

Permanent Forum on Indigenous Issues

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**Outcome of the high-level plenary meeting of the General Assembly
known as the World Conference on Indigenous Peoples**

Joint Statement of the Grand Council of the Crees (Eeyou Istchee); Amnesty International; Assembly of First Nations; Canadian Friends Service Committee (Quakers); Chiefs of Ontario; Femmes Autochtones du Québec/ Québec Native Women; First Nations Summit; First Peoples Human Rights Coalition; KAIROS: Canadian Ecumenical Justice Initiatives; Na Koa Ikaika KaLahui Hawaii; Native Women's Association of Canada; Samson Cree Nation; Union of British Columbia Indian Chiefs

Thank you for the opportunity to address the Outcome of the World Conference on Indigenous Peoples (WCIP). It is not possible in this short presentation to cover all aspects of the Outcome Document.¹ Our focus today will be on select provisions.

From the outset, it is important to underline a few key points. First, the Outcome Document is a consensus instrument. At the time of its adoption in the General Assembly, no State called for a vote. The subsequent explanations of position tabled by Canada and later by the United States do not constitute objections. An explanation of vote or statement of position has no legal effect on consensus.

Second, the Outcome Document is not merely an “aspirational” instrument. It reaffirms the obligation of all Member States to uphold the purposes and principles of the *Charter of the United Nations*.² It reaffirms States' support for the *UN Declaration on the Rights of Indigenous Peoples*, which is a vital instrument human rights instrument that has diverse legal effects. Former Special Rapporteur James Anaya emphasized that “implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.”³ The International Law Association concluded in 2010 that the *UN Declaration* is “a declaration deserving of utmost respect”.⁴

Third, specific paragraphs in the Outcome Document cannot be considered in isolation. They must be interpreted in the context of the complete text and other international law. For example, there is no specific reference in the Outcome Document to Indigenous peoples' right of self-determination, or to Indigenous peoples' Treaties, or to the doctrine of discovery. However, such key issues are still included in the *UN Declaration*. In **para. 4** of the Outcome Document, States have generally reaffirmed their “solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration”.

Commitments already violated

In the context of traditional knowledge, conservation and biodiversity, **para. 22** of the Outcome Document uses the term “Indigenous peoples and local communities” without qualification. Yet in October 2014, less than a month after the WCIP, States undermined both the Outcome Document and the *UN Declaration* at a Convention on Biological Diversity meeting in Korea. The Conference of the Parties (COP) decided to use the term “Indigenous peoples and local communities” (instead of “Indigenous and local communities”) solely with the proviso that this change would have no legal effect whatsoever within the CBD now or in the future.⁵ Such action contradicts use of the term Indigenous “peoples” in the *UN Declaration* and other international law.

At the CBD meeting, Canada played a key role in opposing use of the term “peoples” – even though this term is enshrined in Canada’s Constitution and diverse federal legislation. States have no authority to restrict the status of Indigenous peoples, in order to impair in any way Indigenous peoples’ right to self-determination or other human rights. Such actions constitute racial discrimination.⁶

Specific commitments

Para. 28 of the Outcome Document calls on the Human Rights Council “taking into account the views of indigenous peoples, to review the mandates of its existing mechanisms, in particular the Expert Mechanism on the Rights of Indigenous Peoples”. Thus, it would be important to focus on all existing mechanisms and not solely EMRIP, so as to ensure more effective promotion of respect for the *UN Declaration*.

The purpose in para. 28 is to “modify and improve” EMRIP. It is not to replace this body with a new entity with such wide-ranging powers that it could duplicate the work of UN treaty bodies and mechanisms. Para. 28 does not specify any limitation such as “within existing resources”. Clearly, modification and improvement of EMRIP will require additional human and financial resources.

Para. 31 of the Outcome Document requests “the Secretary-General, in consultation and cooperation with indigenous peoples, the Inter-Agency Support Group on Indigenous Peoples’ Issues and Member States, to begin the development, within existing resources, of a system-wide action plan to ensure a coherent approach to achieving the ends of the Declaration”.

The system-wide action plan needs to address “rights ritualism”: “Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses.”⁷ A stark example is Canada joining the consensus around the Outcome Document, but then subsequently violating its provisions at the CBD.

UN treaty bodies, specialized agencies and mechanisms need to increase their reliance on, and interpretation of, the *Declaration* so as to promote, respect, protect and fulfil Indigenous peoples’ human rights and fulfil related State obligations.

In particular, the UN Human Rights Committee has not made specific reference to the *UN Declaration* in carrying out its mandate as a treaty body. It appears that the Committee may consider the *Declaration* in its deliberations, but claims that the Committee cannot specifically mention any instrument other than the *International Covenant on Civil and Political Rights*. This situation requires further examination. No other UN treaty body assumes such a narrow interpretation of its mandate.

In **Para. 33**, States have committed to considering “ways to enable the participation of indigenous peoples’ representatives and institutions in meetings of relevant United Nations bodies on issues affecting them”.⁸ This would include “any specific proposals made by the Secretary-General in response to the request made in paragraph 40”.

Para. 40 emphasizes “ways to enhance a coherent, system-wide approach to achieving the ends of the Declaration”. It also underlines the need for “specific proposals to enable the participation of indigenous peoples’ representatives and institutions, building on the report of the Secretary-General” in July 2012.⁹

Clearly, these are interrelated. Without full and effective democratic participation of Indigenous peoples’ representatives and institutions in meetings of relevant United Nations bodies on issues affecting them, a coherent system-wide approach to achieving the ends of the *UN Declaration* will not be achieved. Cooperation with Indigenous peoples is repeatedly stressed in the Outcome Document. Article 41 of the *Declaration* requires that ways and means of ensuring participation of indigenous peoples on issues affecting them be established.

As former Special Rapporteur Anaya stressed: “involvement of indigenous peoples in decision-making in the international arena ... remains an important component of indigenous peoples’ right to self-determination”.¹⁰ Anaya added: “Financial and administrative support should be maintained and expanded as necessary to ensure that indigenous peoples can participate effectively in international forums.”¹¹

As concluded by the Expert Mechanism on the Rights of Indigenous Peoples: “Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples’ rights.”¹²

Recommendations

1. THAT in **implementing solemn commitments of States**, the consensus Outcome Document be addressed in a manner that requires maximum compliance. Interpretation of specific paragraphs of the Outcome Document must take into account its whole text, the *UN Declaration* and other international law.
2. THAT the Permanent Forum and States take steps, in conjunction with Indigenous peoples, to ensure that the commitments in the Outcome Document are fully and

effectively implemented. States have a responsibility to ensure that their **commitments are not violated in other international forums**, as has occurred at the Convention on Biological Diversity meeting following the World Conference on Indigenous Peoples.

3. THAT in fully implementing para. 28 of the Outcome Document and ensuring effective promotion of respect for the *UN Declaration*, it is important to **focus on all existing mechanisms** and not solely EMRIP.
4. THAT in accordance with para. 28, **effective modification and improvement of EMPRIP be undertaken** together with Indigenous peoples and EMRIP. A reformed EMRIP should include, *inter alia*, an expanded mandate that focuses on implementation of the *UN Declaration*; coordination with UN treaty bodies, mechanisms and specialized agencies; engagement in and promotion of good practices; and undertaking of thematic and other studies. All expert members must have the requisite knowledge and qualifications. Consideration should be given to increasing the number of members and the length of the annual session. Indigenous peoples should effectively participate in this process, including member selection.
5. THAT the **system-wide action plan** be devised and implemented in accordance with paras. 31 and 40 of the Outcome Document, in collaboration with Indigenous peoples at all stages. A coherent approach to achieving the ends of the *Declaration* should be ensured through a systematic review of UN treaty bodies, mechanisms and specialized agencies with a view to increasing reliance on, and interpretation of, the *Declaration*. All such actions must be carried out so as to promote, respect, protect and fulfil Indigenous peoples' human rights and fulfil related State obligations. A constructive dialogue should be initiated with the Human Rights Committee, in regard to its rationale for not making specific references to the *UN Declaration*, in carrying out its mandate.
6. THAT the system-wide action plan should encourage UN treaty bodies and mechanisms, as well as the Universal Periodic Review process, to scrutinize the reports and human rights record of States, so as to effectively address **rights ritualism**. This should include ensuring that State claims are systemically compared to the concerns raised by Indigenous peoples and civil society. The system-wide plan should also ensure that Indigenous peoples' human rights and the *UN Declaration* are fully integrated in the **post-2015 development agenda and the sustainable development goals**.
7. THAT a process be devised to **enable full and effective democratic participation of Indigenous peoples' representatives and institutions** in meetings of relevant United Nations bodies on issues affecting them. Financial and administrative support should be maintained and expanded as necessary to ensure that Indigenous peoples can participate effectively in international forums, as self-determining peoples.

Endnotes

¹ General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote).

² See also *UN Declaration*, preambular para. 1: “Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter”.

³ General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), <http://unsr.jamesanaya.org/docs/annual/2013-ga-annual-report-en.pdf>, para. 67. [emphasis added]

⁴ International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 5, where the following rationale is added: "This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was “[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter”; this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." [underline added]

See also Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples”, (2009) 58 ICLQ 957, at 960: "... recognizing the growing importance of non-binding instruments in the international legal system ... [and] in the light of the context in which it has been established and its very normative content, the Declaration has important legal effects and generates reasonable expectations of complying behaviour.

⁵ Conference of the Parties to the Convention on Biological Diversity, *Article 8(j) and related provisions*, Decision XII/12, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UN Doc. UNEP/CBD/COP/DEC/XII/12 (13 October 2014), <http://www.cbd.int/decisions/cop/?m=cop-12>, at 15 (*A. Terminology “indigenous peoples and local communities”*).

For an in-depth analysis of this whole issue, see Grand Council of the Crees (Eeyou Istchee) *et al.*, “Indigenous Peoples are 'Peoples': Draft COP Decision Violates Treaty Interpretation Rules”, Joint Submission of Indigenous and civil society organizations, Convention on Biological Diversity, Conference of the Parties, 12th sess., Pyeongchang, Republic of Korea on 6-17 October 2014, (9 September 2014), <http://quakerservice.ca/wp-content/uploads/2014/09/COP-12-IPs-are-Peoples-Draft-COP-Decision-Violates-Intl-Rules-GCCEI-Joint-Submission-FINAL-Sep-9-14.pdf>.

⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, (entered into force 4 January 1969), article 1: “... any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), para. 7: “... the term “*discrimination*” as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*”

Outcome Document, para. 18: “We commit ourselves to intensifying our efforts, in cooperation with indigenous peoples, to prevent and eliminate all forms of ... discrimination against indigenous peoples and individuals, ... by strengthening legal, policy and institutional frameworks.”

⁷ Hilary Charlesworth “Kirby Lecture in International Law: Swimming to Cambodia. Justice and Ritual in Human Rights After Conflict” (2010) 29 Australian Yearbook of International Law 1 at 12-13, where it is added: “Countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.”

See also Permanent Forum on Indigenous Issues, “Expert group meeting on the theme ‘Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples’: Note by the Secretariat”, UN Doc. E/C.19/2015/8 (17 February 2015), para. 20: “Rights ritualism means the ‘acceptance of institutionalized means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves’. Rights ritualism can act as a mask to conceal Member States’ resistance to norms. This means that Member States accede to treaties and optional protocols, yet, beyond signing, demonstrate very little commitment to implementing obligations.”

⁸ See also Outcome Document, paras. 15 (Indigenous youth) and 17 (Indigenous women).

⁹ General Assembly, *Ways and means of promoting participation at the United Nations of indigenous peoples’ representatives on issues affecting them: Report of the Secretary-General*, UN Doc. A/HRC/21/24 (2 July 2012).

¹⁰ 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. 45.

¹¹ *Ibid.*, para. 52.

¹² 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. 21.