

**OHCHR Questionnaire for the April 4-5, 2016 Expert Workshop on the
Review of the Mandate on the Expert Mechanism on the Rights of Indigenous
Peoples (EMRIP)**

U.S. Government Response

The United States of America is pleased to provide the following response to the questionnaire of the Office of the High Commissioner for Human Rights (OHCHR) aimed at preparing for the upcoming Expert Workshop on the review of EMRIP's mandate. We appreciate the opportunity to present our preliminary thinking and welcome further discussion on these views with all stakeholders, and to hearing the views of other states and indigenous representatives, in order to determine the best way to proceed. We look forward to participating in a robust and fruitful discussion at the Expert Workshop that significantly advances the substantive conversation on this important issue in advance of the July EMRIP session and the 33rd Session of the Human Rights Council (HRC or Council) in September.

In advance of formulating this response, the United States held two separate consultations with indigenous peoples in the United States to learn their views on the reform of EMRIP's mandate. We are grateful to those who participated for the immensely helpful contributions shared with us during those consultations, and to OHCHR for granting an extension of time so that we could fully consider those contributions. Many of the ideas below reflect input shared with us during these consultations.

As explained in detail under Question 2 below, the most significant change we suggest for EMRIP is to merge it with the Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur) to create a single entity charged with promoting respect for the UN Declaration on the Rights of Indigenous Peoples (Declaration). The Special Rapporteur would become the head of the new entity, which would combine and streamline aspects of the current mandates of EMRIP and the Special Rapporteur and take on new functions, in order to better assist states. The new entity would be designed to have greater flexibility and to make more efficient use of resources. In short, such a body would be designed to be greater than its individual parts.

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

EMRIP is currently charged with preparing studies and conducting research on themes selected by the Human Rights Council (HRC or Council) related to the rights of indigenous peoples. Since EMRIP was established in 2007, it has examined topics of importance to states, the HRC, and indigenous peoples worldwide. It has completed studies on indigenous peoples' education, participation in decision-making, languages and culture, and access to justice. Work on the right to health, cultural heritage, and disaster risk reduction is ongoing. This function is valuable and could be retained in a modified form, as discussed in our answer to Question 2 below.

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

EMRIP, the Permanent Forum on Indigenous Issues (PFII), and the Special Rapporteur are the three main UN mechanisms devoted to the rights of indigenous peoples. In order to frame the proposals that follow, it is useful to recall their respective mandates.

- The HRC created EMRIP through Resolution 6/36 in 2007. Under that mandate, EMRIP provides the HRC with thematic advice on the rights of indigenous peoples as directed by the Council, and suggests proposals to the Council for its consideration and approval. In this capacity, EMRIP conducts studies, writes reports, and gives written advice.
- The PFII, an advisory body to the Economic and Social Council (ECOSOC) established by ECOSOC Resolution 2000/22 in 2000, examines indigenous issues related to, *inter alia*, economic and social development, culture, the environment, education, health, and human rights. In addition, the PFII provides advice to ECOSOC and other UN bodies.
- The UN Commission on Human Rights established the mandate of the Special Rapporteur in Resolution 2001/57 of 2001, and the HRC has renewed it several times. The Special Rapporteur's functions are to 1) promote good practices – including new laws, government programs, and agreements between states and indigenous peoples – to advance the rights of indigenous peoples; 2) report on the rights of indigenous peoples in selected countries; 3) address situations of

concern to indigenous peoples through communications with governments and others; and 4) prepare thematic studies on topics of particular importance on promoting and protecting the rights of indigenous peoples. The HRC last renewed the Special Rapporteur's mandate in 2013; that mandate expires in October 2016.

In considering what EMRIP's future mandate should be, it is essential to reflect holistically on activities of EMRIP, the PFII, and the Special Rapporteur and consider how these three can function synergistically and without duplication of efforts. In this regard, we note the large degree of overlap in the current mandates of EMRIP and the Special Rapporteur, both of which fall under the purview of the HRC and may be modified through an HRC resolution.

Neither EMRIP, the PFII, nor the Special Rapporteur is currently mandated specifically with examining member states' progress in achieving the goals of the UN Declaration on the Rights of Indigenous Peoples (Declaration). The United States supports the consensus of the 2014 World Conference on Indigenous Peoples (WCIP) that an important step forward would be to explicitly include this responsibility in the mandate of a UN body. While we are open to other ideas and look forward to engaging in a robust dialogue at the Expert Workshop, the United States believes that a modified mechanism that combines EMRIP and the Special Rapporteur into a single entity could appropriately assume this role.

We would therefore suggest, first, that EMRIP's mandate designate its *raison d'être* as "promot[ing] respect for the Declaration, including by better assisting member states to monitor, evaluate, and improve the achievement of the ends of the Declaration," reflecting the wording from paragraph 28 of the WCIP outcome document.

EMRIP's mandate could then specify that it would carry out this broad grant of authority through two principal functions: 1) examining member state achievement of the Declaration's ends within a particular member state and giving pointed advice and recommendations as appropriate; and 2) examining regional, cross-regional, and worldwide indigenous issues with a view to advancing the ends of the Declaration, and preparing studies and focused recommendations.

If framed in this manner, this new mandate would accordingly reflect the most critical functions currently performed by EMRIP the Special Rapporteur, while shifting the body's focus explicitly toward member states' achievement of the ends of the Declaration. We well recognize that the Special Rapporteur has the additional and critical responsibilities – for example, important personal advocacy and outreach, and the Special Rapporteur's role as a prominent voice on the rights

of indigenous peoples. If EMRIP and the Special Rapporteur were combined, we would suggest that the Special Rapporteur serve as its head. The Special Rapporteur also would continue to exercise the existing, important responsibilities of that mandate. Member states could consider changing EMRIP's name to reflect this new role as the preeminent body for the protection and promotion of the rights of indigenous peoples; and could also consider whether the Special Rapporteur, as head of this newly mandate body, would be called the "chair" or some other appropriate title, while continuing to carry the title "Special Rapporteur."

The paragraphs below elaborate our preliminary views on the two principal functions proposed above. For purposes of the present discussion, we will continue to refer to the reformed body as "EMRIP."

Function 1: Examining member state achievement of the Declaration's ends. EMRIP could be authorized to identify, on its own initiative, a particular issue or concern within a member state related to specific provisions of the Declaration. EMRIP could garner information about the issue on the basis of input from state officials, indigenous peoples, and nongovernmental organizations (NGOs). Member states could also, if they so choose, ask EMRIP for advice on a given issue. The state's participation in EMRIP's review would be purely voluntary, consistent with states' prerogative to decide whether to accept a country visit request by a special procedure mandate holder and otherwise accommodate the mandate holder's activities.

EMRIP could have various tools at its disposal for engaging with member states, indigenous peoples, and other stakeholders. For example, it could make country visits at a state's invitation to assess needs and view the area in question. In order to make more efficient use of resources, one or several EMRIP members, rather than the entire EMRIP membership, could conduct a country visit, and particular members could take responsibility for particular topics. EMRIP members could request to meet with relevant state officials, affected indigenous peoples, and other knowledgeable persons and entities to discuss the issue being reviewed.

After gathering and assessing the relevant information, EMRIP could prepare and publish concise findings and recommendations to the state, focused on discrete subjects that implicate specific provisions of the Declaration. It would be within the discretion of the state to decide whether or not to act on any given recommendations. EMRIP's mandate should neither state nor imply that EMRIP has the power to issue binding recommendations or orders. Furthermore, although EMRIP would have the ability to receive information or complaints from

individuals or organizations, and to request information in response from states, its role in examining achievement of the Declaration's ends would not imply any ability to "adjudicate" individual complaints, by persons or groups, against a state.

Function 2: Examining cross-cutting or systemic issues in more than one state. With respect to the second function proposed above, many concerns of course apply to indigenous peoples in more than one state, across a region, across several regions, or even globally. Some of these are longstanding systemic concerns. As such, EMRIP could retain, in modified form, its own and the Special Rapporteur's current authority to consider cross-cutting issues present in more than one state. EMRIP could prepare focused studies and recommendations on those issues that can provide guidance to states, as they work, individually or in coordination with other states, to achieve the ends of the Declaration. In addition, to the extent that some issues have a regional or cross-border character, EMRIP could engage with more than one state at a time. EMRIP's focused recommendations related to particular concerns or issues, which would be made public, could apply with respect to certain states or be of a general nature or broader application. EMRIP's mandate should not state or imply an ability to issue general comments on the interpretation of particular provisions of the Declaration, akin to a treaty body.

While this second function retains, in modified form, EMRIP's existing ability to issue reports at the HRC's request on thematic issues affecting indigenous peoples regionally or worldwide, EMRIP's revised mandate should not contemplate preparation of lengthy reports on achievement of the ends of the Declaration – either under Function 1 or Function 2 – but should instead contain language aimed at keeping EMRIP's written advice and recommendations concise and focused. As has occurred with other global and regional human rights bodies, issuance of long reports would impose burdens greater than EMRIP could manage effectively and efficiently, and could undermine states' enthusiasm to look to EMRIP as an indispensable resource for assisting in achieving the ends of the Declaration.

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

The EMRIP chair is currently invited to attend and speak at some UN meetings devoted to indigenous peoples. These include sessions of the HRC, the PFII, and UN General Assembly Third Committee; the latter has a standing agenda

item on indigenous peoples. If the Special Rapporteur were to become a member of EMRIP, we envision the Special Rapporteur retaining his or her current ability to liaise across the UN and regional systems on behalf of EMRIP. Consideration should be given to expanding collaboration with other UN bodies to the maximum appropriate extent.

Because EMRIP is an HRC subsidiary body, it reports to the HRC, which in turn report to the UN General Assembly. The revitalized EMRIP's reporting abilities should be at least as broad as those of the current EMRIP and Special Rapporteur. Without prejudice to the body's reporting lines, the reformed EMRIP's findings should be communicated to the relevant parts of the UN system. Thought can be given to identifying appropriate ways to accomplish this objective.

4. Do you envision a role for the Expert Mechanism in supporting States in the implementation of Universal Periodic Review, treaty body, and special procedures recommendations relating to the rights of indigenous peoples?

As EMRIP members have expertise related to indigenous peoples across regions of the world, a state that is working to implement Universal Periodic Review (UPR), treaty body, or special procedures recommendations can turn to EMRIP for guidance. To avoid overburdening EMRIP and help focus its efforts, this would be a state-driven action rather than a specific activity EMRIP would undertake at its own initiative. On the special procedures, EMRIP could coordinate with the special procedures mandate holders to avoid duplication of efforts. For example, if a special procedures mandate holder plans to conduct a visit to a state in which EMRIP is interested, EMRIP could request the mandate holder to make inquiries related to EMRIP's specific questions or concerns. EMRIP could issue joint communications with relevant special procedures mandate holders to request information from states on cross-cutting issues, and similarly it could issue joint press statements with other mandate holders.

5. How could a new mandate for the Expert Mechanism contribute to greater engagement between States and indigenous peoples to overcome obstacles to the implementation of indigenous peoples' rights?

A revised mandate for EMRIP along the lines of what is suggested above would facilitate voluntary discussions between EMRIP and member states on issues of importance to indigenous peoples in the state, with a view toward better

achieving specific ends of the Declaration within and across states. This process would involve and encourage dialogue not only between EMRIP and the state, but among EMRIP, the state, and the affected indigenous peoples, NGOs, and other stakeholders in the state about the issues in question. Moreover, recommendations resulting from discussions between EMRIP and a member state could serve as a model for other states with similar circumstances or situations.

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

Appointment of EMRIP members and membership size. EMRIP now consists of five independent experts. All are of indigenous origin, in accordance with the strong recommendation in HRC Resolution 6/36 establishing EMRIP's mandate. The United States recommends that the revised EMRIP continue to be made up of experts serving in their individual capacity, independent of any government.

To help member states better achieve the ends of the Declaration, EMRIP will likely require more than its current five members. The United States is open to suggestions about the appropriate number, noting that EMRIP's revised functions should help point the way to the correct membership size. At the same time, too many members could prove unworkable, inefficient, and make consensus more difficult. While EMRIP should continue to endeavor to make decisions by consensus, an odd number of members is advisable, should situations arise in which the members cannot take a decision by consensus.

Member states, individually or in regional groupings, and indigenous peoples could propose candidates for consideration. Asking the candidates to submit applications could be considered, if helpful. A consultative group would then review the qualifications of any candidates put forward, and the HRC President, as happens currently, could select the members, keeping in mind equitable geographic and gender representation and the value of having persons of indigenous origin among the membership.

The United States is also open to suggestions about term lengths. One possibility would be for the members to serve three-year terms, as they currently do. To allow expertise to be transferred and to avoid an influx of many new members at once, new members would be phased in over the first three years their terms would be staggered.

PFII and EMRIP annual sessions. Given the importance of certain topics under consideration by both the PFII and EMRIP, some overlap in their annual agendas is to be expected. We would encourage reducing duplication of topics or specific areas of focus within common topics to the greatest extent possible. Similar meeting agendas discourage interest, both on the part of member states and indigenous peoples, in participating in two annual meetings which are held only several weeks apart in different countries. More importantly, having EMRIP endeavor not to take up topics that have already been discussed at the PFII, or to focus only on aspects of a topic the PFII did not address, would enable EMRIP to focus on assisting states to achieve the ends of the Declaration.

Expanding EMRIP's mandate would likely make meeting more than once a year advisable. One possibility would be for EMRIP to meet once a year in person in Geneva, and hold additional electronic/virtual meetings as needed.

Additional U.S. government comments

- Budgetary considerations. The United States would like to see a revitalized EMRIP that is adequately funded, allowing it to achieve its mandate in a cost-effective manner and without duplicating other efforts. Merging the Special Rapporteur and EMRIP to create the single entity described above would entail significant cost savings by streamlining efforts to promote the rights of indigenous peoples, using existing resources in a more efficient way.
- Avoiding creation of another treaty body. We do not recommend turning EMRIP into an entity resembling a treaty body. The treaty bodies continue to be challenged by significant backlogs and delays. In redefining EMRIP's functions, we want to avoid imposing additional reporting requirements on UN member states, with the concomitant resource burden that would impose on EMRIP. This pitfall can be avoided by carefully defining EMRIP's revised mandate. For example, as noted above, EMRIP should not have a mandate to issue general comments interpreting provisions of the Declaration or to "adjudicate" individual complaints, and its written advice and recommendations should be concise and focused.

Envisioning a more efficient and effective institution. Although the review process would be voluntary, we predict that member states would have a significant incentive to take advantage of it. Many member states and indigenous peoples recognize that it is essential to work toward the Declaration's ends to better the

situation of indigenous peoples worldwide. Revitalizing EMRIP, along with the Special Rapporteur, offers a way to move forward on this objective, and is also an example of using existing UN structures more effectively to accomplish an important task.