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## Human Rights Council

Expert Mechanism on the Rights of Indigenous Peoples

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Item 4 of the provisional agenda

United Nations Declaration on the Rights of Indigenous Peoples

### **Report of the United Nations seminar on treaties, agreements and other constructive arrangements between States and indigenous peoples\***

Hobbema, Canada, 14–17 November 2006

*Chairperson:* Sharon **Venne**

*Co-Rapporteurs:* Chief Wilton **Littlechild** and Andrea **Carmen**

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\* Late submission. The annex to the present document is circulated as received, in the language of submission only.

## I. Introduction

1. At its 46th plenary meeting on 23 July 2003, the Economic and Social Council took note of the decision of the Commission on Human Rights 2003/117 and endorsed the Commission's recommendation that it request the United Nations High Commissioner for Human Rights to organize, before the end of the International Decade of the World's Indigenous People, a seminar on treaties, agreements and other constructive arrangements between States and indigenous peoples to explore possible ways and means to follow up on the recommendations included in the final report of the Special Rapporteur of the study on treaties, agreements and other constructive arrangements between States and indigenous populations (E/CN.4/Sub.2/1999/20, paras. 289–322).

2. The seminar, organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in November 2003, in Geneva, provided an opportunity to 39 indigenous representatives, 9 academic experts and 30 State representatives to discuss the difficulties relating to the implementation of treaties, agreements and other constructive arrangements concluded between States and indigenous peoples and the need to foster better understanding between the parties.

3. While the seminar considered the impact of the legacy of these historical treaties on indigenous peoples, it also looked at how treaties, agreements and other constructive arrangements could play a role in reconciling indigenous peoples and States. Situations pertaining to historical and modern treaties in Australia, Bangladesh, Canada, Chile, Indonesia, Kenya, Mexico, Myanmar, New Zealand, Panama, the Philippines and the United States of America were discussed at length, including with expert working papers, which identified core issues and made proposals.

4. On the basis of the conclusions and the recommendations of the seminar, whereby it was felt that work should be undertaken to share information on "best practices" in relation to historic treaties but also modern-day treaty-making between States and indigenous peoples, OHCHR welcomed, in 2006, the invitation extended by the elders and chiefs of the Maskwacis Cree Nation to co-organize on their traditional lands a follow-up seminar to the one held in Geneva in 2003.

5. The objectives of the seminar was to identify the lessons learned that might serve as a guide for the better implementation of historic treaties and the development of modern agreements between indigenous peoples and States, provide an opportunity to build on the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the Human Rights Council on 29 June 2006, in particular the provisions relating to treaties, and also explore the scope and extent of the treaty rights of indigenous peoples. It was expected that the recommendations of the seminar would contribute to a dialogue between States and indigenous peoples and provide a framework for the implementation and elaboration of treaties and agreements that would better protect the rights of indigenous peoples.

6. The seminar was held on the traditional lands of the Maskwacis Cree peoples, in Hobbema, Canada, from 14 to 17 November 2006. A total of 523 indigenous representatives, mainly from Canada, attended the seminar. In addition to indigenous experts from Canada who participated in the seminar, OHCHR funded the participation of indigenous experts from New Zealand (Hone Harawira), Australia (Megan Davis), the United States of America (William Mean and Andrea Carmen), Mali (Saoudata Aboubacrine), Nicaragua (Oscar Hodgson) and Panama (Hector Huertas), as well as the participation of the Chairperson of the Working Group on Indigenous Populations, Miguel Alfonso Martínez, a member of the United Nations Permanent Forum on Indigenous Issues, Chief Wilton Littlechild and a member of the Committee on the Elimination of Racial

Discrimination, Francisco Cali Tzai. The Government of Canada contributed actively to the seminar. A representative of Indonesia attended as an observer. Sharon Venne was nominated Chairperson by acclamation. Andrea Carmen and Chief Wilton Littlechild were co-Rapporteurs of the seminar.

7. The seminar was preceded by a two-day preparatory meeting organized by the Confederacy of Treaty Six Nations Elders on 12 and 13 November. The meeting held on Enoch Cree Nation territory was attended by chiefs, leaders, elders and other representatives of indigenous peoples from North, Central and South America, Africa and the Pacific, who discussed a range of issues addressing the themes of the seminar, as well as proposals for recommendations for inclusions in the final report.

8. Expert participants also provided the following written presentations:

- “Importance of the oral understanding of treaties”, by Sharon Venne
- “Implementing treaty rights at the international level: the role of the United Nations Declaration on the Rights of Indigenous Peoples”, by Chief Wilton Littlechild
- “Treaties, agreements, conflict-prevention and conflict-resolution mechanisms”, by Oscar Hodgson
- “Importance of the oral understanding of treaties”, by Sharon Venne
- “*Te Tiriti o Waitangi*: the means by which a nation promotes harmonious, just and more positive relations between States and essential peoples”, by Hone Harawira
- “Constructive agreements between indigenous peoples and the Australian State: recent developments”, by Megan Davis and Hannah McGlade
- “Free, prior informed consent, treaty rights and the United Nations Declaration on the Rights of Indigenous Peoples”, by Andrea Carmen
- “Update on modern treaty-making, agreements and other constructive arrangements: the Canadian experience”, by Sandra Ginnish, Director General – Treaties, research, International and Gender Equality, Indian and Northern Affairs Canada

## II. Summary of discussions

9. Expert participants took note of the Enoch River Cree Declaration, adopted at the preparatory meeting organized on 12 and 13 November 2006. Discussions focused on the themes of indigenous peoples’ and States’ understanding of treaties, agreements and constructive arrangements; issues related to the implementation of treaties, agreements and other constructive arrangements; practical experiences of treaties and agreements as mechanisms for conflict resolution and reconciliation; international developments and treaties, agreements and other constructive arrangements, including the role of the Declaration on the Rights of Indigenous Peoples, the human rights treaty bodies and regional human rights instruments. The programme of work of the seminar is annexed to the present report.

### A. Indigenous peoples understanding of treaties, agreements and other constructive arrangements

10. As in previous discussions relating to treaties, agreements and other constructive arrangements between States and indigenous peoples, indigenous participants underlined the important role played by treaties in determining their relationship with the States in which they lived. The treaties were perceived by some of the experts as having a legally-

binding character and were considered indispensable as a framework for the resolution of conflicts. It was noted that the history of treaty-breaking by Governments over the years had undermined confidence between the parties, and that this was compounded by differing interpretations or understandings of treaties. For example, speakers referred to the unwritten intent as expressed orally, which was to give indigenous nations the capacity to be self-determining and self-sufficient, while States and courts focused literally on the text of the treaty itself. The language the treaty was written in might also change the contents, as is the case of the Waitangi treaty between the British Crown and the Maori people of Aotearoa, New Zealand.

11. A number of speakers pointed to the importance of elders and oral histories as sources of interpretation of the original spirit and intent of treaties, and believed that greater efforts should be made to gather information from them. The role of treaty education was mentioned as critical in passing the message of treaties on to future generations and not losing the indigenous oral understanding of the original documents.

## **B. Implementation of treaties, agreements and other constructive arrangements**

12. Reference was made to the recommendations made by the Special Rapporteur, Miguel Alfonso Martínez, in his study and at the 2003 treaties seminar organized by OHCHR by participants, and it was recommended that they be used as a starting point for the discussions on implementation. The experts as well as the representative of Canada believed there was much to be learned from recent experiences in treaty negotiation that could be helpful if applied to the contemporary context.

13. Some discussion arose concerning the principle of free, prior and informed consent and its relevance to the process of negotiating and finally agreeing upon treaties and agreements as they are reviewed and considered today. Free, prior and informed consent, it was suggested, was the means by which treaties should be respected, and implied the full consultation with the indigenous peoples concerned to ensure their agreement on any outcome. The evolution of treaties as implemented in practice was considered relevant to the seminar. An example was given from a constructive arrangement in Panama, which placed in the hands of the indigenous authorities almost all matters concerning the administration of justice and the economic development on their lands. These responsibilities had evolved over time and through negotiations with successive Governments.

## **C. Treaties and agreements and conflict-prevention and conflict-resolution mechanisms**

14. Much of the discussion on treaties focused on their value as mechanisms and models for the resolution of disputes and conflicts between States and treaty-making indigenous peoples. It was understood by the experts that treaties, in order to be useful as a framework for reconciliation, had to be understood in the same way by all parties and respected. Experts also commented that treaties could be a major factor in any discussion or settlement process involving indigenous peoples, with a focus on conflict prevention as well as the establishment of fair and fully participatory processes to redress violations effectively.

15. Many speakers noted that, unfortunately, the history of implementation had not been good in the past, hence the interest of indigenous peoples in raising the issue at the international level and seeking some evaluation from the United Nations. One specific proposal related to restorative justice and the possibilities for financial and other forms of

compensation to indigenous nations through application to the courts. There was discussion about a possible role for the United Nations and its organs, such as the Permanent Forum on Indigenous Issues, which, it was felt, might be able to act as an arbiter in cases of conflicts arising between indigenous nations and States. Experts noted that such an international mechanism, while desirable in cases where conflicts and violations are not able to be resolved by bilateral processes established jointly by the treaty partners, would require considerable political and technical adaptation by the United Nations.

#### **D. Role of the United Nations Declaration on the Rights of Indigenous Peoples**

16. The seminar concluded by reflecting on the role of the United Nations Declaration on the Rights of Indigenous Peoples in implementing treaty rights. The long history of elaboration and negotiation of the Declaration was noted, and the successful adoption by the Human Rights Council welcomed. Article 36 (now 37) specifically addressed treaties and treaty rights but, it was noted, the article needed to be read alongside a number of other articles, as well as the preambular paragraphs of the Declaration, which are directly relevant.

17. Experts noted in particular the importance and relevance of the references in the United Nations Declaration to the right of free, prior informed consent, which is an essential principle of international treaty-making. Articles 19 and 32 were noted in particular. Several experts stressed that free, prior and informed consent was basic to traditional understandings about treaty-making and was a requirement for addressing violations and abrogations of treaty rights, as well as for the establishment of participatory processes to redress violations effectively.

18. Reference was also made to the specialized agencies of the United Nations currently working on indigenous issues, such as the World Intellectual Property Organization (WIPO), or human rights bodies such as the Committee on the Elimination of Racial Discrimination, where it was felt the implications of the Declaration and particularly the article relating to treaties ought to be given visibility and used as guidance in current negotiations and monitoring. Experts concluded by agreeing that there was further need for discussions on the implementation of treaties and hoped that a third seminar would be convened in the future.

### **III. Conclusions and recommendations**

19. **The experts participating in the seminar on treaties, agreements and other constructive arrangements between States and indigenous peoples, meeting in Maskwacis Territory of Treaty No. 6, from 14 to 17 November 2006, agreed upon the conclusions and recommendations set out below.**

#### **1. Conclusions**

20. **The experts reaffirmed the conclusions and recommendations of the seminar on treaties, agreements and other constructive arrangements, held in Geneva in December 2003 (E/CN.4/2004/111), and emphasized their continued relevance.**

21. **The experts endorsed the Enoch River Cree Declaration adopted by consensus by the participating experts of the International Indigenous Nations Treaty Summit, held on 12 and 13 November 2006 on Enoch Cree Nation Territory of Treaty No. 6**

and presented to the United Nations expert seminar on treaties, agreements and constructive arrangements on 14 to 17 November 2006.

22. The experts stressed the need to emphasize and assert indigenous peoples' own understanding of the treaties negotiated by treaty nations, as documented and evidenced by indigenous peoples' oral histories, traditions and the concepts expressed in their own languages.

23. The experts emphasized that these understandings must be the basis for all current processes between States and indigenous peoples, to resolve conflicts and disputes related to the abrogation and implementation of treaties and the rights they affirm.

24. The experts took note with deep appreciation of the recent advances with respect to the recognition of treaty rights in the work of key United Nations bodies, including the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues, the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as well as regional organizations, such as the Inter-American Human Rights Court of the Organization of American States, which had taken place since the first seminar.

## **2. Recommendations**

### **A. Governments**

25. The experts expressed concern at the lack of implementation by States of recommendations, particularly those contained in paragraphs 7 and 8 of the report on the 2003 seminar and addressing the need to establish effective mechanisms through mutually agreed upon processes to address issues of implementation, compliance, prevention and resolution of conflicts related to treaties.

26. The experts reiterated the need for States to implement effective participatory and just processes, based on the principles of free, prior and informed consent and mutual recognition, whereby treaty violations and disputes regarding implementation and compliance could be addressed by States and indigenous treaty partners.

27. The experts noted with appreciation that the Government of Canada, in its statement on the present seminar of 15 November 2006, also recognized the need for implementation of effective mechanisms.

28. The experts recommended that States should clarify their terminology relating to the use of the terms "treaties", "agreements" and "constructive arrangements" in keeping with the definitions applied in the original United Nations treaty study. This will prevent any confusion with regard to the national and international legal status of treaties as legally binding nation to nation, on the one hand and, on the other, agreements with international character and other forms of agreements and arrangements, which sometimes carry the misnomer "modern treaties".

29. The experts called upon States to provide and support education programmes in public school systems and through other education programmes, with the full participation and direct involvement of indigenous peoples, regarding the accurate historical record of indigenous peoples, treaty rights and responsibilities of their own citizens, government agencies and officials.

30. The experts urged States to include the implementation of treaties and treaty rights, as well as a review of current international mechanisms and activities, as

permanent agenda items in all relevant legislative, parliamentary processes and, when relevant, in chiefs' summits. The experts also encouraged treaty partners to initiate discussions for the development of mutually acceptable joint implementation plans of action and institutional mechanisms in this regard.

31. The experts recommended that States should assess and incorporate into their respective legal systems those rights recognized in treaties, agreements and other constructive arrangements, as well as international human rights standards regarding the rights of indigenous peoples and nations divided by international borders.

32. The experts recommended full compliance with and implementation of articles of the United Nations Declaration on the Rights of Indigenous Peoples relating to the principle of free, prior and informed consent and the right to self-determination as key principles for concluding, implementing, monitoring and redressing of violations regarding treaties, agreements and other constructive arrangements.

#### **B. Indigenous peoples and nations**

33. The experts reaffirmed the need to advance the treaty-making processes between indigenous nations for their mutual support and development.

34. The experts endorsed the implementation and dissemination of treaty education curricula developed independently by indigenous peoples and in conjunction with State educational systems.

35. The experts expressed support for ongoing and current efforts by indigenous nations and peoples to document, research and preserve oral histories, traditional knowledge and cultural understandings of the treaties negotiated by their peoples, including the content, terms, provisions, rights and relationships that they affirm from an indigenous understanding.

#### **C. Human Rights Council**

36. The experts recommended that the new Human Rights Council should implement the recommendations made by consensus of the indigenous participants in the fifth session of the Permanent Forum on Indigenous Issues and presented to the Council at its second session to establish an expert advisory body on indigenous peoples' human rights, to provide advice to the Council regarding issues affecting the exercise and enjoyment of the human rights of indigenous peoples, including treaty rights.

37. The experts also recommended that the Council should include the question of treaties, agreements and other constructive arrangements when undertaking its universal periodic review.

#### **D. United Nations bodies and specialized agencies**

38. The experts recommended that the Working Group on Indigenous Populations should initiate at its twenty-fifth session a study focusing on the full implementation of treaty or non-treaty rights of indigenous peoples in all regions of the world.

39. The experts reaffirmed the call by the United Nations study on treaties, agreements and constructive arrangements for the international recognition of the treaties concluded between indigenous peoples and States, as well as effective and accessible mechanisms to provide international redress for treaty violations and abrogations.

40. The experts called for the full and effective implementation of article 42 of the Declaration on the Rights of Indigenous Peoples and, in particular, call upon the Permanent Forum on Indigenous Issues to initiate a five-year review and follow-up process based on reports from States, specialized agencies and bodies, and indigenous organizations addressing treaties and treaty rights.

41. The experts reiterated the recommendation made at the first seminar on treaties, agreements and other constructive arrangements, calling upon the Economic and Social Council to seek an advisory opinion from the International Court of Justice in relation to treaties and agreements between States and indigenous peoples, and recommended that the request should be made through the Permanent Forum on Indigenous Issues at its sixth session.

42. The experts requested that the relevant recommendations contained in the United Nations study on treaties, agreements and constructive arrangements and the two United Nations seminars on treaties, agreements and constructive arrangements be taken into consideration by:

(a) The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other relevant thematic special procedures;

(b) International conferences of the United Nations system;

(c) The Permanent Forum, in particular at the 2007 session focusing on land, territories and natural resources, which would also include the issue of treaties, agreements and constructive arrangements;

(d) States when implementing the United Nations Millennium Development Goals, as well as United Nations bodies when developing indigenous peoples' indicators relating to sustainable development, food sovereignty, biological diversity as other key aspects of development from indigenous peoples' perspective;

(e) United Nations organizations and specialized agencies when developing plans of action, including, inter alia, the Food and Agriculture Organization of the United Nations, the World Intellectual Property Organization, the United Nations Development Programme, the Convention on Biological Diversity and the Commission on Sustainable Development;

(f) States, when implementing the plan of action for the International Decade of the World's Indigenous Peoples, and in particular, its stated goals to promote non-discrimination and inclusion of indigenous peoples in all phases of the policy process, from design through implementation and evaluation, and to promote full and effective participation of indigenous peoples in the decisions that affect their lives, based on the principle of free, prior and informed consent.

**E. Office of the United Nations High Commissioner for Human Rights**

43. The experts called upon the Office of the United Nations High Commissioner for Human Rights to develop, in conjunction with the Working Group on Indigenous Populations and indigenous treaty nations and organizations, a capacity-building and training programme for indigenous peoples, United Nations staff and State representatives in the use of treaties, agreements and constructive arrangements for conflict prevention and resolution.

44. The experts recommended that the Office of the High Commissioner should organize seminars, in cooperation with the Working Group on Indigenous



Populations, to study the situation of treaties, agreements and other constructive arrangements in Asia and Africa.

45. The experts reaffirmed the recommendation that the Office of the High Commissioner organize, in conjunction with the Working Group on Indigenous Populations and indigenous treaty nations and organizations, a world conference on indigenous peoples' treaties, agreements and constructive arrangements, to be held during the first half of the Second International Decade of the World's Indigenous People.

46. The experts recommended that the third expert seminar on treaties, agreements and other constructive arrangements should be held in Waitangi, Aotearoa (New Zealand), in February 2008 and that the Office of the United Nations High Commissioner for Human Rights should organize the seminar with the full participation of the Special Rapporteur on treaties, agreements and other constructive arrangements, the indigenous host communities, States and other indigenous organizations.

47. The experts requested that the above recommendations be submitted to all relevant United Nations bodies, including, inter alia, the Permanent Forum on Indigenous Issues, the Human Rights Council, the Working Group on Indigenous Populations and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

## Annex

### Programme of work

#### Tuesday 14 November 2006

- 10.30 Invocation by Elder Norman Yellowbird, Samson Cree Nation  
Welcome by Chief Victor Buffalo, Samson Cree Nation, I.O.I.R.D. President  
Opening statement on behalf of the High Commissioner for Human Rights  
Election of the Chairperson of the Seminar  
Adoption of the programme  
Introductory remarks by Miguel Alfonso Martínez, Special Rapporteur
- Item 1. Presentation of the recommendations of the Expert Seminar on treaties, agreements and constructive arrangements, November 2003, Geneva  
E/CN.4/2004/111 by Chief Wilton Littlechild  
General discussion  
E/CN.4/2004/111/Add.1 by the Government of Canada
- 15.00 Item 2. (a) Indigenous peoples understanding of treaties and agreements  
(b) Understanding of other constructive arrangements
- 9.00 Item 3. Implementing treaties  
(a) The principle of free, prior and informed consent as a treaty principle  
(b) Implementing treaty rights at the national level  
(c) Implementing constructive arrangements at the national or regional level
- Four Schoolchildren – “Treaty right to education”
- Item 4. Treaties and agreements and conflict-prevention and conflict-resolution mechanisms  
(a) At the domestic level  
(b) At the international level

#### Thursday 16 November

- 9.00 Item 4. (*continued*)
- Item 5. Implementing treaty rights at the international level  
(a) The role of the Declaration on the rights of indigenous peoples  
(b) The role of the treaty bodies and treaty rights  
(c) The role of regional human rights mechanisms
- 15.00 Item 5 (*continued*)

**Friday 17 November**

Conclusions and recommendations

Closing remarks

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