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**Contribution to the study on indigenous peoples  
and the right to participate in decision-making**

## **Contribution to the study on indigenous peoples and the right to participate in decision-making**

**Report of the Secretariat\***

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\* Late submission.

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## I. Introduction

1. In its resolution 12/13, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to carry out a study on indigenous peoples and the right to participate in decision-making and to present a progress report to the Council at its fifteenth session, and a final study to the Council at its eighteenth session.

2. The present report is a contribution of the Office of the United Nations High Commissioner for Human Rights (OHCHR) to the progress report on the study on indigenous peoples and the right to participate in decision-making. It presents a review of relevant issues, including related good examples and challenges, arising out of the work of the treaty bodies and the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. It also presents the activities conducted by OHCHR to promote United Nations consultative mechanisms at the regional and national levels.

## II. Review of relevant issues arising out of the work of the treaty bodies

### A. General comments

3. A number of general comments and general recommendations adopted by treaty bodies are relevant to the right of indigenous peoples to participate in decision-making. In 1997, in its general comment No. 23 on the rights of minorities (CCPR/C/21/Rev.1/Add.5), the Human Rights Committee noted the need to ensure effective participation of indigenous peoples in decisions that affect them in order for them to enjoy their cultural rights protected under the International Covenant of Civil and Political Rights. In the same year, the Committee on the Elimination of Racial Discrimination, in its general recommendation No. 23<sup>1</sup> on indigenous peoples, called upon State parties to ensure their effective participation in public life and that no decisions directly relating to their rights and interests were taken without their informed consent. The Committee on Economic, Social and Cultural Rights has, in a number of its general comments (E/C.12/1999/5; E/C.12/2000/4 and E/C.12/2002/11), made reference to the requirement of participation by indigenous peoples in decision-making processes that affect their enjoyment of specific rights. In 2009, in its general comment No. 20 on non-discrimination (E/C.12/GC/20), the Committee called for the ensuring of the right to participate in decision-making of individuals and groups of individuals. More recently, in its general comment No. 21 on the right to participate in cultural life (E/C.12/GC/21), the Committee asked State parties to respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights. Finally, also in 2009, the Committee on the Rights of the Child, in its general comment No. 11 on indigenous children and their rights under the Convention (CRC/C/GC/2001/1), called for the participation of and consultation with indigenous peoples, including meaningful participation of indigenous children, in decision-making concerning their rights and interests.

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<sup>1</sup> *Official Records of the General Assembly, fifty-second session, Supplement No. 18 (A/52/18), annex V.*

## **B. Good examples**

4. In recent years, several good examples and challenges relating to the right of participation of indigenous peoples have been observed by treaty bodies in their reviews of State party reports.

### **1. Legal and constitutional reform**

5. In many concluding observations, treaty bodies have noted with approval the efforts made by States to introduce constitutional and legal measures that promote the right of participation of indigenous peoples in various forms. For instance, the Human Rights Committee favourably noted the guidelines issued by Costa Rica to judges regarding the need to consult indigenous peoples while dealing with disputes having a bearing on their interests (CCPR/C/CRI/CO/5). In 2007, the Committee on the Elimination of Racial Discrimination commended the rights and principles contained in the new Constitution of 1999 in Venezuela (Bolivarian Republic of), including the right to participate in political life (CERD/C/VEN/CO/18). In 2008, the Committee took positive note of the adoption of the Consultation and Participation Act by Ecuador (CERD/C/ECU/CO/19). With regard to Peru, the Committee welcomed the bill on the consultation and participation of indigenous peoples in environmental matters (CERD/C/PER/CO/14-17). As described by the Committee, the bill provided for the adaptation of other national legislation to reflect the right of indigenous peoples to free, prior and informed consent, and particularly with regard to infrastructure projects or works that might affect their other rights. Finally, also in 2009, the Committee noted the efforts made by Chile to undertake constitutional reform in the area of indigenous rights, particularly with regard to consultations to be held with indigenous peoples (CERD/C/CHL/CO/15-18). In 2008, the Committee on Economic, Social and Cultural Rights noted with satisfaction the adoption by the Philippines of the Free and Prior Informed Consent Guidelines, which particularly emphasize the right of indigenous peoples to participate in decisions that affect them (E/C.12/PHL/CO/4).

### **2. Adoption of consultative processes**

6. In a number of concluding observations, treaty bodies have positively commented on actual consultative processes undertaken by States with indigenous peoples. In 2009, the Human Rights Committee acknowledged the consultative process initiated by Australia in order to establish a national indigenous representative body to replace the Aboriginal and Torres Islander Commission (CCPR/C/AUS/CO/5). Also in 2009, the Committee noted the efforts of Colombia to conduct consultations with indigenous communities affected by mega-projects relating to infrastructure and natural resource exploitation (CERD/C/COL/CO/14).

## **C. Challenges**

### **1. Compliance with existing law**

7. In numerous concluding observations, treaty bodies have noted with concern the non-compliance with, or non-enforcement of, existing law and policies related to the right of participation of indigenous peoples by State parties. In the case of Colombia in 2009, the Committee on the Elimination of Racial Discrimination noted with concern the frequent violation of the right to prior consultations and consent with regard to mega-projects relating to infrastructure and natural resource exploitation (CERD/C/COL/CO/14). Later that year, the Committee commented that, in the case of Peru, the right of indigenous peoples to be consulted and to provide their informed consent prior to the exploitation of natural resources on their territories was not fully respected in practice

(CERD/C/PER/CO/14-17). In its concluding observations on Chile, the Committee noted with concern the slow pace of the process of undertaking constitutional reform on indigenous peoples' rights (CERD/C/CHL/CO/15-18) and that, in practice, their right to be consulted was not fully respected.

## 2. Representation in decision-making bodies and participation in political life

8. Treaty bodies have repeatedly observed a significant underrepresentation of indigenous peoples in positions of decision-making and a low level of participation in political life. In its concluding observations for Mexico and Guatemala, in 2006 (CEDAW/C/MEX/CO/6 and CEDAW/C/GUA/CO/6), the Committee on the Elimination of Discrimination against Women expressed concern about the underrepresentation of indigenous women in political and public positions at all levels and commented on the low level of participation in decision-making by indigenous women. In 2007, the Committee again expressed concern about the underrepresentation of women in Colombia, including indigenous women in elected bodies and the judiciary branch (CEDAW/C/COL/CO/6). In the same year, in its concluding observations on Nicaragua, the Committee noted the limited participation of indigenous women in all spheres of life and multiple forms of discrimination being faced by them (CEDAW/C/NIC/CO/6). Also in 2007, in its concluding observations on Suriname, the Committee commented on the continuing underrepresentation of women in political and public life and in decision-making positions (CEDAW/C/SUR/CO/3). Likewise, in 2006, the Committee on the Elimination of Racial Discrimination, in its concluding observations on El Salvador, noted with concern the low level of indigenous participation in government, the public service and the management of public affairs at all levels (CERD/C/SLV/CO/13). Finally, the Committee, in its concluding observations on Guatemala, expressed concern about the low level of participation in political life and in particular the lack of representation in the Congress by indigenous peoples, especially women (CERD/C/GTM/CO/11).

9. In 2008, the Committee on the Elimination of Racial Discrimination expressed concern at the low level of participation by indigenous peoples in the political life of Nicaragua, in particular in its autonomous regional councils (CERD/C/NIC/CO/14). Subsequently, in its concluding observations on the report of the Russian Federation, the Committee noted a complete lack of representation of indigenous peoples in the State Duma of the Federal Assembly (CERD/C/RUS/CO/19). Also in 2008, the Committee commented on the low level of participation in political life, particularly in Parliament, by indigenous peoples in Namibia (CERD/C/NAM/CO/12). In its concluding observations on Ecuador, the Committee expressed similar concerns (CERD/C/ECU/CO/19). Likewise, the Committee on the Elimination of Discrimination against Women, in its concluding observations on the same State party (CEDAW/C/ECU/CO/7), reported that indigenous women faced double discrimination and violence owing to their sex and ethnic origin, which acted as obstacles to their de facto enjoyment of full participation in all spheres of life. Finally, in 2009, in its concluding observations on Chile, the Committee on the Elimination of Racial Discrimination once again noted with concern the low level of participation in political life by indigenous peoples and their poor representation in Parliament (CERD/C/CHL/CO/15-18).

10. In a number of its concluding observations (CEDAW/C/AUL/CO/5, CEDAW/C/GUA/CO/6, CEDAW/C/PHI/CO/6, CEDAW/C/COL/CO/6, CEDAW/C/SUR/CO/3, CEDAW/C/ECU/CO/7 and CEDAW/C/URU/CO/7), the Committee on the Elimination of Discrimination against Women has recommended that State parties, in accordance with article 4 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women and its general recommendation 25, should take measures to ensure an increase in the number of women, especially indigenous women, taking part in public life and decision-making processes. Likewise, the Committee on the

Elimination of Racial Discrimination, in its concluding observations on Ecuador and Chile, recommended that State parties, in compliance with paragraph 4 (d) of its general recommendation No. 23,<sup>1</sup> should redouble their efforts to ensure full participation by indigenous peoples, especially women, in public affairs, and take effective steps to ensure that all indigenous peoples participate in the administration at all levels (CERD/C/ECU/CO/19 and CERD/C/CHL/CO/15-18).

### **3. Absence of a consultative process to secure free, prior and informed consent**

11. On multiple occasions, the treaty bodies have commented on the lack of a consultative process to secure the free, prior and informed consent of indigenous peoples with regard to the exploitation of natural resources on their territories. In 2006, the Committee on Economic, Social and Cultural Rights expressed concern about reports from Mexico that indigenous communities were not properly consulted and were sometimes forcefully prevented from participating in local assemblies concerning the implementation of certain hydroelectric dam projects (E/C.12/MEX/CO/4). Also in 2006, in its concluding observations on Guatemala (CERD/C/GTM/CO/11), the Committee on the Elimination of Racial Discrimination noted with concern the lack of consultation with or information to indigenous peoples with regard to the granting of mining licences on their territories and the promulgation of a draft legislation adversely affecting their right to participate in decisions affecting them (CERD/C/GTM/CO/11).

12. In 2007, the Committee on the Elimination of Racial Discrimination noted the lack of meaningful consultation carried out by Nigeria with the concerned indigenous communities with regard to the large-scale exploitation of natural resources in the Delta region and other river States (CERD/C/NGA/CO/18). In the same year, the Committee commented on large-scale projects undertaken by the Government of India in territories primarily inhabited by indigenous peoples without seeking their prior informed consent (CERD/C/IND/CO/19). In 2008, the Human Rights Committee commented on the absence of a process of consultation to seek such prior, free and informed consent of indigenous peoples before the exploitation of natural resources in their territories in Panama (CCPR/C/PAN/CO/3). The Committee made the same observation in its concluding observations on Nicaragua (CCPR/C/NIC/CO/3). Also in 2008, the Committee on Economic, Social and Cultural Rights expressed regret at the absence of a consultation process to seek indigenous peoples' free, prior and informed consent for the exploitation of natural resources within their territories in Nepal (E/C.12/NPL/CO/2). In the same year, in its final observations on Ecuador, the Committee on the Elimination of Racial Discrimination reiterated its concern that, in practice, the right of the indigenous peoples to be consulted prior to the exploitation of natural resources in their territories was not fully respected (CERD/C/ECU/CO/19). In 2009, in its final observations on Suriname, the Committee expressed concern over the fact that mining licences continued to be granted by the concerned ministry without prior consultations with or providing information to indigenous peoples (CERD/C/SUR/CO/12). In its concluding observations on the country report of Colombia, the Committee observed that the right to prior consultations and consent was not respected in conjunction with mega-projects relating to infrastructure and natural resource exploitation (CERD/C/COL/CO/14). Furthermore, in its final observations on Peru and Chile, the Committee noted that, in some cases, the right of indigenous peoples to be consulted and to give their informed prior consent to the exploitation of natural resources in their territories had not been fully respected (CERD/C/PER/CO/14-17 and CERD/C/CHL/CO/15-18).

13. Treaty bodies have also expressed concern over the lack of consultation with indigenous communities with regard to a number of other areas affecting their rights. In its concluding observations on the United Republic of Tanzania, the Human Rights Committee asked the State party to consult the indigenous communities before deciding to establish

game reserves, granting licences for hunting or other projects on their land (CCPR/C/TZA/CO/4). Also in 2006, the Committee recommended that Canada should adopt measures ending discrimination suffered by indigenous women in consultation with indigenous peoples (CCPR/C/CAN/CO/5). The Committee on the Elimination of Racial Discrimination recommended, in its 2006 concluding observations on Guyana (CERD/C/GUY/CO/14), that the representatives of indigenous communities should be consulted and their informed consent sought in any decision-making processes directly affecting their rights and interests. In its final observations on the United States of America, in 2008, the Committee recommended that the State party should recognize the right of indigenous peoples to participate in decisions that affect them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to them (CERD/C/USA/CO/6). Also in 2008, in its final observations on the Russian Federation, the Committee recommended that the State party should ensure the participation of indigenous people's representatives in decision-making bodies, such as legislative bodies, to ensure their effective participation in any decision-making processes affecting their rights and legitimate interests (CERD/C/RUS/CO/19). In 2009, while making recommendations to Colombia, the Committee underlined the importance of consultation with relevant indigenous communities in the elaboration of development plans and affirmative action policies affecting them (CERD/C/COL/14).

### **III. Review of relevant issues arising out of the work of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people**

#### **A. Annual reports**

14. In 2002, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people submitted his first thematic report (E/CN.4/2002/97). While providing an overview of the main human rights issues concerning indigenous peoples, he first analysed existing international legal instruments, making specific reference to the duty to consult with indigenous peoples under the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) and the recommendation that States allow active participation of indigenous peoples under Agenda 21. In his conclusions, he identified certain topics of special concern, including the participation of indigenous peoples in decision-making processes, autonomic arrangements, governance and policymaking, with special regard for the full implementation of civil and political rights.

15. In his second thematic report, submitted in 2003, on the impact of large-scale development projects on human rights and fundamental freedoms of indigenous peoples (E/CN.4/2003/90), the Special Rapporteur found that the right of free, informed and prior consent by indigenous peoples continued to be a crucial issue owing to general non-compliance with it in the case of decisions concerning large-scale development projects in indigenous territories. In order to bring about a change in the situation, the Special Rapporteur stated that free, prior and informed consent was essential for the human rights of indigenous peoples in relation to major development projects. Furthermore, he stated that the free participation of indigenous peoples as equal partners and citizens in the decision-making processes was a crucial aspect of the effective enjoyment of their human rights. As a good example, he cited the efforts of Canada to ensure the participation of indigenous peoples in development.

16. In his subsequent thematic report (E/CN.4/2004/80), the Special Rapporteur took up the issue of administration of justice. While dealing with the pervasive violations of indigenous peoples' rights by justice systems, he recommended that the basic principle of consultation with and participation of indigenous peoples should be respected while considering any changes to these systems that might affect them. In his thematic report on education and indigenous peoples (E/CN.4/2005/88), while stressing that there was, in many cases, a need for reform of education systems, the Special Rapporteur specifically mentioned the requirement of free participation of indigenous peoples in all phases of such reforms.

17. In his subsequent thematic report on the implementation of norms at the domestic and international levels concerning the rights of indigenous peoples (E/CN.4/2006/78), the Special Rapporteur sought to explain the reasons behind the "implementation gap" in the legislation and reforms concerning indigenous peoples' rights at the domestic level. He identified the low level of indigenous peoples' participation in legislative bodies and the lack of consultation and participation mechanisms, established jointly with indigenous peoples, as major causes of this gap. He concluded that the gap could only be closed by the full participation of indigenous organizations. His recommendations included the establishment of bodies for consultation with and participation of indigenous peoples on all general and particular measures affecting them.

18. In 2008, the Special Rapporteur presented his annual report focusing on the United Nations Declaration on the Rights of Indigenous Peoples (A/HRC/9/9). While analysing the right of self-determination as provided for in the Declaration, he commented on the participatory aspect of this right which, he believed, entailed an engagement and interaction by the indigenous peoples with the larger societal structures in countries in which they live.

19. The most recent annual report (A/HRC/12/34), submitted by the Special Rapporteur in 2009, focused on the State's duty to consult indigenous peoples on matters affecting them. Starting with the normative grounding and general character of the duty of consult, he emphasized that such a duty was firmly based on international human rights law, namely the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

20. With regard to the implementation of the above-mentioned duty, the Special Rapporteur considered that there was no specific procedure or formula that applied to all situations or circumstances. Taking into consideration article 19 of the Declaration and article 6 (2) of ILO Convention No. 169, consultations had to be held in good faith, with the objective of achieving agreement or consent between the parties. The Special Rapporteur also identified a number of elements of confidence-building that may enhance consensus.

21. Finally, the Special Rapporteur tackled the issue of the duty to consult when private companies were also involved. In this regard, he recalled that, according to the well-grounded principles of international law, Governments could not avoid their duty to protect the right of indigenous peoples by delegating some activities that affect indigenous peoples to private companies. The Special Rapporteur expressed the view that, while in strictly legal terms, with the exception of some circumstances, international law did not impose direct responsibility on companies to respect human rights, private companies were in fact increasingly evaluated for their compliance with international human rights norms.



## **B. Good examples and challenges**

22. In several country reports, the Special Rapporteur has observed as a matter of concern the question of the right of indigenous peoples to participate in decision-making and to be consulted. In particular, the issue of effective and appropriate consultations with indigenous peoples, the question of political participation and representation in national institutions as well as the issue of participation and inclusion of women in decision-making processes have been highlighted in many instances.

### **1. Effectiveness and appropriateness of consultations with indigenous peoples**

23. In several countries visited by the Special Rapporteur, the effectiveness and appropriateness of consultations were identified as pressing challenges. According to the Special Rapporteur, consultations had to conform to international law, be systematic and regulated by law. In cases where consultative procedures were not regulated by law, it was recommended that Governments should consult indigenous peoples also for the development of laws that regulate their participation in decision-making and that implement their right to prior consent (see E/CN.4/2004/80/Add.2, A/HRC/12/34/Add.6 and Add.8).

24. From country reports, it emerges that, to be effective and appropriate, consultations should be held in good faith, significantly prior to the decision, and should be based on information accessible to indigenous peoples.

25. In his country reports, the Special Rapporteur assessed that the implementation of the international instruments protecting the right to prior consultation lacks effectiveness, and that the domestic norms that regulate consultations with indigenous peoples are not adequate (see E/CN.4/2003/90/Add.2, A/HRC/4/32/Add.2 and Add.3, A/HRC/12/34/Add.2, Add.3, Add.4, Add.5 and Add.8).

### **2. Political participation of indigenous peoples**

26. The Special Rapporteur has pointed out that, to be effective, participation in public affairs has to be enhanced horizontally, including in legislative, executive and judicial branches, and vertically, at the local, State and federal levels. In this respect, systems of quotas reserved for indigenous representatives in local, State and federal institutions are recommended and welcomed as examples of good practices (E/CN.4/2006/78/Add.3, A/HRC/12/34/Add.2 and Add.3).

27. For instance, the Mixed Member Proportional system in New Zealand was welcomed by the Special Rapporteur during his mission to the country as an example of good practice of political inclusiveness and participation of indigenous peoples. The system establishes quotas for parliamentary indigenous representation. The Special Rapporteur noted that, whatever its limitations, the system enhanced political inclusion of the Maori above the minimum number of representatives established by the system itself (E/CN.4/2006/78/Add.3).

28. During his mission to Bolivia, the Special Rapporteur acknowledged the efforts of the Government to ensure political inclusion, in particular with the 1994 Popular Participation Act (No. 1551), which recognized the legal status of grass-roots organizations, either composed of non-indigenous or indigenous peoples, and enhanced financial and political federalism providing municipalities with budgetary and power resources (A/HRC/6/15/Add.2). In addition, in the case of the State in question, constitutional reform provided greater autonomy to indigenous peoples, coordinated with other forms of constitutionally recognized autonomy.

29. During his visit to Kenya (A/HRC/4/32/Add.3), the Special Rapporteur observed that the fact that the political system divided indigenous communities into different

administrative and electoral units seriously hindered the full enjoyment of the right to political participation, diminishing the effective power of representation of indigenous peoples.

30. In some cases, the Special Rapporteur recommended that indigenous organizations and communities should strengthen their capacities to control and manage their own affairs and participate effectively in all decisions affecting them (A/HRC/12/34/Add.2 and Add.6).

### **3. Women and decision-making processes**

31. In certain cases (A/HRC/4/32/Add.3 and A/HRC/12/34), the Special Rapporteur has expressed concerns about the lack of inclusion of women in decision-making processes. Subsequently, the Special Rapporteur recommended that both Governments and indigenous communities and organizations should eliminate gender discrimination in decision-making at the community and national levels.

## **IV. United nations consultative mechanisms with indigenous peoples at the country and regional levels**

32. Since 2002, OHCHR, in collaboration with the United Nations Development Programme (UNDP), has been promoting the creation of consultative mechanisms between the United Nations and indigenous peoples at the country level, most notably in the framework of the joint UNDP/OHCHR Human Rights Strengthening Programme. A pilot phase has been implemented in Bolivia (Plurinational State of), Ecuador, Kenya and Guatemala. More recently, the OHCHR Human Rights Adviser in Nicaragua joined efforts with UNDP to promote consultation with indigenous peoples leading to the establishment of a United Nations consultative mechanism with indigenous peoples and Afro-descendants in Nicaragua. The first consultation, to be conducted in 2010, will focus on the elaboration of a United Nations development assistance framework for Nicaragua.

33. At the regional level, OHCHR plays a key role in the functioning of the United Nations Regional Consultative Group on indigenous peoples for Latin America. The Group was established in 2003 by the Regional Office of the United Nations Children's Fund and then extended to all regional offices of the United Nations agencies for Latin America. The OHCHR regional office plays an active role in supporting this regional mechanism of consultation between indigenous peoples and United Nations agencies and programmes. It includes 12 indigenous members from different countries, acting in a personal capacity, as well as representatives of the regional offices of the United Nations agencies and programmes for Latin America.

34. The above-mentioned regional consultative mechanism allows indigenous leaders to provide their views, concerns and expectations and helps to ensure that the voice of indigenous peoples is properly reflected in United Nations programming. The first meeting of the Regional Consultative Group, in its enlarged composition, was held in Panama City, on 16 November 2009. The OHCHR regional office has helped to launch a Latin American network of national human rights institutions working on the rights of indigenous peoples, which has decided to focus on the promotion of the right of indigenous peoples to be consulted.