Expert Mechanism on the Rights of Indigenous Peoples
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Item 8: *United Nations Declaration on the Rights of Indigenous Peoples*

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Joint Statement of Grand Council of the Crees (Eeyou Istchee); Assembly of First Nations; Canadian Friends Service Committee (Quakers); First Nations Summit; First Peoples Human Rights Coalition; Indigenous World Association; Inuit Circumpolar Council; Inuit Tapiriit Kanatami; KAIROS: Canadian Ecumenical Justice Initiatives; Union of British Columbia Indian Chiefs

EMRIP's commitment to monitoring the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* is very welcomed by our organizations. Full and effective implementation of this consensus international human rights instrument is a critical objective with both international and domestic dimensions. It is imperative that States, UN bodies and specialized agencies, in conjunction with Indigenous Peoples, engage meaningfully in this work.

There are significant achievements that we all celebrate. There are also substandard actions that serve to undermine Indigenous Peoples' rights and the *UN Declaration*. Such conduct often entails the very serious challenge of "rights ritualism" – "a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses"[1].

States often acknowledge to human rights bodies Indigenous Peoples' rights and related State obligations. They make positive statements to EMRIP to indicate that Indigenous rights are a priority concern. Yet too often State actions contribute to undermining Indigenous peoples' rights and the *UN Declaration*.

International agencies

We applaud the international agencies that are taking seriously their commitments to the *UN Declaration*. For example, the UN Development Programme (UNDP) "will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration".[2] The UNDP affirms that the "term "indigenous peoples" refers to distinct collectives, regardless of the local, national and regional terms applied to them, who satisfy any of the more commonly accepted definitions of indigenous peoples."[3] The Food and Agriculture Organization (FAO) also applies broad criteria in relation to the term "Indigenous peoples".[4]

In contrast, the use of the term "peoples" was undermined at a Convention on Biological Diversity meeting in October 2014. 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*, the Outcome Document[6] of the World Conference on Indigenous Peoples (WCIP) 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 their right to self-determination or other human rights. Such actions constitute racial discrimination.[7]

Truth and Reconciliation Commission (TRC) "Calls to Action"

The Truth and Reconciliation Commission of Canada (TRC) was mandated as a part of the Indian Residential Schools Settlement Agreement to inform all Canadians about what happened in Indian Residential Schools. Through the last five years, the TRC has documented the truth of survivors, families, and communities. This year the TRC held its closing ceremonies, releasing 94 Calls to Action. We take this opportunity to honour EMRIP member Chief Wilton Littlechild for his work as a Commissioner.

As underscored in the TRC's Summary Report: "The establishment and operation of residential schools were a central element of [Canada's Aboriginal] policy, which can best be described as 'cultural genocide."[8]

A central component of the TRC's Calls to Action is using the *UN Declaration* as the "framework for reconciliation".[9] UN Secretary General Ban Ki-moon, who welcomed the report of the TRC, echoes this: "Truth-telling is important but not sufficient for reconciliation. I encourage all involved in this effort to follow up on the report's recommendations, using the UN Declaration on the Rights of Indigenous Peoples as a roadmap."[10]

It is deeply disturbing that the government of Canada has not responded to the Calls to Action, nor made a commitment to implementing the report of the TRC. In contrast, it is reported, "the provinces have not only pledged to act on the commission's 94 recommendations but, in some cases, have already started."[11]

In 2006 the government of Canada devised a confidential strategy to undermine the *UN Declaration* both internationally and domestically.[12] For Canada to devise such a prejudicial strategy against the human rights of Indigenous Peoples in the same period that it signed the *Indian Residential Schools Settlement Agreement*[13] is unconscionable. This ongoing strategy is highly damaging to Indigenous Peoples globally. Yet it continues to be implemented by Canada.

In contrast to the actions of the federal government, we recognize the province of Alberta who is engaging in a more constructive manner. In July of this year, the Premier of Alberta instructed her cabinet ministers to conduct a review, including budget implications, of all programs, policies and legislation that may require change based on the *UN Declaration*. She emphasized that her government will work with Indigenous Peoples as true partners to ensure their constitutional rights are protected.[14]

Bill C-641

In March 2015 a member of the official opposition in Canada introduced legislation, Bill C-641 - *United Nations Declaration on the Rights of Indigenous Peoples Act*. The Bill proposed that the

government, in consultation and cooperation with Indigenous Peoples, take all measures necessary to ensure that the laws of Canada are consistent with the *UN Declaration*. This conforms to the following commitment in the WCIP Outcome Document:

> We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the Declaration and to promote awareness of it among all sectors of society….[15]

This is also consistent with the commitment of Canada's Prime Minister in 2012: "And, of course, we endorsed the United Nations Declaration on the Rights of Indigenous Peoples. This reaffirms our aspiration and our determination to promote and protect the rights of indigenous people at home and abroad."[16]

However, the government rejected Bill C-641, claiming, "this proposal is simply **impossible to support**..."[17] The central objection of Canada is article 19 of the *Declaration* and "free, prior and informed consent" (FPIC). Canada states that article 19 "would provide first nations with a veto over any sort of legislation or development that concerns them".[18]

Government statements follow a pattern when addressing the rights of Indigenous Peoples. While claiming to support Aboriginal rights, the rhetoric is designed to alarm the public. Little regard is accorded to accuracy or justice.

The term veto is not used in the *UN Declaration*. Veto implies an absolute right or power to reject a law or development that concerns Indigenous peoples, regardless of the facts and law. No balancing of rights would occur. No considerations of the rights of others or justice or non-discrimination or good governance would be permitted. Canada then further builds on this imagined frenzy of absolute power and declares: "it would be irresponsible to give any one group in Canada a veto".

The government has failed to consider the landmark decision of the Supreme Court of Canada in *Tsilhqot'in Nation*. The Court repeatedly referred to the constitutional right of Aboriginal title-holders to give or withhold consent. Such title-holders have the right to use and control the land and enjoy its benefits. Such right to control "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders" (para. 76).

In *Tsilhqot'in Nation*, the Supreme Court ruled that, in the absence of Aboriginal consent, "legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title." (para. 92)

At the Committee on World Food Security in Rome last October, Canada would not accept a reference to FPIC without inserting a formal explanation of position in the consensus Report: "Canada interprets FPIC as calling for a process of meaningful consultation with indigenous peoples on issues of concern to them".[19] Such a view contradicts the Supreme Court's rulings that explicitly refer to "consent".

In *Tsilhqot'in Nation* the Supreme Court highlighted Indigenous "consent" in 9 paragraphs; the "right to control" the land in 11 paras.; and the "right to determine" land uses in 2 paras. The Court added that the "right to control" means that the governments and others seeking to use the land must obtain the consent of the Aboriginal title holders unless stringent infringement tests are met.[20]

Moreover, the Court ruled, "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[21]

“Consent” is not limited to Aboriginal title and applies to other Aboriginal rights. As described in 2004 by the Supreme Court in *Haida Nation* v. *British Columbia (Minister of Forests)*, the high end of the spectrum of consultation requires “‘full consent of [the] aboriginal nation’ on very serious issues.”[22]

It is disturbing that the government of Canada claims to uphold the rights of Aboriginal peoples, but ignores key rulings of Canada's highest court.

Recommendations:

1. THAT EMRIP, through the Human Rights Council, 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.

2. THAT EMRIP **explore methods of addressing the unprincipled positions and actions of those States, such as Canada**, that undermine Indigenous Peoples’ human rights and the *UN Declaration on the Rights of Indigenous Peoples*. Such conduct prejudices Indigenous peoples globally and serves to weaken the international human rights system.

3. THAT EMRIP, through the Human Rights Council, urge States to ensure that **commitments and obligations are not violated in other international forums**,[23], as has occurred at the Convention on Biological Diversity meeting following the World Conference on Indigenous Peoples.

4. THAT EMRIP, through the Human Rights Council, urge States, in conjunction with Indigenous Peoples, to develop legislation at the national level to ensure that laws are consistent with the *UN Declaration.* **Each State has a prime responsibility and duty to protect, promote and implement all human rights**, consistent with the *Charter of the United Nations* and international human rights law.[24]

Endnotes

1 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."

2 United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf, "Standard 6: Indigenous Peoples", para. 4 (Respect for domestic and international law). In regard to "Applicable Law", see the "Overarching Policy and Principles" at p. 5, para. 9: "UNDP will not support activities that do not comply with national law and obligations under international law, whichever is the higher standard …"

3 UN Development Programme, "Contribution to the 14th Session of the UN Permanent Forum on Indigenous Issues", 2015, http://www.un.org/esa/socdev/unpfii/documents/2015/agencies-info/UNDP.pdf, at 1, note 1.

4 Food and Agriculture Organization, "Environmental and Social Management Guidelines", Rome, 2015, http://www.fao.org/3/a-i4413e.pdf, at 54. See generally Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010), http://www.fao.org/docrep/013/i1857e/i1857e00.htm.

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"*).

6 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) (without a vote).

7 *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*."

8 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, May 31, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf, at 1.

9 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, at 4, para. 43.
See also Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 82 (Conclusions and recommendations): "The United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by Canada, provides a common framework within which the issues faced by indigenous peoples in the country can be addressed."

10 UN Secretary-General (Ban Ki-moon), "Secretary-General Praises Canada's Truth, Reconciliation Commission for Setting Example by Addressing Systemic Rights Violations against Indigenous Peoples", SG/SM/16812, 1 June 2015, http://www.un.org/press/en/2015/sgsm16812.doc.htm.

11 Sue Bailey, “Premiers agree to act on recommendations after meeting with native leaders”, *Globe and Mail* (16 July 2015) at A2.

> 12 Paul Joffe, “UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context”, published in *Aboriginal Law Conference—2008*, Continuing Legal Education Society of British Columbia, Paper 2.2 (June 2008), at 2.2.19 - 2.2.20, where excerpts from Canada’s secret strategy are reproduced:Domestically and internationally, Canada will take every opportunity to reiterate our position that the … Declaration is not a legally binding instrument, has no legal effect in Canada, and does not represent customary international law.
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> In the international arena, Canada will raise objections when the Declaration is referenced, and will encourage other States with concerns about the Declaration to make these known …

13 *Indian Residential Schools Settlement Agreement*, May 8, 2006. The establishment of a Truth and Reconciliation Commission was contemplated in this court-approved out-of-court settlement *Agreement*.

14 Rachel Notley (Premier of Alberta), Letter to Cabinet Ministers, 7 July 2015,http://aboriginal.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf

15 Bill C-641, para. 7.

16 Government of Canada, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering", Ottawa, Ontario, 24 January 2012, http://pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=26&id=4597.

17 House of Commons, *Debates* (Hansard), 141st Parl., 2nd sess., vol. 147, No. 185, March 12, 2015 at 12083 (response of MP Mark Strahl, on behalf of the federal government).
For an analysis of Canada’s position on this Bill, see Grand Council of the Crees (Eeyou Istchee) *et al.*, “Bill C-641 – *United Nations Declaration on the Rights of Indigenous Peoples Act*: A Commentary on the Federal Government’s Response”, 13 April 2015, http://quakerservice.ca/c641.

18 House of Commons, *Debates* (Hansard), 141st Parl., 2nd sess., vol. 147, No. 185, March 12, 2015 at 12083 (response of MP Mark Strahl, on behalf of the federal government).

19 Canada, “Explanations of Position of Members Which Requested that They Be Included in the Final Report”, Annex E in Committee on World Food Security, *Report of the 41st Session of the Committee on World Food Security (Rome, 13-18 October 2014)*, CFS 41 Final Report, November 2014, http://www.fao.org/fileadmin/templates/cfs/Docs1314/CFS41/CFS41_Final_Report_EN.pdf, at 39.

20 *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 76.

21 *Ibid.*, para. 86.

22 *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24.

23 See, in particular, Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-E/C.19/2015/10, para. 45: “The Permanent Forum appoints Edward John and Dalee Sambo Dorough to conduct a study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration

and other international human rights law."

24 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144 (9 December 1998) (without a vote), Annex, article 2. See also article 3: "Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights … is the juridical framework within which human rights … should be implemented and enjoyed". General Assembly, *The universal, indivisible, interrelated, interdependent and mutually reinforcing nature of all human rights and fundamental freedoms*, UN Doc. A/RES/66/151 (19 December 2011) (adopted without a vote), para. 6: "recalling that the primary responsibility for promoting and protecting human rights rests with the State".
Human Rights Council, *The role of prevention in the promotion and protection of human rights*, UN Doc. A/HRC/RES/18/13 (29 September 2011), para. 2: "Recognizes that States have the primary responsibility for the promotion and protection of all human rights, including the prevention of human rights violations, and that this responsibility involves all branches of the State".