

**Report of the United Nations Expert Seminar on
*Strengthening Partnership between Indigenous Peoples and States: treaties, agreements and
other constructive arrangements***

Geneva, 16-17 July 2012

Chairperson: Hon. Justice Joseph William

I- Opening of the seminar

1. The opening address was delivered by the Chief of the Indigenous Peoples and Minorities Section of the OHCHR, Mr. Antti Korkeakivi, who welcomed all indigenous participants, experts and UN mandate holders and State representatives whose presence and engagement was essential to advance the issue of treaties and other constructive arrangements and for the seminar to live up to its title on strengthening partnership between States and Indigenous Peoples. He stressed that the improved implementation of treaties, agreements and other constructive arrangements must be an integral part of our efforts in the work to advance the implementation of the Declaration on the Rights of Indigenous Peoples, as is called for in the Preamble as well as in Article 37 and other provisions of the Declaration. Indeed, for many indigenous representatives, the improved implementation of treaty commitments was a major motivation in their tireless efforts to have the Declaration adopted. He underlined the importance that the High Commissioner for Human Rights attaches to indigenous peoples' rights and her commitment to the implementation of the Declaration on the Rights of Indigenous Peoples.
2. Hon. Justice Joseph Williams, acting as Chairperson of the seminar, also welcomed the participants. He reminded the participants that previous seminars on the issue have led all the way to the third treaty seminar and that time has come to find pathways forward that move us

a step closer to the objectives that still need to be achieved. He said that the seminar was an important opportunity to make progress and reach concrete commitments.

3. Ms. Samia Slimane, Human Rights Officer at the Indigenous Peoples and Minorities Section, explained that the seminar was a continuation of the discussions that took place during the first two seminars organized by OHCHR on the issue in 2003 and 2006 which looked at how treaties, agreements and other constructive arrangements could play a role in reconciling indigenous peoples and States and identified “best practices” in relation to existing treaties and modern-day treaty-making. She believed that the present seminar could benefit from the adoption of the UN Declaration on the Rights of Indigenous and expressed hope that discussions would help address the areas of concerns that remain, with a clear focus on implementation of treaties.
4. The documentation included a series of background papers prepared by indigenous non-governmental organizations, indigenous and other experts as well as contributions submitted by the Governments of Canada and Columbia. A paper prepared by the Secretariat was also made available to the seminar on jurisprudence and findings of human rights treaty bodies relating to treaties, agreements and other constructive arrangements between States and indigenous peoples, covering the period from 2007 to 2012. All background papers can be found at <http://www.ohchr.org/EN/Issues/IPeoples/Pages/SeminarTreatiesAgreements.aspx>.

II- Summary of discussions

Session I: International developments relevant to the situation of treaties, agreements and other constructive arrangements

5. This session reviewed the relevant provisions of the Declaration of the Rights of Indigenous Peoples and explored the potential and role of the different UN mechanisms with a specific mandate to address the rights of indigenous peoples.

1) The significance of the UN Declaration on the Rights of Indigenous Peoples concerning treaties, agreements and other constructive arrangements

6. Chief Wilton Littlechild, Member of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), stressed the significance of the UN Declaration on the Rights of Indigenous Peoples for treaties, agreements and other constructive arrangements for indigenous peoples. He drew attention to the previous seminars' calls for the spirit and intent of treaties, as understood by indigenous peoples, to be honored and respected. He further underlined the importance of the Preamble of the UN Declaration, which states that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States.
7. Chief Littlechild stated that indigenous peoples' treaties in Canada are international agreements reflecting indigenous peoples' relationship with the Crown and underlined that they include indigenous peoples' inherent right to self-determination. He emphasized that treaties were sacred agreements and added that mutual consent was an international principle. He further noted that there are a number of treaties, including several modern treaties and arrangements, which are presently being negotiated in Canada and stressed that peaceful coexistence and obligation to honour and respect the treaties must be upheld.
8. He mentioned the preparatory process for the World Conference against racism, racial discrimination, xenophobia and related intolerance, where indigenous peoples made sure that the importance of recognizing treaties and other constructive arrangements between States and indigenous peoples was reflected. He drew attention to Article 37 of the UN Declaration and several preambular paragraphs that affirm treaty rights of indigenous peoples. He stated that all articles in the UN Declaration are in effect treaty rights, including treaty rights to land, water, resources, health, fishing, hunting, gathering etc. and reflect treaty understanding. He emphasized that all rights in the Declaration are underpinned with the spirit and intent of treaties and include indigenous inherent right to self-determination.

9. He also referred to the drafting process of the American Declaration on the Rights of Indigenous Peoples and noted the inclusion in the draft Declaration of a provision relating to treaties, which marked a significant improvement within the international community. He indicated that the final text of Article 23 of the draft Declaration includes all of the language contained in Article 37 the UN Declaration, as well as a provision on international redress for violation and references to “true spirit and intent,” in good faith and understanding of Treaties by indigenous peoples. The final text read as follows: “Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors, in accordance with their true spirit and intent in good faith and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the indigenous peoples as regards to treaties, agreements and other constructive arrangements.” He drew attention to the second part of the text which states that “When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned.”

2) The review of United Nations Bodies’ work relevant to treaties, agreements and other constructive arrangements

10. With respect to this agenda item, Chief Edward John, Member of the Permanent Forum on Indigenous Issues (PFII), noted the endorsement and support of the Permanent Forum to further discussions on the issue of understanding and interpretation of treaties, agreements and other constructive arrangements. He drew attention to the difficulty of strengthening partnerships in situations where States deny the existence of indigenous peoples’ titles and legal rights on their respective lands and territories as demonstrated by judicial proceedings. He argued that the establishment of a voluntary international mechanism would allow indigenous peoples to pursue redress. He added that, in his view, Articles 18, 38 and 41 of the UNDRIP offer guidelines on this neglected and disregarded issue and he expressed hope that the seminar will light the way forward.

11. Mr. Francisaco Cali Tzai, member of CERD, indicated that the reason for CERD's strong support of the UNDRIP is grounded in the preamble of the Convention on the Elimination of All Forms of Racial Discrimination, which stresses that political doctrines based on assertion of superiority of some peoples are morally condemnable and socially unacceptable. He stressed that indigenous peoples must be free from all types of discrimination when they exercise their rights and argued for strengthened links between the work of CERD and UNDRIP. He drew attention to the review of States' reports and observed that the situation of indigenous peoples has received increased attention. He also underlined that CERD has in several cases called upon States to respect treaty rights of indigenous peoples especially when their rights were affected by projects carried out on their lands.
12. Chief Littlechild drew attention to the studies prepared by EMRIP and observed that experts have consistently considered treaties, agreements and constructive arrangements for inclusion in reports and advice presented to the Human Rights Council since the beginning of its mandate. He indicated that during the first session of EMRIP, at the request of the Human Rights Council, a decision was made to study the right to education. He added that, in his view, when implemented as a treaty right, the right to education offers a chance of reconciliation. He also indicated that promotion and protection of treaties, treaty rights, agreements and other constructive arrangements will be included in EMRIP's study on access to justice to be discussed at its fifth session.
13. He also underlined the importance of linkages between violations of treaty rights and unsustainable development. He stressed that the requirement for mutual consent is fundamental for treaties, which are a basis for a strengthened partnership consistent with UNDRIP. He also indicated that EMRIP study on the right of indigenous peoples to participate in decision-making stressed that several treaties between States and indigenous peoples affirmed that the principle of indigenous peoples' consent underpins the treaty relationship between States and indigenous peoples. This is a thread reflected in each of the reports and advice issued by EMRIP to date, he said.

14. He also expressed the view that when treaties exist, they can be a foundation for partnership, cooperation and good faith. He concluded that indigenous peoples' understanding of treaties was as important as the written text of the treaty and explained that pipe ceremonies, songs and other cultural testimonies also carry the treaty story.
15. Mr. Jesse Mc Cormick, OHCHR Senior Indigenous Fellow, noted that the issue of treaties is of concern to all communities residing on treaty lands because they are all treaty people. He shared the experience of his own treaty community, explaining that various Chiefs, including Big Bear Chief Kitchimaqua, entered in treaty negotiations with the Crown in 1818 and that related issues over treaty lands are being settled following the lodging of a claim. In his view, this constituted an example of a contemporary process to address historical injustice.
16. With respect to the agenda item under discussion, he presented a note by the Secretariat entitled "Review of the findings and jurisprudence of treaty bodies and other United Nations human rights mechanisms relating to treaties, agreements and other constructive arrangements (2007-2012)." In his presentation, he underlined the importance that UNDRIP attaches to treaties, affirming that indigenous peoples are entitled to treaty rights in its preambular paragraphs 8, 14 and 15, and also recognizing that treaties and other agreements are matters of international concern and represent a relationship. He observed that Article 37 of the Declaration is the primary article in relation to treaties and he drew attention to the application provision of Article 42.
17. Mr. Mc Cormick also provided further details about the jurisprudence of treaty bodies and mechanisms in relation to consultation and consent and the fundamental requirement of free, prior and informed consent, which has been stressed by several UN bodies. He drew attention to the broad scope of the subject matter addressed in treaties, agreements and other constructive arrangements, which is reflected in the findings and recommendations of UN bodies. EMRIP has noted that when indigenous peoples conduct cultural ceremonies and songs that express treaty-making principles, these ceremonies and songs protect their

traditional lands, territories and resources. EMRIP has also pointed out that in some States, support of indigenous languages and cultures flows from obligations in treaties, agreements and other constructive arrangements. It has discussed treaties as evidence of the right to self-determination.

18. He drew attention to the findings of the Special Rapporteur on the Rights of Indigenous Peoples, who has observed that increasing indigenous participation in and influence over settlement policies, procedures, and outcomes could go a long way in alleviating discontent felt by indigenous groups in relations to a treaty settlement process. He concluded that effective recognition, observance and enforcement of treaties were of primary concern. Potential to realize full and effective participation is reflected widely in UN jurisprudence.
19. Many participants drew attention to a number of treaties which have been entered into in good faith with colonizing States at sacred ceremonies. They stressed that Nations that entered into treaty relationships with States continue to exist and are entitled to have their treaty rights respected. Treaties are “matters of international concerns, interest, responsibility and character,” as affirmed in the UN Declaration. Several participants noted that treaties are sacred and represent nation-to-nation relationships, but disagreements on the nature and scope of treaties have led to much dispute over what outstanding obligations remained to be implemented. Several participants outlined obstacles and limitations that indigenous peoples are facing in seeking redress within the domestic arena when States unilaterally infringe treaties and thus treaty rights. They observed that unsatisfactory domestic processes had to be used in the absence other options to resolve outstanding claims, and they advocated for an international grievance mechanism for treaty violations.
20. With the aim of moving the discussion forward, several participants argued for a strengthened action by the UN to assist indigenous peoples in getting their treaties implemented. Some participants suggested using the International Court of Justice for the resolution of treaty violations. Other views expressed included the need to highlight inherent rights in treaties that are fundamental to indigenous peoples’ existence and survival. It was

noted that the treaty rights to food, water, health and also land, culture and education constitute essential aspects of self-determination and that efforts should be pursued to bring these issues to the international arena. In that respect, reference was made to the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, the OHCHR study on equitable access to safe drinking water and sanitation, as well as findings and recommendations of special procedures mandate holders on the rights to food and health.

21. The Chair of the seminar concluded the agenda item, observing that treaties have historically been means of structuring the relationship between indigenous peoples and states and are the tools through which this relationship could be restructured or constructed in accordance with principles set forth in UN Declaration on the Rights of Indigenous Peoples. He highlighted the role of the UN Declaration as a means to advance effective observance of treaty rights and to ensure full participation of indigenous peoples in terms of their rights and aspirations. He noted the call by participants for an independent international mechanism to address treaty violations and also drew attention to the CERD as a mechanism for encouraging states to comply with the obligations under UN Declaration.

Session II: Highlights on country-level experiences concerning treaties, agreements and other constructive arrangements

22. This session focused on case studies from different regions and discussion on the processes, principles and other essential elements of the negotiation and elaboration of new agreements or other constructive arrangements as well as the effective recognition of existing treaties.

1) Experiences in Latin America

23. In his presentation, Mr. José Carlos Morales Morales, Chairperson of the UN Expert Mechanism on the Rights of Indigenous Peoples, drew attention to the El Diquis hydroelectric

project in Costa Rica. He stressed that a number of indigenous territories recognized by the government have been affected by the project, which was planned without any prior consultation and informed consent of the affected peoples and raised significant human rights concerns. He also explained that the design of the project would take up to 800 hectares of land of the affected indigenous peoples. A large area would also be flooded and areas downstream would be affected by the change of the river flow. The flood of workers to the area would also have a social impact on the indigenous communities living in the area. He regretted that no appropriate response was provided at the national level and underlined the importance of actions taken by CERD and the Special Rapporteur on the Rights of Indigenous Peoples. These actions, he said, opened up an opportunity for dialogue between indigenous peoples concerned and the government and he hoped that the situation will improve so as to fully respect the human rights of the indigenous peoples, on the basis of agreements reached with them.

24. Mr. Gabriel Muyuy Jacanamejoy, from the Government of Colombia, presented a paper which outlined the process of implementing ILO 169 Convention in Colombia. He stressed that Colombia took an active part in the revision process of the ILO Convention 107 and negotiations for ILO 169. The Government signed the Convention in 1989 and ratified it in 1991, which allowed indigenous peoples to bring ILO 169 in the discussions at the Constitutional Assembly that year. In his view, Colombia made great strides in recognizing the rights of indigenous peoples when it formally recognized that 29% of its national territory was owned jointly with the indigenous peoples. However, he regretted the lack of property titles which would allow the effective enjoyment of the territory. He referred to his community, the Incas, and explained that non-indigenous peoples have a different vision of development which leads to difficulties on the ground and obstacles in the implementation of various conventions including ILO 169. In his view, raising awareness of the wider society on indigenous peoples' issues was important. He advocated the need for a treaty to reconcile constitutional rights in the country. He also underlined the importance of having the support of the UN, including the Permanent Forum on Indigenous Issues, the EMRIP and OHCHR to reconcile diverging views and to help strengthen intercultural dialogues.

25. In her presentation concerning treaty-making in Latin America, Professor Isabelle Schulte-Tenckhoff, highlighted the disparity between the research in North America versus Latin America on the political and legal implications of the treaty-based nation-to-nation relationships between indigenous peoples and States. She explained that, unlike in North America, the debates in Latin America over indigenous rights, whether scholarly or policy-oriented, tend to discount the relevance of treaty-making in defining such rights.
26. She discussed the history of the Mapuche in Chile and explained that they managed to preserve their sovereignty until the mid-nineteenth century. In her view, domestication of relations with indigenous peoples by and large across the Americas came to head only in the second half of the nineteenth century, and treaties with indigenous peoples started to be used as a convenient means to extinguish aboriginal titles to vast tracts of land or to force relocation. She also observed that, in a manner similar to the North America situation, *parlamentos* (peace conferences leading to oral or written agreements) came to be used as tools of territorial dispossession. She believed that these instruments and their legal and political implications should be featured in ongoing discussions to create a proper basis for negotiations where these occur or where they involve what has been termed as “other constructive arrangements.” She concluded that treaties contradict the widespread doctrinal assumption that indigenous peoples could not lay claim to sovereignty and regretted that the interpretative framework to resolve treaty disputes was still being confined to the dominant culture and institutions.
27. Mr. Saul Vicente Vasquez, member of the UN Permanent Forum on Indigenous Issues, spoke about the situation of the Yaqui tribe in Sonora, Mexico. He stressed that the Yaqui territory has continually diminished with each succeeding presidential term and explained that President Cardenas granted the Yaqui tribe official recognition and title to their traditional tribal lands in 1939. He indicated that this constructive arrangement between the State and Yaqui’s is known as the Cardenas Agreement. However, he said that subsequent decrees served for the government to expropriate the Yaqui’s from their land and water rights. He concluding asking several questions such as how can indigenous peoples who have treaties

prior to the establishment of states have them enforced? What are the UN mechanisms that could offer redress? Would we need to establish a new mechanism or should we reform existing ones?

2) Experiences in Africa

28. Ms. Adele Wildshut, representing the Indigenous Peoples of Africa Coordinating Committee (IPACC), observed that many African States have been reluctant to acknowledge the existence of indigenous peoples in their territories and noted the difficulty of strengthening partnership when there is no recognition by the State of communities as indigenous. She stressed, however, that indigenous peoples have rights whether they are recognized or not.
29. Referring to the situation in South Africa, she drew attention to the constitutional recognition of the historically diminished use and status of the indigenous languages of the Khoi, Nama and San. She explained that the Khomani San were among the first communities to benefit under the land restitution. However, she stressed that the Khomani land claim was settled after years of negotiations, backed by community mobilization, extensive research and cultural mapping. She also outlined experiences of negotiations between the Nama of the Richtersveld and the State. In terms of the agreement relating to the proclamation of the Richtersveld National Park in 1991 on their lands, the ownership of the land continued to vest in the community while management was jointly exercised. In the second case, a deed of settlement was negotiated between a state-owned mining company, the Nama community and the South African Government and endorsed by the Land Claims Court in 2007. In this case, the agreement was reached following the 2001 Land Claims Court ruling that the community was entitled to lodge a claim to land that had been expropriated for mining purposes.
30. These examples, she believed, set important precedents for the cause of indigenous peoples. However, she asked whether these examples of negotiations and agreements constitute recognition. She expressed hope that indigenous peoples obtain constitutional

recognition in South Africa and drew attention to the current proposal for a National Traditional Affairs Bill which could provide for a major step forward for the recognition of Khoi and San communities. As far as other parts of Africa are concerned, she highlighted progress made in central Africa with the adoption of a law to protect indigenous populations in the Republic of Congo and the reserved seats for the Batwa in Parliament.

31. Mr. Roger Chennells, San legal representative, presented a paper on the Hoodia case. He noted that the San are the oldest human inhabitants of Africa, who comprise approximately 100,000 people living in Botswana, Namibia, South Africa and Angola with scattered population in Zimbabwe and Zambia. He observed that the collective trauma inflicted upon indigenous peoples by colonial invasions has been remarkably similar from the Americas to Australasia to Africa. He explained that the first recorded use of the Hoodia by the San dated back to the eighteenth century as a substitute for food and water. He explained that a South African Research Institution (the CSIR) filed a patent application in South Africa in 1995, after years of confidential development, for the use of the active component of the plant that was responsible for suppressing appetite. Licensing agreements were subsequently signed with a British and U.S. companies for the further development and commercialization of the product. He said that the San challenged the patent on the basis of it having been based upon their traditional knowledge, and without their prior informed consent. He explained that two years of negotiations ensued, followed by a benefit sharing agreement in March 2003.
32. He underlined the importance of provisions of the Convention on Biological Diversity which requires benefit sharing to be paid as a compensating mechanism not only to states, but to indigenous peoples whose traditional knowledge contributes towards the value of the biological resource being exchanged, and said that the benefit sharing agreement between the San and the CISR referred to the Convention.
33. Mr. Kanyinke Sena, member of the UN Permanent Forum on Indigenous Issues, concluded the session with experiences in Africa. He noted in that in the African context, treaties between states and indigenous peoples have been aimed at facilitating colonization, as

evidenced by the Maasai Treaties with the British in 1904 and 1911. However, he explained that in the majority of cases, there have been no treaties, agreements or other constructive arrangements with indigenous peoples in Africa. He stressed that this absence of treaties or other constructive arrangements with indigenous peoples in Africa is grounded on the lack of recognition of indigenous peoples as distinct separate peoples with distinct rights, coupled with the notion of “nation building”.

34. He referred to the situation of the indigenous Ogiek in Kenya, a hunter gatherer linguistic minority tribe living in the Mau forest complex and Mt. Elgon in Kenya, who number around 15,000. He explained that the destruction of the Mau forest is closely linked with the dispossession of the historical custodian of the forest – the Ogiek community.
35. He drew attention to constructive arrangements being undertaken by the government of Kenya to include the Ogiek in the restoration of the Mau forest complex following local and international pressure and the realization that the continued destruction of the Mau was having a negative effect on the economy. The Prime Minister Task Force on the Conservation of the Mau forest recommended in 2009 the resettlement of Ogiek in their traditional lands within the Mau forest. However, he said that there was a feeling among the Ogiek that the speed with which their rights were being addressed was rather slow.
36. He also observed that the Reduced Emissions from Deforestation and Degradation, Sustainable Forest Management and Carbon Enhancement (REDD+) program, currently under development within the framework of the UNFCCC as a climate change mitigation program, is an emerging vehicle for constructive arrangements between indigenous peoples and governments in Africa.

3) Experiences in Asia-Pacific

37. Mr. Devasish Roy, member of the UN Permanent Forum on Indigenous Issues, drew attention to the political agreement signed in 1997 between the government of Bangladesh

and the major political party of the Chittagong Hill Tracts to end the ensuing conflict between the government and guerilla forces of the indigenous political party. He explained that crucial provisions of the agreement - known as the CHT Accord - remain unimplemented, including some critical clauses such as the settlement of land disputes, demilitarization and the devolution of authority to local institutions. He recalled that the CHT indigenous peoples also had concluded treaties between sovereigns, including the treaty between the Chakma King and the British Governor General in 1787.

38. He outlined the weaknesses of the implementing mechanism included in the Accord and explained that engagement in the arena of human rights was among the few avenues left to indigenous peoples to advance their issues in the CHT. He drew attention to a report on the status of implementation of the Accord submitted to the Permanent Forum on Indigenous Issues at its tenth session, and indicated that several of its recommendations have been endorsed by the Forum. However, he noted the limitations of international bodies in impacting decision-making at national level. He stressed that the National Human Rights Commission has proven to be a strong voice in favour of indigenous peoples, including in the CHT, and regretted that the Commission - although composed of persons with integrity - has been largely sidelined and marginalized by the executive organ of the government. He also referred to the Permanent Forum recommendation that dialogue and consensus-building to resolve conflicts, in areas where treaties, agreements and other constructive arrangements have been entered into, should be guided by the principles of the UN Declaration. By way of conclusion, he advocated the need for UN agencies at country levels to strengthen their role in monitoring and reporting on different aspects of implementation of peace agreements related to their area of work and expertise.

39. Mr. Raphael Mapou, advisor to the Customary Senate in New Caledonia, referred to Noumea Accord signed in 1998 between the Government of France, the New Caledonia pro-independence coalition (FLNKS) and the New Caledonia pro-unity movement (RCPR). He explained that the Nouméa Accord builds on the landmark peace agreement, the Matignon Accord signed in 1988, which brought an end to violent confrontations that took place in the

1970s and 1980s that surrounded responses to the Kanak nationalist movement led by the FLNKS. He argued that the existing legal model was oppressive to the Kanak people and called for a model based on indigenous Kanak values. He observed that the decolonization process was far from being completed and that the Kanak people were nowhere near being empowered. As New Caledonia prepares for the post-2014 referendum on the status of the territory, he advocated the need for promoting further the values, identity and rights of the indigenous Kanak among the wider society in New Caledonia.

4) Experiences in North America

40. Mr. Gabriel Galanda, partner in the Seattle office of Galanda Broadman, PLLC and member of the Round Valley Indian Tribes of California, presented a paper entitled “American Indian Treaties: The Consultation Mandate.” He noted that tribal governments in the US were forced to seek new and sometime creative methods to effectively implement their historical treaties vis-à-vis the State. He discussed how the procedural right to tribal consultation can give teeth to substantive indigenous rights not otherwise respected by the State. These include cultural, heritage, and land rights and, most importantly, historical Indian treaty rights. He observed that this consultative approach operates in contrast to a previous model where the authorities took action, asked questions later, and remedied breaches with compensation. Now, subsequent to determining that there is potential for a breach of tribal rights, tribes and States are often entering into working relationships that operate to ensure through self-determination that indigenous rights are respected and upheld.

41. He stressed that the authorities in the United States have interpreted Article 19 of the UNDRIP as a “call for a process of meaningful consultation with tribal leaders, but not necessarily an agreement of those leaders, before the actions addressed in those consultations are taken,” thereby confirming those consultation rights already mandated by domestic law. The American Indian consultation mandate operates to determine, from a tribal perspective, how a proposed action will affect a tribe, particularly as to any potential breaches of its

historical treaty. In this way, meaningful consultation helps to render a historical treaty a real and enforceable assertion of tribal sovereignty.

42. He concluded that meaningful consultation not only acts to inform the State of the impropriety of its proposed action, but in many instances results in working relationships, agreements, and constructive arrangements with tribal governments. Like the historical treaty that these relationships operate to protect, the agreements and constructive arrangements themselves are enforceable under both U.S. domestic and international law.

43. Ms. Marie-Eve Lachapelle Bordeleau, from the Quebec Native Women Association, discussed how the James Bay and Northern Quebec Agreement (JBNQA) - the first modern land claim agreement in Canada - was negotiated in 1975 to allow the Cree Nation to pursue with their traditional way of life and also participate in natural resources development on their traditional territory. She further explained that after 25 years of the Agreement, the Cree Nation were still under developed and excluded from development opportunities on their territory as a result of not having successfully negotiated the implementation of the JBNQA. To overcome this impasse, she said that a team of litigators was united by Chief Dr. Ted Moses in 2001 and negotiated a new Agreement in principle known as the Paix-des-Braves. She underlined the importance of this new Agreement, which stated essential principles such as no extinguishment of rights and the use of the Cree expertise in the implementation of agreements. This has led to the signature of a series of agreements in 2012 which provided for the establishments of entities to manage the funds and benefits. She concluded that the Paix-des-Braves Agreement was a commitment from the leadership to the future Cree generations and that it was through unity on the Cree part that the execution of these agreements was possible.

44. Mr. Jean-François Tremblay, from the Canadian Government, concluded this session on experiences in North America. He provided an overview of the Canadian Government's efforts to achieve reconciliation with Aboriginal peoples and focused his presentation on Canada's approach to addressing Aboriginal peoples' constitutionally protected rights. He

underlined that the Supreme Court of Canada has indicated that Canada should strive to achieve reconciliation between Aboriginal peoples (First Nations, Inuit and Metis) and Treaty rights, and broader societal interests. Among the various means available, he said, the following are the most important to achieve reconciliation: consultation with Aboriginal People; negotiation with Aboriginal people; addressing Aboriginal People's historic grievances; and implementing the historic treaty relationship and other agreements.

45. He noted that positive outcomes have been achieved from reaching agreements with Aboriginal people, despite the challenges presented by negotiations. He drew attention to a 2009 evaluation, which concluded that modern treaties have brought clarity and certainty to settlement of lands and enabled Aboriginal people to position themselves to take advantage of resource development and contributed to creating a positive environment for investment. He added that modern treaties have also had a positive impact on the role of Aboriginal people in their settlement areas' economy and their relationship with industries. He believed that they also ensured that Aboriginal people have a meaningful and effective voice in land and resources management decision-making and also contributed to the protection of their traditional way of life.

46. Mr. Tremblay also underlined the importance of interim measures to protect Aboriginal interest and address critical issues during treaty negotiations. These could include the protection of key parcels of critical land and resources prior to treaty settlement. He stressed that Canada's federal policy framework for comprehensive land claim agreement provides for settlement of land claims through negotiation to resolve the legal ambiguities associated with Aboriginal rights and title. He also outlined the policy framework introduced in 1995 to negotiate Aboriginal self-government agreements and stressed that the focus was on practical and workable arrangements to implement self-government within the Canadian constitutional framework. He stated that Canada's self-government policy was a framework to negotiate an agreement that allows Aboriginal people to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures and consistent with their lands and resources.

47. With respect to historic grievances, he referred to a policy-based disputes resolution process created in 1973 to address specific claims made by First Nations in relation to the administration of land and other First Nations assets and to the fulfillment of Indian Treaties. However, he added that a fundamental reform of the process was launched in 2007 to respond to criticisms. An independent tribunal with authority to issue binding decisions was created. He concluded that processes for reconciliation were facing significant challenges ranging from the significant amount of time needed to conclude agreements to the differing interpretation of historic provisions and their spirit and intent.
48. During the session devoted to questions and comments from participants, concerns were expressed about the non-recognition of tribal governments as sovereign peoples and nations. Many participants also deplored the lack of mechanism to address divergent views on the interpretation of treaties, and discrepancy between written text and oral understanding, and called for an interpretation of treaties in accordance with the original spirit and intent of treaties. Mutual recognition, good faith, respect and consent were considered as essential elements of the nation-to-nation partnership. The international relationship that treaties represent was reaffirmed by many participants.
49. Other participants advocated for international support and attention to treaty violations, including violations of indigenous peoples' rights to food, water and access to justice, which affect the very existence of indigenous peoples. Some participants identified the need for international bodies to monitor compliance by States. Participants also underlined the mandates of the three mechanisms specifically devoted to the rights of indigenous peoples, which all relate to the implementation of the UN Declaration, and called for strengthened action in this regard. The role of regional mechanisms in addressing treaty violations was also highlighted. Other views expressed include the need to set up a working group to start a dialogue between States and indigenous peoples. Several participants advocated the need for guidelines for negotiation and implementation of agreements and constructive arrangements.

Session III: Implementation plans and mechanisms: practical experiences and way forward

50. Under this agenda item, Mr. Carwyn Jones provided a brief description of the Treaty of Waitangi which was signed in 1840 between Māori Chiefs and the British Crown. He highlighted the discrepancies between the Māori and English version of the Treaty, which led to much debate about the specific terms of the Treaty. He explained that the Waitangi Tribunal was established in 1975 to provide for the observance and confirmation of the principles of the Treaty of Waitangi and make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters were inconsistent with the principles of the Treaty. He added that the membership of the Tribunal includes Māori elders. He also explained that the findings and recommendations of the Tribunal are not binding orders but recommendations to the Minister of Māori Affairs. However, he observed that some of the recommendations of the Tribunal have provoked significant changes in law and policy in New Zealand. For instance, the Māori Language Act of 1987 and the Māori Language Commission resulted from recommendations made by the Tribunal and illustrate the way in which the Tribunal can be effective in recommending practical measures that the New Zealand Government could take to give effect to the rights and obligations agreed to in the Treaty of Waitangi.
51. Chief Willie Littlechild concluded this session and focused his presentation on the Specific Claims Tribunal that was created in 2008 to resolve specific claims through negotiation and respond to the distinctive tasks of adjudicating such claims in accordance with law and in a just and timely manner. He explained that specific claims could include issues such as alleged breaches of treaties, inadequate compensation and illegal disposition. He emphasized that the Assembly of First Nations and the Government of Canada worked together on draft legislation culminating in the adoption of an Act establishing the Tribunal. This joint effort, he said, reflected the principles set forth in Article 19 of the UNDRIP.
52. He explained that the Tribunal started its work in June 2011 and the first hearing took place in May 2012. He underlined several issues including the amount of time needed to settle

a claim and noted that there were 541 outstanding claims that could potentially take hundreds of years to resolve. He clarified that while the Specific Claim Tribunal provides an alternative to court proceedings, it does not prevent further judicial review if decisions are not deemed satisfactory.

53. During the ensuing discussion, reference was made to the recommendations included in the final report of the Special Rapporteur on the Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations. The relevance of the work being done by the Human Rights Council's Advisory Committee on the right to peace was also stressed, together with the importance of having the Advisory Committee's support to advance the ongoing work on treaties. Participants also underlined the mandates of the three mechanisms specifically devoted to the rights of indigenous peoples, which all relate to the implementation of the UN Declaration and called for a strengthened action in this regard.

54. Mr. Saul Vicente indicated that the Permanent Forum will consider strategies to advance implementation of provisions on treaties in the UN Declaration. Ms. Jannie Lasimbang, member of EMRIP, emphasized EMRIP's support to the issues of treaties as evidence by the integration of treaty issues in its thematic studies. She also indicated that the report of the second treaty seminar, including its recommendations, was presented at the third session of EMRIP and stressed that EMRIP has engaged in the run-up to the third seminar. Chief Willie Littlechild added that the Human Rights Council requested EMRIP to seek States and indigenous views on best practices regarding implementation strategies to obtain the goals of the Declaration on the Rights of Indigenous Peoples. He stressed that the questionnaire, prepared in this connection, includes a question on the implementation of treaties and agreements. He also underlined the importance to discuss further examples of compliance by treaty partners rather than merely treaty violations. He also suggested considering all the through the lens of the UN Declaration. Many participants emphasized the need to reaffirm recommendations of the two previous seminars and review findings in light of the UN Declaration.

55. In concluding the discussion, the Chair thanked all the participants, including the Governments of Canada and Columbia as well as indigenous representatives and experts, for their active contributions to the seminar. He expressed the hope that conclusions and recommendations made at the seminar will help advance the issue of implementation of treaties, agreements and other constructive arrangements further.

III- Discussion on Conclusions and Recommendations

A) Conclusions

In the final session, experts participating in the seminar made a number of concluding remarks, including the following:

- The right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements has been affirmed in Article 37 of the UN Declaration on the Rights of Indigenous Peoples and in preambular paragraphs 14, 15 and 24, which underscore the importance of partnerships between Indigenous Peoples and States based on mutual consent and good faith.

Free, prior and informed consent

- With the adoption of the UN Declaration on the Rights of Indigenous Peoples, the principle of free, prior and informed consent is now an undeniable part of the human rights framework. It should be used as the minimum standard for negotiating and concluding any new treaties and agreements, as well as for negotiations between Indigenous Peoples and States relating to the implementation of existing treaties, agreements and constructive arrangements;

- Free, prior and informed consent is an aspect of the right to self-determination. It is also a fundamental element of treaty-making processes;

- The principle of free, prior and informed consent should be treated as the operative principle through which States and Indigenous Peoples establish, in equal and full partnership, the terms, processes, mechanisms and criteria for settling disputes arising from the failure to implement and respect such treaties.

Original spirit and intent of Treaties concluded between States and Indigenous Peoples

- Treaties constitute nation-to-nation partnerships based on mutual recognition, consent, good faith and respect, and they should be enforced in accordance with their original spirit and intent and as understood by Indigenous Peoples;
- Oral history and understanding of treaties transmitted from generation to generation among Indigenous Peoples should be given equal weight and standing, and be used to supplement the States' interpretation of treaties based on the written documents.

Respect for Treaties, Agreements and other Constructive Arrangements as a means of Reconciliation

- Where treaties, agreements and other constructive arrangements already exist, these instruments can provide the foundation for partnership, mutual respect, cooperation and good faith between States and Indigenous Peoples;
- Treaties and the relationship they represent are evidence of the right to self-determination, and as such are the basis for strengthened partnerships, consistent with the UN Declaration on the Rights of Indigenous Peoples;
- Treaties between States and Indigenous Peoples are key tools for securing the recognition of Indigenous Peoples' rights and freedoms; and enforcing these treaties would further the aims of international human rights instruments;
- The work of Truth and Reconciliation Commissions can offer positive examples for improved relations between States and Indigenous Peoples, in particular when they consider the UN Declaration on the Rights of Indigenous Peoples and treaties as framework for reconciliation.

Implementation of Treaties, Agreements and other Constructive Arrangements

- Indigenous Peoples have the right to the recognition, observance and enforcement of the treaties, agreements and other constructive arrangements concluded with States and their

successors in accordance with their true spirit and intent, in good faith, and to have the same be respected and honored by the States;

- The UN Declaration on the Rights of Indigenous Peoples, in particular Articles 27, 28, and 40, should serve as a framework for implementing, in full partnership with Indigenous Peoples, processes that can resolve the violations of treaty rights;

- In some instances, National Human Rights Commissions have proven to be a strong voice in favour of Indigenous Peoples;

- The experience of the Waitangi Tribunal can serve as an important example for the establishment of participatory grievance mechanisms to address treaty violations;

- In light of the principles and purposes of the United Nations Charter and the rights of Indigenous Peoples affirmed in the UN Declaration on the Rights of Indigenous Peoples, an International Court of Justice (ICJ) advisory opinion regarding treaties between Indigenous Peoples and States could make an important contribution to implementation efforts.

Negotiating new agreements including for benefit sharing

- The process of negotiation and consent inherent in treaty-making is the most suitable way of not only securing effective indigenous contribution towards the recognition of Indigenous Peoples' rights and freedoms, but also establishing the practical mechanisms to ensure enforcement;

- Good faith consultations and consent or agreement of Indigenous Peoples are necessary in relation to the development of benefit-sharing arrangements, which must accord with Indigenous Peoples' own understanding of benefits and use and protection of their territories, resources and cultural heritage;

- Building trust between representatives of States and Indigenous Peoples and having in place a political climate conducive to fair and fully participatory deliberations are critical factors to allow comprehensive and sustainable agreements;

B) Recommendations

In the final session, experts participating in the seminar also proposed a range of recommendations for various interlocutors, including the following:

Recommendations to States

- Give due consideration to the understanding of the Indigenous Peoples in regard to implementation of treaties, agreements and other constructive arrangements;
- Support efforts of Indigenous Peoples to raise their capacity to engage, assert and advocate for the implementation of their treaty rights;
- Recognize that the UN Declaration on the Rights of Indigenous Peoples is also a Declaration on treaties and provides a framework for the implementation of treaty rights;
- Establish effective participatory mechanisms, including monitoring, to ensure that Indigenous Peoples' traditional knowledge is not expropriated without their free, prior and informed consent and that provisions are made for the development of appropriate and mutually acceptable access and benefit-sharing arrangements;
- Develop, in conjunction with the Indigenous Peoples concerned, treaty education programs for both indigenous and non-Indigenous Peoples and ensure inclusion in school curricula at all levels;
- Establish participatory grievance mechanisms to address treaty violations based on the framework contained in the UN Declaration on the Rights of Indigenous Peoples;
- Address the lack of recognition and enforcement of treaties, agreements and constructive arrangements at the World Conference on the Rights of Indigenous Peoples to be held in September 2014:

Recommendations to the United Nations system and human rights mechanisms and bodies

- That United Nations agencies contribute to strengthening and integrating the rights affirmed in treaties, agreements and other constructive arrangements, including Indigenous

Peoples' treaty rights to food, education, health, culture, lands and resources, in their programmes and standard setting activities;

- That the proposal of the UN Study on treaties, agreements and other constructive arrangements between States and indigenous populations to establish an international mechanism to handle disputes related to treaties and constructive arrangements be followed up. This mechanism should operate pursuant to the principle of free, prior and informed consent and incorporate Indigenous legal norms and understanding in order to foster just and fair outcomes;

- That close attention is paid to addressing power imbalances that invariably exist in negotiation contexts, as well as to the substantive rights, as affirmed in the UN Declaration on the Rights of Indigenous Peoples, which should shape the substantive content of new agreements and legal texts;

- That the United Nations country teams engage in monitoring and reporting on different aspects of implementation of peace agreements, in partnership with Indigenous Peoples affected by conflicts;

- That the United Nations system, including country teams, actively support and promote processes of dialogue and consensus-building guided by the principles of the UN Declaration on the Rights of Indigenous Peoples and the rights affirmed in treaties, Agreements and other Constructive Arrangements;

- That UN human rights treaty bodies address issues related to treaties or agreements concluded between States and Indigenous Peoples and pay special attention to the studies of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) which offer guidelines to States;

- That the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-recurrence pay particular attention to the situation of Indigenous Peoples and their right to reparations for, and especially, on non-recurrence of the continued violations of the rights affirmed in treaties, agreements and other constructive arrangements;

- That procedures and models for Indigenous Peoples to negotiate modern agreements and legal texts be developed in conjunction with Indigenous Peoples concerned, drawing on the provisions of consultation and free, prior and informed consent articulated in the UN Declaration on the Rights of Indigenous Peoples;
- That guidelines for the implementation/recognition of treaties, agreements and constructive arrangements be developed from the lens of the principles of the UN Declaration on the Rights of Indigenous Peoples;
- That an appropriate body be considered to register and publish copies of all treaties, taking into account the oral histories, between Indigenous Peoples and States, giving due attention to securing access to the indigenous oral version of the instruments in question;
- That relevant mechanisms within the UN system, including the Advisory Committee of the Human Rights Council in the framework of its work on the right to peace, continue to address the issues of treaties, agreements and other constructive arrangements;
- That the recommendations of the three OHCHR seminars devoted to treaties, agreements and other constructive arrangements be submitted to the World Conference on the Rights of Indigenous Peoples to be held in September 2014;
- That OHCHR organize workshops to discuss the establishment of participatory mechanisms to address the issues of redress; restitution; conflicts resolution; land rights adjudication and recognition in matters relating to treaties, which should use the UN Declaration on the Rights of Indigenous Peoples and its provisions related to treaties as a framework;
- That an appropriate body be considered to request an advisory opinion by the International Court of Justice (ICJ) regarding the status of the historic treaties concluded between States and Indigenous Peoples;

Recommendations to regional human rights mechanisms

- That disputes that cannot be resolved between the parties in relation to treaties, agreements and other constructive arrangements, be submitted to competent bodies, including regional and international bodies by the States or Indigenous Peoples concerned;

- That the African Commission on Human and Peoples' Rights engage on the issue of treaties, agreements and constructive arrangements, in particular when Indigenous Peoples are involved in peace agreements;
- That the Inter-American Commission on Human Rights make recommendations on treaty disputes that affect the obligations of the American Convention on Human Rights.

Recommendations to Indigenous Peoples

- That Indigenous Peoples concerned share information about draft legislations that affects treaty rights and seek technical advice from United Nations system and mechanisms related to Indigenous Peoples;
- That Indigenous Peoples use existing international human rights treaty bodies, including Early-Warning Measures and Urgent Procedures of the Committee on the Elimination of Racial Discrimination (CERD), which could serve as effective mechanisms for resolving disputes between Indigenous Peoples and States as a means to ensuring the obligations required by the human rights instruments;
- That Indigenous Peoples strengthen, and where necessary, restore traditional legal and judicial processes including those based on Treaty principles, original understanding and intent, rights and relationships.

ANNEX I - List of participants

United Nations mandates, mechanisms, bodies, specialized agencies, funds and programmes, represented by observers

UN Committee on Elimination of All forms of Discrimination (Mr. Jose Francisco Carl Tzai); UN Expert Mechanism on the Rights of Indigenous Peoples (Chief Wilton Littlechild, Ms. Jannie Lasimbang, Mr. Jose Carlos Morales Morales); UN Permanent Forum on Indigenous Issues (Mr. Devasish Roy, Chief Edward John, Mr. Kanyinke Sena, Mr. Saul Vicente Vasquez).

United Agencies

UN Permanent Forum on Indigenous Issues (Ms. Sonia Smallacombe); United Nations Institute for Training and Research (Ms. Trisha Riedy); International Labour Organisation (Mr. Morse Flores).

Academics and experts on indigenous issues, non-governmental organizations as well as indigenous nations, peoples and organizations, represented by observers

African Commission of Health and Human Rights Promoters (Mr. Djely Samoura); American Indian Law Council (Ms. June Lorenzo); American Indian Movement – West (Ms. Carol Locke-Peneaux, Mr. William Simmons); Asociacion Indigena De La Republica Argentina (Mr. Gaston Lion); Asamblea Nacional Mapuche de Izquierda (Ms. Maria Desponds-Maninao, Ms. Anna Vera Vega); Bangladesh Indigenous Peoples Forum (Mr. Binota Moy Dhamai); Biocybernaut Institute of Canada (Dr. James Hardt); Cabildo Indigena de Honduras (Mr. Jose Job Goyes Santacruz); Cameroon Indigenous Women Forum (Ms. Aie Satu Bouba); Coordinador de Organizaciones Indigenas Coenca Amazonica – COIC (Mr. Carlos Mamani); El Consejo de Todas las Tierras Mapuche (Mr. Huilcaman Aucan); Culture of Afro-Indigenous Solidarity (Ms. Ana Leurinda); Customary Senate, New Caledonia (Mr. Raphael Mapou); Graduate Institute of International and Development Studies (Ms. Isabelle Schulte-Tenckhoff); Indigenous Peoples of Africa Co-ordinating Committee (Ms. Adele Wildschut, Mr. Roger Chennels); Quebec Native Women Inc (Ms. Marie-Eve Lachapelle Bordeleau); DoCip (Mr. Ben Delgado, Mr. David Matthey-Doret); Foundation for Aboriginal and Islander Research Action - FAIRA (Ms. Amala Groom, Mr. Les Malezer); Federation of Saskatchewan Indian Nations (Ms. Naomi Thunderchild-Bird, Mr. Simon Bird); Gugu Badhun Limited (Ms. Janine Gertz); Graduate Institute, Geneva – IHEID (Mr. Adil

Hasan Khan); Hawaiian Kingdom (Mr. Leon Siu); Incomindios Switzerland (Ms. Helen Nyberg); Indian Movement "Tupay Amaru"(Lazaro Pary); Indigenous Bar Association Canada (Ms. Brenda Gunn); Indigenous Peoples Council on Biocolonialism (Ms. Debra Harry); Indigenous Peoples and Nations Coalition (Mr. Gawan Maringer, Mr. Ronald Barnes, Ms. Sharon Verne); Indigenous Peoples Development Nexus (Mr. Terence Douglas); Indigenous Network on Economics and Trade (Ms. Emma Feltes); Indigenous World Association (Kenneth Deer); Indigenous World Association, USA (Mr. Petuuche Gilbert); International Indian Treaty Council (Ms. Andrea Carmen, Mr. Brian Lee, Ms. Danika Billie Littlechild, Mr. Dennis Whitebear ; International Network of Human Rights (Mr. Alex Carl White Plume, Mr. Diego de Leon Sagot, Ms. Maneli Farahmand); Iskatewizaagegan Independent First Nation (Mr. Leon Mandamin); Kapaeeng Foundation Bangladesh (Ms. Lina Jesmin Lushai); Meghalaya Peoples Human Rights Council, India (Mr. Dino Dean Gracious Dympep); Mision Permanente Mapuche (Mr. Flor Rayen Calfunao Paillalef, Ms. Tania Marino Queupumil); Naga Peoples Movement for Human Rights (Mr. Neingulo Krome); Ochapowace – Kakisewew Indigenous Nations (Mr. Wesley George) Original Sovereign Tribal Federation (Mr. Mark McMurtrie); Owe Aku International Justice Project (Mr. Brad Schliesmann, Mr. John Kent Lebsock, Mr. Matthew Thomas Bartlett); Parbatya Chattagram Jana Samhati Samiti (Mr. Chakma Bidhayak); Mr. Mark Koolmatrie; Round Valley Indian Tribe, USA (Mr. Gabriel Galanda); Victoria University of Wellington, New Zealand (Mr. Carwyn Jones); Southern Diaspora Research Development (Ms. Beatriz Schuchthess); Sioux Nation Treaty Council (Ms. Charmaine White Face); Te Alepha No Te Taata Maohi (Mr. Teatuaura Temataru); Ti Tlanizke (Ms. Brigitte Vonosch); University of Sevilla, Spain (Mr. Pablo Gutierrez Vega).

States Members of the United Nations, represented by observers

Argentina, Algeria, Austria, Canada, Chile, Colombia, Denmark, France, Finland, Germany, Guatemala, Italy, Iraq, Mexico, Norway, Paraguay, Peru.

UN Office of the High Commissioner for Human Rights

Mr. Antti Korkeakivi

Ms. Samia Slimane

Mr. Jesse McCormick – Senior Indigenous Fellow.