate.** Consensus is not a legitimate process, if its intention or effect is to undermine the human rights of Indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be considered.

vi) **Addressing power imbalances.** Existing power imbalances between Indigenous peoples and States should be effectively addressed through procedural rules, consistent with Indigenous peoples' right to participate in decision-making. In this context, principles of equality and mutual respect parties would serve to generate increased confidence and trust.

vii) **Financial commitments.** Meaningful exercise of Indigenous peoples' right to participate in decision-making requires adequate financial commitments from States. Experience has shown that voluntary funds alone are inadequate.