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Expert Mechanism on the Rights of Indigenous Peoples
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Study on access to justice in the promotion and protection of the rights of indigenous peoples

Joint Statement of the Grand Council of the Crees (Eeyou Istchee); Canadian Friends Service Committee (Quakers); Chiefs of Ontario; Federation of Saskatchewan Indian Nations; Native Women's Association of Canada; Union of British Columbia Indian Chiefs; First Nations Summit; Indigenous World Association; KAIROS: Canadian Ecumenical Justice Initiatives; First Peoples Human Rights Coalition

Speaker: Paul Joffe

Thank you for the opportunity to address "access to justice in the promotion and protection of the rights of indigenous peoples".

As affirmed in the *ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems*:

> All persons, groups and peoples must be able to access justice effectively at the national and international levels. To this end, States must act to ensure equality in access to justice ... to give effect to human rights obligations, including the right to a remedy and reparation.[1]

Failure to ensure "access to justice" has far-reaching consequences on such principles as justice, democracy, human rights, rule of law, equality, non-discrimination, good governance and good faith.

Good governance requires States to support Indigenous peoples' human rights and their governing institutions. National legislation must not be used to subjugate or exploit Indigenous peoples.

Our Joint Statement focuses on Indigenous peoples' access to justice in Canada. We have grave concerns that ongoing actions by the Canadian government impede access to justice. Such conduct is inconsistent with the spirit of partnership or with harmonious and cooperative relations.

Access to justice is often assessed in terms of the availability of both judicial and non-judicial remedies. Remedies become illusory if they are not accessible. The Supreme Court of Canada has ruled: "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[2]

The Inter-American Court of Human Rights has affirmed: "the right of every person to simple and rapid remedy or to any other effective remedy ... to protect them against acts which violate their fundamental rights ... is one of the basic mainstays ... of the Rule of Law in a democratic society".[3]

The right to an effective remedy is entrenched in diverse international human rights instruments, including the *UN Declaration on the Rights of Indigenous Peoples*.[4]

Article 40 of the *UN Declaration* affirms that the right to effective remedies applies to both individual and collective rights. In addition, Indigenous peoples have the "right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties". This also includes non-judicial procedures. Such a decision "shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights".

For Indigenous peoples, the human right to an effective remedy is crucial. Yet when they seek a legal remedy in domestic courts, the Canadian government invokes extreme arguments and aggressive procedures so as to delay such cases for years.[5] Such an approach is inconsistent with principles of justice, fairness, cooperation and good faith.

Throughout Canada's history, in virtually every court case relating to Aboriginal and Treaty rights, federal and provincial governments choose to act as an adversary. No other people in Canada are automatically subjected to such consistently adverse treatment.[6]

Doctrines of racial superiority are invalid.[7] Yet federal and provincial governments in Canada are still invoking the doctrine of "discovery" in domestic courts to deny or limit Aboriginal title to lands or territories.[8] This impedes the progressive development of Indigenous peoples' rights. As a result, no Indigenous peoples in Canada have succeeded in affirming such title through the courts.[9] The impoverishment of Indigenous peoples is perpetuated.

The following actions further illustrate how Indigenous peoples' access to justice is impeded:

1. Since 2006 the Canadian government has refused to acknowledge that Indigenous peoples' collective rights are human rights. This is inconsistent with the position of its own Canadian Human Rights Commission,[10] as well as the practice within the UN system for over 30 years.

2. Contrary to international and Canadian law,[11] Canada claims[12] that the *Declaration* is merely an "aspirational" instrument with no legal effect.[13] It is only when Canada is being challenged before a domestic court[14] or a UN treaty body[15] that the government alters this position. In June 2013, the Aboriginal Affairs Minister denied that the *Declaration* has any effect on the "government's treaty and aboriginal rights obligations".[16]

   In March 2011, Canada released updated guidelines to federal officials on "Aboriginal Consultation and Accommodation". These guidelines characterize the *Declaration* as "aspirational" and "a non-legally binding document that does not change Canadian laws. Therefore, it does not alter the legal duty to consult".[17]

3. During the negotiations of the *Nagoya Protocol*, Canada and other Parties insisted on the term used in the 1993 *Convention on Biological Diversity*, namely, "indigenous and local communities" – rather than "indigenous peoples and local communities". Despite use of the term "peoples" in Canada's Constitution,[18] the government maintains this position.

   For Canada to restrict or deny the status of Indigenous peoples as "peoples", so that the effect is to impair or deny them their human rights violates the *International Convention on the Elimination of All Forms of Racial Discrimination*[19] and the *International Covenant on Civil and Political Rights*.[20] Impairing the status of Indigenous peoples is part of a broader strategy to undermine their rights in the *Protocol*, including the right to self-determination.

4. In 1999 the Human Rights Committee expressed its regret to Canada that "no explanation was given ... concerning the elements that make up [the concept of self-determination]" as it applies to Indigenous peoples in Canada.[21] Canada was urged "to report adequately on implementation of article 1 of the Covenant in its next periodic report."[22] This request has not been fulfilled.

   The term "peoples" has a particular legal status and all "peoples" have the right of self-determination.[23] This same legal status and right are not recognized in regard to "minorities" or "communities" *per se*. Special Rapporteur on the rights of indigenous peoples, James Anaya, has affirmed: "The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."[24]

5. Canada has failed to honour and implement the numbered treaties in accordance with their spirit and intent[25] – especially in relation to lands and resources. Governments in Canada continue to issue licenses and permits to industry without regard to the "duty to consult and accommodate" or the right to "free, prior and informed consent" of Indigenous peoples. Such prejudicial actions have contributed to the impoverishment of First Nations and a wide range of socio-economic disadvantages and impacts.[26]

   The Land Claims Agreements Coalition has indicated the "Government of Canada has failed universally to fully implement the spirit and intent and the broad socio-economic objectives of all modern land agreements."[27]

6. In 2012, Canada adopted two omnibus "budget" laws (approx. 900 pages) that significantly weakened environmental safeguards. [28] In rushing through the adoption of such laws without careful scrutiny, the integrity of Parliament was undermined. The strong objections of Indigenous peoples were undemocratically ignored.

7. In regard to Indigenous women and girls, there is a wide range of issues where they receive substandard treatment and continue to be discriminated against in Canada. A critical, ongoing concern is the violence against Aboriginal women – especially the hundreds of unresolved cases of missing and murdered Aboriginal women.

   As the Native Women's Association of Canada has indicated: "Canada does not yet have in place a co-ordinated National Action Plan, with detailed and concrete measures, to address

the root causes and remedy the consequences of the violence against Aboriginal women and girls."[29] Aboriginal leaders are also calling for a national public inquiry into the issue of missing and murdered Aboriginal women.

8. The Canadian government has recently imposed significant funding cuts on Indigenous peoples' national and regional institutions.[30] Such unilateral actions increase vulnerability and undermine self-determination. According to the government, the cuts are intended to limit "advocacy" funding for Indigenous peoples. However, advocacy is an integral part of promoting and defending Indigenous peoples' human rights.[31] The *ICJ Declaration on Access to Justice and Right to a Remedy* affirms that "[e]nsuring effective access to justice also entails empowering the most marginalized and disadvantaged people".[32]

9. Overrepresentation of Indigenous people in Canada's prisons continues to get worse. In the past five years alone, the population of aboriginal inmates in federal penitentiaries increased by 43 per cent. Today, aboriginal people make up 23 per cent of all inmates in federal institutions despite representing just 4 per cent of Canada's population.[33] The Correctional Investigator for Canada has criticized the federal government for doing little to address this situation.

Recommendations to EMRIP

1. The *UN Declaration on the Rights of Indigenous Peoples* constitutes a principled framework for justice and reconciliation. In order to ensure access to justice, it is necessary to utilize the *Declaration* and other international human rights law.

2. States must take effective measures to eliminate barriers that impede Indigenous peoples' access to justice. These include discriminatory laws, policies and practices.

3. States must take immediate measures, in conjunction with Indigenous peoples, to ensure that doctrines of superiority, such as "discovery" are not invoked in court cases or negotiations, particularly in regard to Indigenous peoples' lands, territories and resources.

4. There cannot be a rule of law without access. States have an obligation to ensure access to justice so that the right of Indigenous peoples to an effective remedy is fully realized.

5. Too often, Indigenous peoples face slow, costly, ineffective or burdensome legal and other processes that serve to deny them enjoyment of their human rights. States must cease invoking extreme arguments and aggressive procedures in judicial and administrative processes, so as to deprive Indigenous peoples their human right to an effective remedy.

Endnotes

[1] *ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems*, Geneva, Switzerland, adopted by International Commission of Jurists, 12 December 2012, para. 1.

[2] *B.C.G.E.U.* v. *British Columbia (A.G.)*, [1988] 2 S.C.R. 214, Dickson C.J. for the majority, para. 25.

[3] *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 112.

[4] See, *e.g.*, *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Art. 8; *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966)., Art. 2, para. 3; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352..

[5] See, e.g., *Nunavut Tunngavik Inc.* v. *Canada (Attorney General)*, 2012 NUCJ 11 (Nunavut Court of Justice), where the Canadian government has delayed fulfillment of a major treaty obligation for many years. After losing its case in the Nunavut Court of Justice, the government has filed an appeal.

See also *First Nations Child and Family Caring Society of Canada* v. *Canada (Attorney General)*, 2012 FC 445, http://quakerservice.ca/wp-content/uploads/2012/04/Fed-Ct-Judicial-Review-JUDGMENT-Discrim-re-federal-funding-on-FNs-reserves-Apr-18-12-copy.pdf, where the government has delayed the hearing of a complaint filed in 2007 for alleged discrimination in relation to federal funding of child welfare services on First Nations reserves. After unsuccessfully opposing the applications for judicial review in the Federal Court of Canada, the government filed an appeal which it also lost. The government also cut off its funding for the First Nations Child and Family Caring Society and allegedly engaged in other punitive or harassment measures.

In *Lameman* v. *Alberta*, 2013 ABCA 148, the Beaver Lake Cree First Nation is suing the Canadian and Alberta governments for cumulative effects that arose out of some 300 projects or developments in which approximately 19,000 individual authorizations were granted. After five years of procedures, the Alberta Court of Appeal refused to allow Canada to continue requesting more and more particulars before filing any statement of defence. At para. 29, the Court ruled: "the demand for particulars should not be permitted to turn into a delaying tactic .... Otherwise, litigation will be stonewalled at an early stage through excessive particularization."

[6] In contrast, in litigation within the United States, it is very common for the federal government to act as amicus curiae in support of an Indigenous nation or individual. See, e.g., Nevada v. :Hicks, 533 U.S. 353 (2001); Atkinson Trading Company, Inc., v. Shirley, 532 U.S. 645 (2001); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc, 523 U.S. 751 (1998); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Duro v. Reina, 495 U.S. 676 (1990); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1984); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[7] *UN Declaration*, preamble: "... all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust". See also *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble and para. 7; and Human Rights Council, *Incompatibility between democracy and racism*, UN Doc. A/HRC/RES/18/15 (29 September 2011), para. 5, where doctrines of superiority are condemned "as incompatible with democracy and transparent and accountable governance".

[8] Most recently, see *Tsilhqot'in Nation* v. *British Columbia*, 2012 BCCA 285 (British Columbia Court of Appeal), para. 166: "European explorers considered that by virtue of the "principle of discovery" they were at liberty to claim territory in North America on behalf of their sovereigns ... <u>While it is difficult to rationalize that view from a modern perspective, the history is clear</u>."

[9] Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, CERD/C/61/CO/3 (23 August 2002), para. 16: "The Committee expresses concern about the difficulties which may be encountered by Aboriginal peoples before courts in the establishment of Aboriginal title over land. The Committee notes in that connection that to date, no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before courts." [emphasis added]

Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc. CERD/C/CAN/CO/19-20 (9 March 2012) (adv. unedited version), para. 20, where it is recommended that Canada, "in consultation with Aboriginal peoples ... (b) find means and ways to establish titles over their lands, and respect their treaty rights".

[10] Canadian Human Rights Commission, "Still A Matter of Rights", A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act, January 2008, at 8: "... human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either."

[11] 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. 62:

> ... even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. [emphasis added]

Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, at 348: "The various sources of international human rights law -- *declarations*, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions." [emphasis added]

[12] For a detailed refutation of Canada's position, see Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Not Merely 'Aspirational'", 22 June 2013, http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf.

[13] Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, http://www.aadnc-aandc.gc.ca/eng/1309374239861: "The Declaration is an aspirational document ... a non-legally binding document that does not reflect customary international law nor change Canadian laws."

See *First Nations Child and Family Caring Society et al.* v. *Attorney General of Canada*, Submissions by Attorney General of Canada in response to Assembly of First Nations' submissions on the endorsement by Canada of the UN Declaration on the Rights of Indigenous Peoples, December 17, 2010, Human Rights Tribunal File No. T1340/7008, para. 10 In a human rights complaint alleging Canadian government discrimination in funding child welfare services for First Nations children on reserves, Canada claimed: "the Declaration does not change Canadian laws. It represents an expression of political, not legal, commitment. Canadian laws define the bounds of Canada's engagement with the Declaration". [emphasis added]

[14] *First Nations Child and Family Caring Society et al.* v. *Canada (Attorney General)*, "Memorandum of Fact and Law of the Respondent, the Attorney General of Canada", Respondent's Record, vol. 5, Federal Court of Canada, Dockets T-578-11, T-630-11, T-638-11, 17 November 2011, para. 71, where Canada concedes that the *UN Declaration* can have legal effect: "Non-binding international law may provide legal context that is of assistance in interpreting domestic legislation."

[15] Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *Nineteenth and twentieth periodic reports of Canada* (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39: "The Declaration was a non-legally-binding document that did not reflect customary international law. While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution." [emphasis added]

[16] Michael Wood, "Minister defends aboriginal cuts", [Montreal] Gazette (7 June 2013), http://www.montrealgazette.com/news/Minister+defends+aboriginal+cuts/8502012/story.html, at A7.

[17] Minister of the Department of Indian Affairs and Northern Development, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*, http://www.aadnc-aandc.gc.ca/eng/1100100014664.

[18] *Constitution Act, 1982*, section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[19] ICERD, art. 1(1): " In this Convention, the term 'racial discrimination' shall mean 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." [emphasis added]

[20] Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at 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." [emphasis added]

[21] Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), at para. 7.

[22] *Ibid.*, para. 7. The Committee is referring here to the right of all peoples to self-determination in article 1 of the *International Covenant on Civil and Political Rights*.

[23] In regard to the right of self-determination, see identical article 1 of the *International Covenant on Civil and Political Rights*, and *International Covenant on Economic, Social and Cultural Rights*,.

S. James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009), 184 at 185: "... indigenous peoples have the same right of self-determination enjoyed by other peoples. This follows from the principle of equality that runs throughout the text of the Declaration".

[24] 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.

[25] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 17: "The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required ..." [emphasis added]

Beckman v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42: "The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 ... in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples."

[26] See, *e.g.*, letter from Chief Perry Bellegarde, Federation of Saskatchewan Indian Nations, Indian Governments of Saskatchewan, to UN Special Rapporteur on the rights of indigenous peoples, James Anaya, 5 July 2013.

[27] Land Claims Agreements Coalition (LCAC), "Universal Periodic Review of Canada: Submission of the Land Claims Agreements Coalition (LCAC) to the United Nations Human Rights Council September 8, 2008", http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/LCAC_CAN_UPR_S4_2009_LandClaimsAgreementsCoalition_JOINT.pdf, para. 2. Members of the Coalition include indigenous signatories of 21 modern treaties in Canada since 1975.

[28] See *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (Bill C-38), S.C. 2012, c. 19. Its short title is: "*Jobs, Growth and Long-term Prosperity Act*"; and *A second Act to implement*

certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures" (Bill C-45), S.C. 2012, c. 31. Its short title is "*Jobs and Growth Act*".

[29] Native Women's Association of Canada, "NWAC Shadow Report, United Nations Committee on the Elimination of Racial Discrimination, 80th Session, 13 February - 9 March 2012 Geneva, 30 January 2012 : "the voices of Aboriginal women and their organizations are still ignored and disrespected, and they are excluded from participation in deliberations about their lives and their deaths."

[30] Michael Wood, "Minister defends aboriginal cuts", [Montreal] Gazette (7 June 2013) http://www.montrealgazette.com/news/Minister+defends+aboriginal+cuts/8502012/story.html, at A7.

Mike De Souza, "Researchers denounce 'deep' federal cuts to First Nations communities", *Edmonton Journal* (23 November 2012), http://www.edmontonjournal.com/news/national/Researchers+denounce+deep+federal+cuts+First+Nations/7602715/story.html: "More than 100 academics have sent the Harper government's aboriginal affairs minister a scathing letter denouncing "deep" cuts to programs they believe would have a staggering effect on living conditions, including access to clean drinking water, in First Nations communities."

[31] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UNGA Res. 53/144, UN Doc. A/RES/53/144 (8 March 1999), Annex, art. 1: "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

[32] Para. 3.

[33] Gary Mason, "More jail won't solve Canada's aboriginal incarceration problem", *Globe and Mail* (5 April 2013,) http://www.theglobeandmail.com/commentary/more-jail-wont-solve-canadas-aboriginal-incarceration-problem/article10791308/.