

Written Contribution to the

EXPERT WORKSHOP TO REVIEW THE MANDATE OF THE
EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

by

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This is an indigenous peoples contribution to the Expert Workshop that will be held at the Palais des Nations on 4-5 April 2016 to implement the request of the Human Rights Council in ¶ 1 of its Resolution No. A/HRC/RES/30/11 (1 October 2015) to “review the mandate of the Expert Mechanism on the Rights of Indigenous Peoples and to propose recommendations on how it can more effectively promote respect for the Declaration, including by better assisting Member States to monitor, evaluate and improve the achievement of the ends of the Declaration, as outlined in the outcome Document of the World Conference on Indigenous Peoples.” It asks for that review “with a view to modifying and improving the Expert Mechanism” to achieve those ends.

These are the comments of the Shiprock Community Development Corporation, a Navajo Nation nonprofit corporation that was incorporated in June of 1995 and undertakes initiatives for the benefit of the Navajo People. The corporation made a submission to the Expert Mechanism on 16 February 2015 on the rights of Indigenous Peoples to Cultural Heritage (including “participation in political and cultural life”). It is in the process of developing Navajo communities along the San Juan River in New Mexico and Utah as an important agricultural heritage system and assessing approaches to deal with the 2015 Gold King Mine waste water spill (given brief mention here as an example of possible future work by the Expert Mechanism).

The spill is a large scale environmental disaster whereby, due to U.S. federal governmental negligence, three million U.S. gallons (11 ML) of mine waste water and tailings were released into waters that included the Animas River in Colorado and New Mexico and the San Juan River of New Mexico, Arizona and Utah. It occurred on August 5, 2015 and its lingering effects have still not been adequately assessed. The San Juan River is the northern boundary of New Mexico and Arizona portions of the Navajo Nation and its waters are used by twelve Navajo Nation local government chapter populations for crop irrigation, livestock watering and human consumption. The waters carried heavy metals including cadmium and lead and toxic elements including arsenic. The presence of those poisonous substances caused a shutdown of water use and it is still unclear what the lingering and long-term impacts will be to public health and the economies of river communities. The United States and its agencies have not implemented means to deal with the spill and the New Mexico congressional delegation (of two United States Senators and three Representatives) urged

action by the U.S. Environmental Protection Agency on March 7, 2016 due to agency inaction.¹ While the United States announced its “support” for the Declaration on the Rights of Indigenous Peoples in December 2010, its acknowledgment has been mixed and the United States continues to insist that it owes obligations only to American Indian tribes it “recognizes,” speaking through elected tribal leaders, thereby excluding indigenous civil society and urban indigenous peoples. The definitions and provisions of the Declaration are clearly aimed to protect *all* indigenous peoples, whether they are rural or urban, citizen or immigrant or of a given national origin.

Those considerations now lead to the questions and this contribution:

QUESTIONS AND RESPONSES

1. What are the most valuable aspects of the current mandate of the Expert Mechanism on the Rights of Indigenous Peoples?

The open-ended inter-sessional Working Group on the draft declaration on the rights of indigenous peoples was established by the Commission on Human Rights in 1995 and its work concluded on 13 September 2007, with the adoption of the Declaration by the General Assembly.² Throughout, certain states in attendance at working group meetings over twelve years of deliberation insisted that the Declaration was not “binding” (as “law”) while indigenous participants consistently asserted that, given over 500 years of international state practice, its principles are binding as international customary law.

The primary task of the inter-sessional Working Group and the Expert Mechanism that followed has been norm and standard-setting. There is general agreement that the usual process of elaborating and defining rights in the Universal Declaration of Human Rights of study-declaration-convention standards setting has not worked when it comes to definitions of human rights for indigenous peoples. One of the reasons is state insistence that the Declaration cannot be used to prompt state action to comply, avoiding compliance with persistent objection to the Declaration at stating international customary law or by giving cosmetic acknowledgment to the Declaration while ignoring it.

The Expert Mechanism has been a valuable means for indigenous civil society input into a rational process to discuss, elaborate and fine-tune various provisions of the Declaration in studies that address important major aspects. Unlike any other international body or process, the Expert Mechanism has been valuable because it is fine-tuning Declaration standards so they can be applied to concrete problems.

¹ Marley Shebala, *Lawmakers urge EPA to pay spill damages*, Gallup (New Mexico) Independent, p. 1 (March 10, 2016).

² The author of this submission participated in four working group meetings, including the December 2005 and January-February 2006 sessions.

The Expert Mechanism has also been an important venue for indigenous governmental and state bodies, non-governmental organizations, civil society organizations and individuals to voice issues and concerns and to call for action on specific problems.

2. How can the Expert Mechanism's role in assisting States to monitor, evaluate and improve the achievement of the ends of the Declaration be strengthened?

The real issue does not lie with State understandings of the "ends" or specifics of the Declaration, and the Expert Mechanism is going well (within its financial limitations) in a slow, but deliberate, process of defining and fine-tuning specific rights for better understanding and possible implementation. At least it cannot be said that there is no guidance on what the (quite concrete) provisions of the Declaration happen to be.

A question must be posed to the major "settler" States with large indigenous populations is their commitment, or not, to implementing the Declaration. The Expert Mechanism has been a good venue to ask for responses to that question, and the Special Rapporteur on the rights of indigenous peoples has been as helpful as can be expected for one individual with a global mandate.

We have heard criticism of the current process as excluding indigenous governmental bodies and as being of little help to indigenous organizations and individuals who cannot afford to participate in short two-day sessions held in Geneva. We recognize a lack of State financial support for the work of the Expert Mechanism.

The Secretary General should advise the General Assembly to adopt measures to exhort or require States that claim to support the Declaration that they should conduct periodic public stakeholder-civil society sessions with all segments of indigenous civil society (including indigenous governments, members of civil society and members of all indigenous groups and urban indigenous). All such processes should fully accord the right of participation to all and be open and transparent to measure State acceptance and compliance with principles of indigenous rights.

3. Do you have any suggestions to strengthen the Expert Mechanism's collaboration with other bodies and mechanisms working on the rights of indigenous peoples?

This is a difficult question to answer for United Nations actors because there has been little information on such collaboration. Otherwise, special care should be taken to identify how, given problems of cost and access to electronic media, collaboration by encouraging participation by all segments of indigenous society can be achieved. Indigenous persons and their organizations and governmental organs do not have the financial or material means to fully participate and there must be a meaningful assessment of who is excluded and how participation can be facilitated by means other than gatherings in New York or Geneva.

4. Do you envision a role for the Expert Mechanism in supporting States in the implementation of Universal Periodic Review, treaty body and special procedures

recommendations relating to the rights of indigenous peoples?

It would be well for the Expert Mechanism to have a more clearly-defined role and responsibility to serve as a clearing house and monitor for findings or conclusions that either specifically relate to indigenous rights or may have such an impact. The Mechanism is an unusual initiative because it consciously utilizes the concept of “expert” or “publicist” as a source of international law. That is authorized in Article 38 of the Statute of the International Court of Justice, “the principal judicial organ of the United Nations,” that finds “international law” in international conventions, international custom (“as evidence of a *general* [not “universal”] practice accepted as law”), “general principles of law,” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” “Publicists,” who are “experts,” are co-equal with courts in decision-making, in the civil law tradition.

International law is becoming stronger, given modern communications and means of connecting nations and civil society, and it is clear that United Nations determinations made by resolution and (now) determinations by treaty bodies and high-level United Nations bodies such as the Expert Mechanism are gaining strength as statements of *opinion juris* with varying degrees of “binding” force.³

It is sometimes said that rules of international human rights law dealing with or affecting indigenous peoples are *sui generis*. One survey of the human rights of indigenous peoples in North America suggests that adverse social conditions or impacts should be used to drive indigenous human rights, along with indigenous demands and perspectives, with those considerations driving a review of definitions of human rights.⁴ Another argument in favor utilizing history and over 500 years of state practice in the development of indigenous law and its foundations is outlined a survey by two recognized authors on indigenous rights.⁵ Indigenous publicists and their gatherings in conferences and ad hoc tribunals have been active, and their publications are not utilized as much as they should be as sources of international indigenous human rights law.

5. How could a new mandate for the Expert Mechanism contribute to greater engagement

³ See, e.g., Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EJIL 879 (2005) (reviewing international precedent on the “binding effect” of United Nations actions, with particular attention to the concept of *opinion juris* as reflecting acceptance as “law” with “binding” force).

⁴ James W. Zion, *North American Indian Perspectives on Human Rights*, in Abdullahi Ahmed An-Na’im, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 191-220, at 196-197, 197-212 & 194-197 (1992).

⁵ James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20(1) BOSTON COLL. INTNL & COMP. L. REV. 55-84 (1997).

between States and indigenous peoples to overcome obstacles to the implementation of indigenous peoples' rights?

There must first be an identification of obstacles, with priorities to address them, and the primary obstacle relates to the rule of law and an ongoing refusal to recognize the Declaration as a source of rights. This is an opportune time to revisit the Expert Mechanism mandate because of changed circumstances. That is, the “expert” concept was used by the United Nations Working Group on Indigenous Peoples in commissioning a landmark study on treaties, agreements and constructive arrangements involving Indigenous Populations.⁶ It is now considered to be an authoritative work that recognizes indigenous peoples as subjects of international law and treaties or agreements with them as instruments of international law. Dr. Shirley Hill Witt, one of the founders of the U.S. National Indian Youth Council (an ECOSOC NGO), was called upon to author the portion of the first report of the Commission on Security and Cooperation in Europe that addressed the international status of American Indians as having international character and as national minorities, dispelling assertions by some in the United States that Indian rights and treaties are outside international law.⁷ Rodolfo Stavenhagen, the first Special Rapporteur on the rights of indigenous peoples, formalized the indigenous “expert” mode of elaborating principles of international human rights law by convening the Expert Seminar on Indigenous Peoples and the Administration of Justice in Madrid in 2003 so that indigenous experts could participate and contribute to a body of law on point.⁸

The Expert Mechanism should have its status reinforced as a precedent- and standards-setting body by more clearly defining its role as an “expert-jurist” body. The Secretary General can and should consider that when he makes his decision on the role of the Expert Mechanism, with the assistance of the advisors and experts he selected.

6. Do you have any comments or suggestions concerning the composition and working methods of the Expert Mechanism?

The first question is whether, given the utilization of the “expert” concept, as in the Statute of the International Court of Justice that recognizes the role of “jurists” as a source of international law, the work of the Expert Mechanism should be one by holders of speciality expertise. That is, the

⁶ Miguel Alfonso Martinez, Special Rapporteur, STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS (July 1997).

⁷ Commission on Security and Cooperation in Europe, FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT 148-164 (November 1979).

⁸ Commission on Human Rights, Report of the Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, 12-14 November 2003), No. E/CN.4/Sub.2/AC.r/2004/6 (10 June 2004).

United Nations Permanent Forum on Indigenous Issues, that has been held yearly in New York, is clearly an indigenous policy body, given its open-ended participation and agendas. It is a valuable means of measuring international issue priorities. On the other hand, the Expert Mechanism is more of a legal-technical body in its mission. Given that, however the leading experts for the body are chosen, there should be a method to identify experts in the fields of indigenous human rights and policy (including law and history) and involve them. Some may or may not be able to travel to Geneva or other sites for meetings, but most should be able to participate by electronic communication to give authoritative information and opinions for reports that will have dignity as a source of international human rights law.

CONCLUSION

The Expert Mechanism has been a valuable organ to identify and articulate important human rights norms and principles and consideration should be given to means to make it a more persuasive and authoritative body, with significant indigenous expert input.

Respectfully submitted this 13th day of March, 2016

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