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Summary record of the first part (public)* of the 2903rd meeting

Held at the Palais Wilson, Geneva, on Monday, 16 July 2012, at 10 a.m.

Chairperson: Ms. Majodina

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* No summary record was prepared for the second part (closed) of the meeting.

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The meeting was called to order at 10.05 a.m.

Meeting with the representative of the Expert Mechanism on the Rights of Indigenous Peoples

1. **The Chairperson** welcomed the representative of the Expert Mechanism on the Rights of Indigenous Peoples and invited her to present the activities of the Expert Mechanism to the members of the Committee.

2. **Ms. Lasimbang** (Expert Mechanism on the Rights of Indigenous Peoples) recalled that in 2007 the General Assembly had adopted the United Nations Declaration on the Rights of Indigenous Peoples, following which the Human Rights Council had established the Expert Mechanism on the Rights of Indigenous Peoples. In accordance with the mandate entrusted to it by Human Rights Council resolution 6/36, the Expert Mechanism assisted the Human Rights Council in the implementation of its mandate and provided the Council with thematic expertise in the manner and form requested by the Council. Its thematic expertise focused mainly on studies and research, on the basis of which it rendered advice and suggested proposals to the Council. The three main thrusts of its activity thus far had been the right to education, the right to participate in decision-making and the cultures and languages of indigenous peoples. Since 2008, the Expert Mechanism had reported to the Council on its activities every year. It was composed of five independent experts with a three-year mandate renewable once. It cooperated closely with the Special Rapporteur on the rights of indigenous peoples and the Permanent Forum on Indigenous Issues. The normative framework they had in common was the United Nations Declaration on the Rights of Indigenous Peoples. In 2012, the three institutions had initiated a fruitful dialogue on the implementation of the Declaration.

4. The Expert Mechanism met each year in Geneva, for five days, and indigenous peoples' representatives, States, national human rights institutions and other national bodies, as well as academics, attended the sessions as observers. The Expert Mechanism conducted studies with the support of the various stakeholders. Their first study (A/HRC/12/33), published in 2009, had concerned the right to education, which was essential to the realization of the right of indigenous peoples to self-determination. Several conclusions had been drawn from the study, in particular the need for constitutional recognition of indigenous peoples and the adoption of national laws and policies on education, which should be considered a priority in the application of the right of indigenous peoples to education. The study also reflected the need to find sufficient funding and to attach a high priority to education. It highlighted a number of difficulties such as the lack of supervision over education initiatives for indigenous children, the lack of consultation on the development and implementation of educational services provided to indigenous peoples and the limited consideration given to autonomy and participation of indigenous peoples in the delivery of educational services. The fact that indigenous children were integrated into mainstream education posed another major problem. The Expert Mechanism had annexed to its study Advice No. 1 on the right of indigenous peoples to education, which provided details, *inter alia*, of the substance of that right and of appropriate measures for its implementation.

5. In 2011, the Expert Mechanism had published a study on indigenous peoples and the right to participate in decision-making (A/HRC/EMRIP/2011/2), drawing in particular on the Committee's general comment No. 23 on article 27 of the International Covenant on Civil and Political Rights (Rights of minorities) and on its general comment No. 25 on article 25 of the Covenant (Participation in public affairs and the right to vote), as well as on the Committee's jurisprudence. The Expert Mechanism had also referred to the concluding observations, in which the Committee had addressed indigenous peoples' issues in the context of the implementation of article 1 of the Covenant. The study had placed

particular emphasis on the need for States parties to implement consultation processes or procedures promoting the free, prior and informed consent of indigenous peoples. It had also reviewed the characteristics of decision-making processes that focused on the participation of indigenous peoples in decision-making, and that ensured that those peoples were free from imposed external influence. The study contained descriptions of good practices, but also of the difficulties encountered in the practical realization of the right of indigenous peoples to participate in decision-making. In addition, the Expert Mechanism had annexed to the study Advice No. 2, in which it had provided guidance on the methods and objectives of the consultation of indigenous peoples that States parties needed to establish.

6. The Expert Mechanism commended the fact that, in a number of recent communications, the Human Rights Committee had adopted similar views to its own regarding the right of indigenous peoples to be consulted on issues affecting them and the need to obtain their free, prior and informed consent.

7. In its resolution 18/8 of 29 September 2011, the Human Rights Council had requested the Expert Mechanism to prepare a study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples and to continue its work on the participation of indigenous peoples in decision-making in the extractive industries. The study on the cultures and languages of indigenous peoples was to be submitted to the Council in September 2012. It would draw on the jurisprudence of the Human Rights Committee in cases concerning article 27 of the Covenant, in particular the following communications: *Bande du lac Lubicon v. Canada* (No. 167/1984), *Mahuika et al v. New Zealand* (No. 547/1993) and *Poma Poma v. Peru* (No. 1457/2006).

8. To conclude, she stressed the convergence of views between the Expert Mechanism and the Committee on the interpretation of a number of rights, in particular indigenous peoples' right to participation. The work of the Expert Mechanism could also be useful to the Committee to the extent that it highlighted the practical difficulties encountered in the realization of indigenous peoples' rights and good practices in that area, in the light of the relevant jurisprudence of all the relevant human rights bodies. The Advice rendered by the Expert Mechanism gave rise to discussions between States and among indigenous peoples' representatives, civil society organizations, national human rights institutions and academics, which contributed to promoting and protecting indigenous peoples' rights. The Expert Mechanism looked forward to continuing to provide advice to assist the work of, and develop cooperation with, the Committee.

9. **The Chairperson** thanked Ms. Lasimbang for her presentation and invited Committee members to make comments and ask questions.

10. **Mr. O'Flaherty** said that the Committee considered that the right of indigenous peoples to participate in decision-making was an ancillary right based partly on articles 25 and 27 of the Covenant, and partly on article 2. For the Expert Mechanism, however, it appeared that that right was primarily based on the provisions of article 1 (Right to self-determination of peoples). He wondered whether that reflected two different understandings of the right to participate in decision-making, and he wished to hear the views of the representative of the Expert Mechanism on that question.

11. In his view, the right of indigenous peoples to participate in decision-making could be defined as an ancillary right with a specific meaning in the context of indigenous communities. As it appeared that the Expert Mechanism considered that indigenous peoples had a specific right in that regard, it would be interesting to know what considerations had led to that viewpoint and on what the right was founded.

12. He noted that indigenous people often did not wish their complaints or claims to be based on article 27 of the Covenant because they did not want to be associated with

minorities. The Expert Mechanism nevertheless seemed to consider that article 27 applied to indigenous peoples, and he would like to hear what the representative had to say on the matter.

13. Lastly, he observed that indigenous peoples' representatives did not show as much interest in the work of the Committee as they should. While that issue probably fell outside the remit of the Expert Mechanism, it would be worth knowing whether the latter had examined ways of further involving indigenous peoples' representatives in the work of the Committee, for example through the Permanent Forum on Indigenous Issues.

14. **Mr. Iwasawa** said that he had been a member of the Permanent Forum on Indigenous Issues from 2002 to 2004. In the exercise of its mandate, the Expert Mechanism duly took into account the jurisprudence of the treaty bodies, in particular that of the Committee. In addition, the Expert Mechanism did not focus solely on the Committee's decisions regarding communications under the Optional Protocol but also referred to the concluding observations adopted following its consideration of States parties' periodic reports. Before the establishment of the Expert Mechanism, there had been a Working Group on Indigenous Populations, which was a subsidiary body of the Sub-Commission on the Promotion and Protection of Human Rights, that came under the authority of the Commission on Human Rights, later replaced by the Human Rights Council. The Expert Mechanism therefore currently operated directly under the auspices of the Council. He wondered whether that change of authority had affected the work of the Expert Mechanism. He also asked for more information on the working methods used in preparing studies and wished to know, in particular, whether any one member of the Expert Mechanism was responsible for their preparation.

15. **Ms. Motoc** said that she had been a member of the Working Group on Indigenous Populations for several years, until it had been superseded by the Mechanism. She wished to know whether the Expert Mechanism followed the same approach as the Working Group, which used to study the treaty bodies' concluding observations but also looked even further. In view of the fact that the Expert Mechanism had developed an "indigenous perspective", combining the outlooks of the indigenous peoples' representatives, there was a risk that it might consider the work of the Committee and in particular its concluding observations only insofar as they were relevant to the indigenous perspective, by focusing exclusively on observations and viewpoints specifically related to indigenous issues. However, the Committee often addressed issues connected with indigenous peoples' rights, but in a broader context, such as that of article 27 of the Covenant concerning minorities.

16. On the issue of free, prior and informed consent, she recalled that the Working Group on Indigenous Populations had always faced the opposition of some national and international institutions and some Member states, which, while accepting to include indigenous peoples in the consultation process, had refused to qualify as consent the positive outcomes arising from the consultations, as they wished the latter to be considered merely as a process rather than an outcome. The Working Group had succeeded in establishing that without the free, prior and informed consent of indigenous peoples — in other words without their approval — no project could be implemented. She asked what progress had been made with regard to changing the attitude of institutions and States that were reluctant to require the systematic consent of the indigenous communities concerned before initiating a project.

17. **Ms. Lasimbang** (Expert Mechanism on the Rights of Indigenous Peoples), replying to the first question raised by Mr. O'Flaherty regarding articles 25 and 27 of the Covenant, said that the Expert Mechanism had referred mainly to article 1 of the Covenant on the right to self-determination of peoples. For indigenous peoples, the issue of self-determination, in connection with participation, was the key issue. The reason was that indigenous peoples often did not have occasions for dialogue with the State and had no opportunity to express

their views forcefully enough to ensure that they were taken into account. Many indigenous peoples had therefore placed emphasis on the issue of self-determination in various areas, such as education, participation in decision-making and justice. Of course, the Expert Mechanism also referred to article 25 of the Covenant with regard to participation in the conduct of public affairs. As to the right of participation and decision-making within communities, the institutions themselves were not recognized and communities were subject to considerable interference when it came to choosing their leaders.

18. Concerning the relationship between the Expert Mechanism and the Human Rights Council, she said that, although she had not been a member of the Working Group on Indigenous Populations, which had been attached to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, she felt that the current status of the Mechanism provided it with more opportunities than its predecessor had enjoyed. The Mechanism could engage directly in dialogue with the Council in a very dynamic way and the latter was very open to the ways in which indigenous peoples could make a contribution, through the Expert Mechanism and through the Special Rapporteur on the rights of indigenous peoples. Moreover, discussions during Council sessions had significantly contributed to promoting indigenous peoples' rights. Much still remained to be done for instance, with regard to studies and advice, as many indigenous people were not aware of the follow-up they were given. The Council had established the practice of a half-day of discussions with the team responsible for a study, which had encouraged more States to show an interest in the advice and studies.

19. With regard to promoting the work of the Committee with the Permanent Forum on Indigenous Issues and the relationship between them, while many indigenous people were interested in the work of the Committee a closer contact would certainly be welcome. The coordination meetings between the Forum, the Special Rapporteur and the Expert Mechanism could help to strengthen that relationship. Indigenous communities had a very high opinion of the work of the Committee, which they deemed very useful.

20. Regarding the preparation of studies, the fact that the Mechanism was composed of only five experts posed a constant challenge, particularly in 2012, when three studies were concurrently under way. The work was carried out jointly, even though some aspects were assigned to experts according to their region and particular areas of expertise, which made it possible to produce more complete reports. The Mechanism received strong support from the secretariat for its research and data collection.

21. The issue of free, prior and informed consent had always been complex because indigenous peoples had invariably been excluded from decision-making. The participation of indigenous peoples in consultations had generally been satisfactory but the procedure was still far from ensuring the approval of those concerned.

22. **Mr. Kälin** thanked Ms. Lasimbang for clearly explaining the relationship between the three bodies responsible for indigenous issues. He considered that the Expert Mechanism's advice and studies were very useful to the Committee, especially since the latter was expected to produce more specific concluding observations that were more applicable in practice. It was very important to be aware of the indigenous perspective and everyone should be encouraged to read the Expert Mechanism's studies and to draw on the advice contained therein, particularly in relation to participation and the question of languages.

23. A major difficulty for the Committee was that the rights of indigenous peoples were essentially collective rights, whereas the International Covenant on Civil and Political Rights dealt with individual rights. It was on that sort of problem that the Committee required the Expert Mechanism's advice. Moreover, the Committee had so far hesitated to

focus too heavily on article 1 of the Covenant, but it could consider more systematically establishing a link between articles 25 and 27 and article 1.

24. With regard to the relationship between the Committee and indigenous communities, he noted with regret that the Committee received very little information and few communications under the Optional Protocol, although many cases had been brought to its attention in recent years which had raised major issues and needed clarification. The members of indigenous communities should be encouraged to report on the follow-up given to the Committee's decisions in the cases it had considered and to submit communications expressing their complaints.

25. **Sir Nigel Rodley** thanked Ms. Lasimbang for her presentation, which had covered both institutional and substantive issues. At the institutional level, he did not understand what distinguished the work of the Expert Mechanism from that of the Special Rapporteur as far as thematic advice and studies were concerned. According to Ms. Lasimbang, the Expert Mechanism focused its work mainly on thematic advice, while the Special Rapporteur also carried out thematic studies and made recommendations, which fell within the tasks of the Expert Mechanism. It might be appropriate to divide up the work in order to address the ongoing concern of the Human Rights Council regarding the need to prevent overlap and duplication. On substantive issues, he recalled a case that had not been mentioned and that was very important in the Committee's jurisprudence, that of *Lovelace v. Canada* (No. 24/1977), which essentially raised the issue, at least indirectly, of the rights of the members of the community versus the rights of the community as a whole. That issue was referred to in the United Nations Declaration on the Rights of Indigenous Peoples and he wondered whether a study on the subject had already been undertaken, was under way or was planned.

26. **Mr. Salvioli** said that he always welcomed the meetings held with other human rights bodies, particularly because the scope of the Covenant was so broad that special cases tended to be overlooked. In the absence of a convention that explicitly addressed indigenous peoples and of a specialized committee, those who worked with indigenous communities must cooperate closely with the treaty bodies. There were many examples of ways in which militant action in favour of indigenous peoples' rights had led human rights protection bodies to take account of the indigenous component even when the instruments under which they had been established did not explicitly refer to the component. The International Covenant on Civil and Political Rights, for instance, provided an opportunity to take that component into account.

27. There were a considerable number of organizations and indigenous groups that constituted a large reference base. The Expert Mechanism and the Special Rapporteur, who were in constant touch with them, could let the relevant bodies know which countries were to be considered at each session of the Committee. The meetings held at the same time in July by the Committee and the Expert Mechanism could provide opportunities for more exchanges.

28. He concurred with Mr. Kälin that the submission of communications should be encouraged so that the Committee could consider complaints and situations other than those which had been brought to its attention thus far and which concerned participation or free, prior and informed consent. Many of the rights enshrined in the Covenant could be addressed from the perspective of their enjoyment by indigenous peoples.

29. **Ms. Lasimbang** (Expert Mechanism on the Rights of Indigenous Peoples) said that the reason why the Committee had received so few communications from individuals was that many of the States where indigenous peoples lived had not yet ratified the Optional Protocol. As to the differences between the role of the Rapporteur and that of the Expert Mechanism, in addition to giving its views to the Expert Mechanism on the latter's thematic

studies, the Special Rapporteur studied similar themes, but from a different perspective. That year, for instance, the Expert Mechanism had concentrated on the extractive industries and in particular on the issue of participation. For his part, the Special Rapporteur had focused his work primarily on the obligations of States. The two worked in tandem. The collective rights at issue in *Lovelace v. Canada* were certainly a matter that needed considering by the Expert Mechanism. It would need to broaden its expertise to examine all the work carried out by the Committee, not only that directly related to indigenous peoples. Lastly, she said that the exchanges that had taken place had been highly valuable and she hoped that the different sessions would be put to effective use to further enhance dialogue.

30. **Ms. Charters** (Office of the United Nations High Commissioner for Human Rights) said that, on the subject of the right to self-determination of peoples and the use of article 1 of the International Covenant on Civil and Political Rights, all the experts of bodies dealing with indigenous issues referred to the United Nations Declaration on the Rights of Indigenous Peoples and considered the right to self-determination enshrined in article 3 of the Declaration to be the fundamental right. As far as participation was concerned, the wish of many indigenous people was not necessarily participation in overall governance decisions, but rather autonomy or self-governance, which implied a somewhat different approach.

31. With regard to consistency in jurisprudence, many, including the Special Rapporteur and the Expert Mechanism, saw in the United Nations Declaration on the Rights of Indigenous Peoples the development of rights already enshrined in texts such as the International Covenant on Civil and Political Rights. For the Expert Mechanism and the other bodies, it was very important to ensure consistency with existing jurisprudence.

32. The issue of individual and collective rights was linked to that of the right of peoples to self-determination. The right to self-determination as a collective right was considered fundamental by all the expert bodies dealing with indigenous issues. The highly complex issue of the rights of members of an indigenous community, raised in the *Lovelace* case, had been examined by the experts, particularly in their report on participation. The Expert Mechanism also increasingly addressed the problems of indigenous women and the rights of young people and in the years ahead planned to give particular consideration to the problem of access to justice. As to the possibility of referring to articles of the Covenant other than articles 25 and 27, it was worth looking at the *Hopu v. France* (No. 549/1993) case, which focused on the issue of family rights, and there were many other rights in the Covenant that could be applied in the context of indigenous peoples.

The first part (public) of the meeting rose at 11.20 a.m.