Expert Mechanism on the Rights of Indigenous Peoples, Sixth Session, July 8-12, 2013

International Human Rights Association of American Minorities

Intervention re Agenda Item #5 - Study on access to justice in the promotion and protection of the rights of indigenous peoples.

July 9, 2013

Best greetings to the Expert Mechanism members. Thank you very much for this very important study on indigenous peoples' access to justice.

IHRAAM is an International NGO in Consultative Status with ECOSOC, a non-native organization which has been participating at UN fora in attempts to advocate for an indigenous petition at the American regional UN court, the Inter-American Commission on Human Rights. The Lil'wat instigators of the petition have convincing proof that they have exhausted the domestic remedy available in Canada, where they cannot possibly get a fair trial on the court's right of jurisdiction from that very court. In legal terms, it would put that court at conflict of interest, though this has never been expressed by any court as its reason for refusing to address this issue. The international level of hearing is a necessity for access to justice, leading to resolution of their situation as an indigenous people who do not have a treaty with Canada and wish to retain jurisdiction over their affairs.

We would like to take this opportunity to make some further suggestions for the study on access to justice, based on our experience in assisting the Lil'wat petition.

It is clear that the global lack of access to justice for indigenous peoples is an urgent problem. We are convinced that in Canada the criminalization of indigenous people will not cease until the cause of it, the competition for the lands and resources of the indigenous peoples, has also ceased, or, in an unparalleled exercise of international pressure or perhaps even the principle of universal jurisdiction to hear crimes against humanity, the

matter is resolved according to the appropriate international human rights instruments which are readily available.

Here, we wish merely to point out a few kinds of the deprivation of justice experienced by indigenous peoples and individuals in Canada, to put our next remarks in context. The Indian Act of 1876 is still in effect; the Act still connects many indigenous rights only to Indian Reserves, which are very small lands and were arbitrarily defined by the settler government. In some cases those Indian Reserves were formed without treaties, or instead of treaties. While we may promote the remedy of Canada making fair, forward looking and honourable treaties with all indigenous peoples whose lands it covers, which is indicated as the only legal course of settlement in Canada' s constitution, the present day treaty making process is deeply flawed. The voluntary plan of action for the so called "reconciliation" occurring in Canada, the British Columbia Treaty Commission, is a process which ends in extinguishment of aboriginal title and the codification of limited aboriginal rights, for a financial settlement and small lands which cannot possibly ensure a collective, sustainable future.

We note that the study often frames problems as resulting from historic injustice, and we simply point to the fact that so many of these historic injustices continue unabated in the present day, and so it is often not a question of hurt feelings or a buried past, but active oppression with which we are dealing: human rights crimes in progress.

We recommend that the Expert Mechanism consider adding to the sources referenced as international legal bases upon which indigenous peoples and nations may advance themselves in the modern day and restore their peoples and nations. The Genocide Convention, 1948, which has not been made operable by a form of mechanism or protocol to complement the Convention, is a serious source of right for indigenous peoples. Implementation of that convention has been limited to states' importing the articles into their own constitutions and criminal codes, but this is sometimes ineffective as in the case of Canada, which adopted only two of the five articles which define genocide into its criminal code, and changed a third to make prosecution on that point unrealistic. A second international document which has particular significance for many indigenous nations is the Vienna Convention on the Laws of Treaties. Many nations within the arbitrary borders of Canada would like to put that Convention to work for them, but they have this difficulty of not having "standing" in the usual international arenas where that Convention could be considered against the treaty relationships between Canada and many indigenous nations. Perhaps the Expert Mechanism could consider how the HRC may be able to augment rules of access to allow those nations with treaties and other constructive arrangements, which other arrangements surely are some kind of treaty, access to that third party international venue which is appropriate to their specific problem of broken treaties.

We ask the Expert Mechanism to consider the international legal principle that a single party cannot be both suitor to the court and be the court itself. The difficulty for indigenous peoples is that this conflict of interest is always present when they are in contact with state courts. The situation is that the state itself has constituted the court and bound it to uphold the laws of the state. That conflict of interest renders the court without jurisdiction in questions of indigenous rights, because it cannot be impartial to legal issues around indigenous peoples – who in most cases have superior titles to the lands and resources than the states do – the court is obviously partial to the result because its survival is with the state. In Canada the partiality of the courts, when hearing indigenous questions, has been extensively documented, especially in cases where courts are dealing directly with indigenous peoples who are attempting to prevent extractive industries in their territories. This is the reason for criminalization of indigenous peoples: the state's illegitimate assumption of control of their lands and territories.

We recommend further for the use of the study on access to justice:

Creation of a voluntary fund for indigenous peoples' legal action at the international level, as justice is expensive, and also to support the dissemination of information within states, both to indigenous peoples and to the public, related to indigenous rights

EMRIP might consider urging states to make treaties with indigenous peoples where the state is interested in the lands, territories or resources which belong to a particular indigenous people, and the creation of an international body offering third party good offices to oversee such negotiations to achieve agreements in the context of international law.
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We support the proposal that indigenous peoples must be able to attend UN fora with observer status accorded to them, and that they no longer have to attend UN fora as representatives or delegates of organizations.

Finally, we would like to stress the importance of international oversight in the exercises of accessing justice which indigenous peoples and nations may engage in. The point of a court losing jurisdiction when it is clearly partial to the outcome of a case is a point which must be given its due weight by the international community.