

Permanent Forum on Indigenous Issues

**Thirteenth session**

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Item 4(a) of the agenda

**Human Rights: Implementation of the United Nations Declaration on the Rights of Indigenous Peoples**

**Joint Statement of the Grand Council of the Crees (Eeyou Istchee); Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Canadian Friends Service Committee (Quakers); Centre for Pre-Confederation Treaties and Reconciliation; Chiefs of Ontario; Federation of Saskatchewan Indian Nations; Femmes Autochtones du Québec/ Québec Native Women; First Nations Summit; First Peoples Human Rights Coalition; Indigenous World Association; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women's Association of Canada; Union of British Columbia Indian Chiefs**

Thank you for the opportunity to address the implementation of the *UN Declaration on the Rights of Indigenous Peoples* in a human rights context. This approach is crucial, as some States – including Canada and the United States – refuse to acknowledge that Indigenous peoples' collective rights are human rights<sup>1</sup> and are addressed as such in international and regional human rights systems.

In light of the normative and legal<sup>2</sup> significance of the *UN Declaration*, it is imperative to carefully analyze all provisions. No provision should be examined in isolation. Each provision should be interpreted in the context of the whole *Declaration* as well as other international human rights law.

This statement focuses on Indigenous peoples' right to self-determination and the right to free, prior and informed consent (FPIC), as well as the role of the *Declaration* in the context of resource development. In addition, we wish to bring to your attention the substandard approaches being taken by the Canadian government in regard to resource development in western Canada. Such approaches set negative precedents for all other regions in Canada.

**Self-determination and FPIC**

The first preambular paragraph of the *UN Declaration* affirms: "*Guided* by the purposes and principles of the Charter of the United Nations". These "purposes and principles" include the principle of "equal rights and self-determination of peoples".<sup>3</sup> This is reflected in the provisions of the *Declaration*<sup>4</sup> and provides further guidance for their interpretation.

The right of Indigenous peoples to self-determination is a prerequisite to the enjoyment of all other human rights.<sup>5</sup> It is "a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."<sup>6</sup>

The right of self-determination includes "consent".<sup>7</sup> This underlines that FPIC is not limited to those provisions in the *Declaration* that explicitly include the term. A consensual element is found in diverse articles<sup>8</sup> that require States to take measures "in conjunction with" Indigenous peoples. The phrase "in conjunction with" means "together with".<sup>9</sup> This suggests that the "consent" of Indigenous peoples is required, since the State cannot act alone.<sup>10</sup>

We also wish to emphasize that the right to give or withhold "consent" is not synonymous with "veto". The term "veto" may imply an absolute right to block a proposed development regardless of the facts and law in any given case. In contrast, Indigenous consent in international and Canadian law is neither arbitrary nor absolute, but responds to the rights at stake and the potential for harm. The Supreme Court of Canada ruled that - at the high end of the consultation spectrum – the Crown's duty to consult would require the "'full consent of [the] aboriginal nation ...' on very serious issues".<sup>11</sup>

### ***UN Declaration and resource development***

FPIC of Indigenous peoples should not be viewed as an impediment to States or business enterprises. Indigenous peoples' consent constitutes part of our human rights, including our right to development. Respect for such human rights is essential for State and corporate good governance. As Special Rapporteur James Anaya has emphasized:

The Declaration and various other international sources of authority, along with practical considerations, lead to **a general rule** that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent.<sup>12</sup>

The *UN Declaration* has an essential role in the context of resource development. The "Guiding Principles on Business and Human Rights" affirm that business enterprises have a responsibility to respect 'internationally recognized human rights'.<sup>13</sup> The commentary in the Guiding Principles emphasizes that consideration be given to UN instruments that have elaborated on the rights of Indigenous peoples. This clearly includes the *UN Declaration*, especially since "overwhelming support by the UN General Assembly leads to an expectation of maximum compliance".<sup>14</sup>

Prior to considering consultation and consent, it is important to first identify the nature and scope of Indigenous peoples' rights that may be affected by a proposed development.<sup>15</sup> Such rights would include, *inter alia*: self-determination, including self-government; subsistence; lands, territories and resources; development, including determining Indigenous peoples' own priorities; safe and healthy environment; health and well-being; culture; and right to an effective remedy.<sup>16</sup>

### **Western Canada resource development – flawed approach**

In regard to resource development in western Canada, the federal government's overall approach to consultation is highly questionable. It makes little sense for the National Energy Board (NEB) to examine the environmental effects on Indigenous peoples' rights, if the government does not first consult on what rights are being affected. For example, in regard to the proposed Northern Gateway Pipeline, the real and potential impacts on Aboriginal title<sup>17</sup> may differ from those on specific rights.<sup>18</sup> Yet such distinctions were not made by either Northern Gateway or the National Energy Board's Joint Review Panel (JRP), since neither had such a mandate.<sup>19</sup>

During the Panel's hearings, the Canadian government confirmed that, once the Panel had released its Report, the government would engage in consultations. In particular, it would "afford to all the groups an opportunity to make their views known about whether the impacts on their rights are accurately characterized ... and ... find out from groups whether there are any outstanding issues."<sup>20</sup> The government also said that "participant funding would be available to Aboriginal groups ... for carrying out such consultation" and that "it would then take into consideration these outstanding concerns before making any final decisions on the project".

Following the release of the Joint Review Panel’s Report, the government failed to carry out the required consultations. In March 2014, Indigenous organizations in British Columbia, in collaboration with other Indigenous and human rights organizations, submitted to the Canadian government an elaboration of Indigenous rights and concerns relating to proposed development in western Canada.<sup>21</sup> Although a written response was requested, no response has been received. Nor has there been any indication that the government of Canada will fully and fairly fulfill its constitutional and international human rights obligations prior to making a decision on the proposed Northern Gateway Pipeline.

## Recommendations

1. THAT the Permanent Forum reiterate its recommendation that States fully utilize the *UN Declaration on the Rights of Indigenous Peoples* as a framework for justice and reconciliation.
2. THAT in relation to Indigenous peoples, the Permanent Forum call on States to fully “promote the realization of the right of self-determination ... and ... respect that right, in conformity with the provisions of the Charter of the United Nations”<sup>22</sup> and the principle of “equal rights and self-determination of peoples”.
3. THAT the Permanent Forum affirm that the right and principle of “free, prior and informed consent” (FPIC) is not limited to those provisions in the *Declaration* that explicitly include this term, and that a consensual element is found in diverse articles that require States to take measures “in conjunction with” Indigenous peoples.
4. THAT in the context of resource development, the Permanent Forum urge both States and business enterprises to exercise due diligence in ensuring that the human rights of Indigenous peoples are fully recognized and safeguarded, including their right to FPIC.
5. THAT the Permanent Forum underline the importance of enabling Indigenous peoples to first identify the nature and scope of their rights that may be affected by a proposed development, as well as related State obligations, prior to carrying out collaborative processes with them relating to consultation, consent and other related actions.
6. THAT the Permanent Forum undertake a study on the relationship between Indigenous peoples’ human rights and resource projects with a focus on energy, including oil, gas, coal and hydro. Such a study would build on the Forum’s existing work on mining and land rights.

## Endnotes

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<sup>1</sup> Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex (approved in UN General Assembly, Res. 62/219, 22 December 2007), where the Council has permanently included the “rights of peoples” whenever it addresses the “promotion and protection of all human rights”.

<sup>2</sup> UN General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 85 (Conclusions): “Implementation of the Declaration

should be regarded as a political, moral and legal imperative without qualification, within the framework of the human rights objectives of the Charter of the United Nations."

<sup>3</sup> *Charter of the United Nations*, arts. 1(2) and 55c.

<sup>4</sup> See, e.g., *UN Declaration*, art. 2: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." See also art. 3 on Indigenous peoples' right to self-determination.

<sup>5</sup> Human Rights Committee, *General Comment No. 12, Article 1*, 21<sup>st</sup> sess., A/39/40 (1984), para. 1.

<sup>6</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41.

<sup>7</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20.

<sup>8</sup> E.g., in relation to redress and protection of Indigenous peoples' property, see arts. 11(2), 12(2), 14(3), 27 and 31(2); and State measures to safeguard women and children from violence and discrimination, see art. 22(2).

<sup>9</sup> *Oxford English Reference Dictionary*, 2<sup>nd</sup> ed. (1996), at 304.

<sup>10</sup> See, e.g., Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples: Note by the Secretariat*, UN Doc. E/C.19/2013/9 (12 February 2013), para. 8: "Article 22 (2) expresses in mandatory terms that ... there is a duty upon States to take active measures to ensure full protection and guarantees against all forms of violence and discrimination. The wording "in conjunction with indigenous peoples" reinforces the commitment of Member States through the Declaration to obtain free, prior and informed consent from, and to working in partnership with, indigenous peoples when realizing that goal."

<sup>11</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24 (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168).

<sup>12</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/HRC/24/41 (1 July 2013), para. 27.

<sup>13</sup> See "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" in Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), Annex, Principle 12 and Commentary. Endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4/ (16 June 2011) (without a vote), para. 1.

<sup>14</sup> International Law Association, "Rights of Indigenous Peoples", Final report, Sofia Conference (2012), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, (Conclusions and Recommendations), at 29.

<sup>15</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 53.

<sup>16</sup> See also *ibid.*, para. 50.

<sup>17</sup> See, e.g., JRP Report, vol. 2, at 37, where Aboriginal groups criticized Northern Gateway for not addressing their concerns that dealt with Aboriginal title, jurisdiction, consent, and governance.

<sup>18</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 117: "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures". See also para. 166.

<sup>19</sup> Canada (National Energy Board), *Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, 2013, <http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprt-eng.html>, vol. 2 at 47: "In keeping with its mandate, the Panel has not made any determinations regarding Aboriginal rights, including Métis rights, treaty rights, or the strength of an Aboriginal group's claim respecting Aboriginal rights."

<sup>20</sup> JRP Report, vol. 2, at 39.

<sup>21</sup> BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs *et al.*, "Resource development in western Canada: Indigenous peoples' human rights must be respected", joint submission to Prime Minister Stephen Harper, March 26, 2014, <http://quakerservice.ca/wp-content/uploads/2014/04/Western-Canada-resource-devt-Joint-Response-Apr-10-14.pdf>.

<sup>22</sup> *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 1(3).