

Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

Suikhar
suikhar@hotmail.com

Background

- Created in Dec 2007 as a result of strong lobby by IPs and some supportive govts (HRC Resolution 6/36)
- Subsidiary expert body under the HRC
- Reports annually to the HRC (September)



Special Rapporteur Prof. S. James Anaya at the Expert Mechanism on the Rights of Indigenous Peoples

Mandate

- Mandate – provide HRC with:
 - thematic expertise mainly on studies and research-based advice on the rights of IPs requested by the Council
 - other proposals for Council's consideration and approval
 - annual reporting to the HRC on its work



Composition

- 5 independent experts, 3-year terms: 2008-2010
 1. John Henriksen, Saami- Norway
 2. Jannie Lasimbang, Kadazan- Malaysia
 3. Jose Carlos Morales, Bribri- Costa Rica
 4. Jose Molintas, Ibaloi - Philippines
 5. Catherine Odimba Kombe, Congo



From left to right: the experts Jose Molintas, John Henriksen and José Carlos Morales, next to Julian Burger, IPMU, OHCHR



Method of work

- Meets annually for 5 days in both private and open meetings
- Open participation
- Determines its own method of work but shall not adopt resolution or decision
- Consider permanent agenda on the implementation of the UNDRIP at the regional and national level
- Enhance cooperation and avoid duplicating the work of SR and UNPFII

Progress so far

- Concluded study on “lessons learned & challenges to achieve the implementation of the rights of indigenous peoples to education” (2009) - HRC strongly encourages States to disseminate it broadly & to take it into account when elaborating national plans & strategies
- Intersessional meetings with govts, collaboration with SR, treaty monitoring bodies, UNDEU



Agenda items for 2010

There are 6 agenda items for the 2010 session. Observers can actively engage in the following items:

Agenda item 3

- Study on indigenous peoples and the right to participate in decision-making

Agenda item 4

- UN Declaration on the Rights of Indigenous Peoples

Agenda item 5

- Proposal to be submitted to the HRC for its consideration and approval

Item 3. Right to decision-making

- Study on *indigenous peoples and the right to participate in decision-making* (2009 - 2011)
- Organized expert workshop in Chiang Mai and Geneva
- Receive submissions/ contributions (part 1) by Feb, 2010
- Progressive report due come out in May 2010 (A/HRC/EMRIP/2010/2)
- It is a must to read this report



From left to right: Jannie Lasimbang, Navanethem Pillay, UN High Commissioner for Human Rights, Catherine Odimba Kombe and Jose Carlos Morales

Summary of the Report

Divided into 4 parts such as:

- Introduction
- International Human Rights Framework
- IPs' internal decision-making processes and institutions
- Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

Introduction

Paragraphs 1-6

- Programme of action for 2nd International Decade of the World's Indigenous peoples and effective participation in decision-making
- UNDRIP and participation in decision-making (art# 3-5, 10-12,14,15,17-19,22,23,26-28,30-32,36,38,40&41)
- Internal and external decision-making
- Relationship between participation in decision-making and self-determination
- Applies both individually and collectively

International H/R framework (UNDRIP)

It contains more than 20 provisions affirming IPs' right to participate in decision-making

- (a) The right to self-determination
- (b) The right to autonomy or self-government
- (c) The right to participate
- (d) The right to be actively involved
- (e) States' duty to obtain FPIC
- (f) The duty to seek "free agreement"
- (g) The duty to consult and cooperate with IPs
- (h) The duty to undertake measures "in conjunction with IPs "
- (i) The duty to pay due "respect to customs" of IPs

International H/R framework (others)

- ICCPR art# 25 (a), (b) and (c)
- General Comment N0. 25 by Human Rights Committee
- ICCPR art # 27 to protect cultural rights
- CRC #art 12 children rights to participate in decision-making - to be interpreted in conjunction with art#30
- ICERD #art 7&8 women's participation
- ICERD #art 5 enjoyment of political rights, general recommendation No. 23 by Committee on ERD - IPs have equal right to participate in public life
- General Comment No. 20 ICESCR

International H/R framework (ILO 169)

The rights to consultation and participation represent the cornerstone of the convention. Affirming rights to participate are:

- The right to participation (Art. 2,5-7,15,22,23)
- The right to be consulted (art. 6,15,17,22,27,28)
- The State obligation to cooperate with IPs (art. 7,20,22,25,27,33)
- IPs right to decide their own priorities (art. 7)
- The obligation to refrain from taking measures contrary to the freely expressed wishes of IPs (art.4)
- The obligation to seek agreement or consent from IPs (art.16)
- IPs right to exercise control over their own development (art.7)
- IPs right to effective representation (art.6 and 16)

International H/R framework (Regional Instruments and Jurisprudence)

- American Declaration on Rights of IPs is currently under process (debated), draft has come out
- Inter-American Court of H/R and American Commission on H/R have not prevented to develop significant law on IPs' rights. E.g Yatama v. Nicaragua
- African Commission on Human and Peoples' Rights, established WG on Indigenous populations and communities

International H/R framework (The right to self-determination)

- A collective right to participation is the right to self-determination, affirmed by art 1 of ICCPR and ICESCR
- IPs' right to self-determination is relevant to participation in decision-making, recognised in art.3 of UNDRIP
- Art. 4 of UNDRIP recognises autonomy or self-government

International H/R framework Free, Prior, Informed Consent (FPIC)

- International H/R law defines FPIC as requirement, prerequisite and manifestation of exercise of their right to self-determination for IPs
- UNDRIP contains a number of provisions regarding FPIC
- ICERD (CERD/C/RUS/CO/19,20, para.24) and Committee on ESCR have clarified that FPIC of IPs is required as State obligations under the treaties
- Akwe: Kon guidelines for implementation of art.8(j) and programme of work on protected areas of CBD recognise FPIC for protection of TK, intellectual property and resettlement in establishment of protected areas
- The draft American Declaration on IPs' contains FPIC
- Policies of international financial institutions and development agencies such as European Bank for Reconstruction and Development and ADB adopted FPIC

IPS' internal decision-making processes and institutions (Processes)

- Customary laws or traditional legal system guide decision
- Traditional decision-making processes can be localized (village) or applied to a whole indigenous people
- Wisdom and experience account for a large component of decision-making by the leaders or council members but others are free to participate
- Decisions are generally reached through inclusive and participatory **process**
- Decisions are made by consensus but in case of major issues that could dramatically affect the survival, **unanimity** is often required
- All decisions including dispute resolutions **aim** primarily to maintain peace, unity and harmony

IPs' internal decision-making processes and institutions (Institutions)

- The structure of decision-making institutions varies - hierarchical or flat - and generally there is a council to maintain peace, harmony and well-being
- The institutions embody democratic principles in reaching decisions
- Council member's criteria - personal integrity, reliability, honesty and far-sightedness among others (knowledge, wisdom and sense of justice)
- Chief of village is tasked with overall administration and role of members of the council are to advise the chief
- Some communities have shamans or priestesses, whose role is to advise in spiritual matters
- Influence of contemporary structures has led to abolish council of elders and only village chiefs are recognised - **this evolution** has eroded the democratic decision-making principles
- Many chiefs are appointed by State, which leads to decline the objectivity and ability to support community's interest
- **States supply inadequate resources and capacity for the chiefs**
- Some prefer to remain unrecognised for the sake of full independence and control

IPs' internal decision-making processes and institutions (IPs' parliaments and organizations)

- Taking contemporary **institutions** such as parliament or organization
- For example: Sami parliament and Kuna Yala (*comarca*) are distinguished from public governments such as Greenland
- An indigenous majority in a country doesn't mean that IPs have direct access to participation in decision-making in the structures of State
- Many IPs and communities have now established organizations at local, national, regional and international levels to facilitate decision-making internally, and engage with State

IPs' internal decision-making processes and institutions (Indigenous Legal Systems)

- Indigenous legal systems are critical to internal decision-making
- Indigenous law can be seen as two components - personal and territorial law
- Indigenous legal systems are linked to indigenous institutions and participatory decision-making processes
- Indigenous legal systems face problems to maintain **themselves when** more than one legal systems exist in a State
- Main challenge is non-acceptance of legal pluralism; other obstacles are: limited administrative and financial support by States, lack of opportunity to update indigenous law and **lack of** respect for indigenous legal systems by other legal systems
- Even in States where legal pluralism is applied, State only recognises indigenous law in soft matters but in not relation to hard issues

IPs' internal decision-making processes and institutions (Indigenous Women's Role)

- Generally, indigenous women are not part of official decision-making authorities, but it is important to note that indigenous women have not always been excluded from decision-making

For example:

(a) North American women before colonization

(b) Bobohizan or priestess in Kadazan, Malaysia

- Women still play significant leadership roles in the intergenerational transfer of knowledge
- Some indigenous laws may also be seen as being unfair to women
- There is a need to reform customary processes in order to allow more women participation in decision-making

IPs' internal decision-making processes and institutions (Transformation and challenges of indigenous governance)

- For IPs, “transformation” often means the revolution of traditional way of life and the gradual acceptance of the intrusion of external and foreign factors
- Indigenous communities continue to maintain and adapt decision-making processes and institutions in dynamic ways - incorporation of voting standards are sometimes voluntary but there are involuntary due to external influences
- There are still many traditional decision-making institutions that remain intact, active and operate in parallel to hybrid governance systems
- There are, in some cases, interferences and lack of respect for decisions made by indigenous institutions
- The deficiencies of including women in traditional decision-making systems need to be confronted

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(a) Participation in electoral politics

- The right of IPs to participate in electoral politics is grounded in the formal recognition of IPs as a specific groups of peoples with specific rights
- Clear progress has been achieved in many countries but recognition of IPs has not been universal (not formally recognized in some countries)
- Omission and denial of electoral registration **exist** in some cases
- Inaccessibility of polling centres, the limited availability of civic and **voting** education in indigenous languages, the use of money, coercion and threat, as well as the delineation of electoral boundaries can put IPs in a disadvantageous situation

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(b) Participation in parliamentary processes

- **Parliament** remains the foremost decision-making body in a democracy
- Representation of IPs in parliaments has increased in recent years
- Both special measures and non-special measures are applied
- Reserved seats for IPs is not the only way but there are other special measures
- Special measures, such as reserved positions, **can hold the risk** that they might be ineffective (Nepal)
- A related risk is that a minority representation will be unable to protect indigenous interests

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(c) Direct Participation in governance

- IPs participate in the governance and administrative affairs through various mechanisms such as establishment of indigenous secretary, commissions or departments, but **it is to be noted** that through these mechanisms, IPs issues can be compartmentalized **when they** should be mainstreamed
- Some local arrangements provide for communities the **possibility** to define a communal authority chosen by themselves in accordance with their own systems
- A method commonly used in many countries is to establish autonomous regions within States
- The introduction of a public government in areas where IPs form a majority is another example of direct self-governance

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(d) Participation in hybrid systems of governance

- Hybrid systems mean that IPs participate in governmental processes by applying, to **various degrees**, their own decision-making structures and practices
- In judicial context some States incorporate indigenous laws into statutory laws, allowing communities to decide matters according to their own laws (Malaysia- Sabah State)
- Other jurisdictions have focused on the participation of indigenous elders (Australia, hearing cases involving Aboriginal people within mainstream criminal justice system)

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(e) State-established councils or committees

- While the State can play a pivotal role in helping to establish indigenous organizations, such State-established councils and committees may have flaws as below:
 - can take over traditional decision-making processes
 - May serve the purpose of silencing indigenous dissent to Government policies and practices
 - Procedure for appointment has often been non-transparent
 - Appointees do not necessarily reflect position of IPs
 - If gov't pays salary of the appointees, they may be afraid to alienate their employer by criticizing government policy

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(f) Consultation and implementation of FPIC for development projects

- IPs are struggling to maintain control over their lands and resources due to encroachment
- Conflicts regarding protection and use of natural resources are rampaging due to lack of implementation or inappropriate application of FPIC
- FPIC is grounded in UNDRIP and its normative character is explored by SR (A/HRC/12/34, paras. 36-57)
- **Even though a** clear standard of FPIC has been provided, many have been manipulated
- In order to avoid such manipulation, some communities have established clear protocols (Malaysia), but it still needs to access capacity-building to continue to develop culturally appropriate protocols and procedures for consultation
- States have to impose statutory obligations on third parties regarding FPIC in accordance with international standard

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(g) Participation in establishing alternative organizations

- To overcome obstacles to meaningful participation in formalized State-driven mechanisms, IPs have formed local, regional and international non-political organizations, which play important roles where IPs are excluded from formal processes
- Nevertheless, a significant challenge is to gain recognition from States, which means that these organizations are often overlooked or excluded from formal decision-making processes

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(h) Participation in regional and international forums and processes

- Relevant UN agencies, treaty bodies and other international mechanisms have enabled direct participation of IPs at highest level but ILO does not allow direct participation of IPs in their conferences
- An appropriate goal is the full and direct participation of IPs in all international processes including biodiversity and climate change negotiations, on matters that particularly concern them.
- Consistent financial and administrative supports are needed

Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting IPs

(i) Other issues and challenges

- Serious attention is still required to improve indigenous participation in decision-making processes
- There is often a gap between formal legislative intent and practical implementation
- One key concern is the question of access to information
 - Consistent and wide dissemination
 - Culturally appropriate
 - Timely manner
- Participation of all sectors including women and youth of indigenous society
- Need to have legitimacy and credibility within indigenous communities
- Selection processes need to be transparent and truly participatory
- To develop the leadership capacity of indigenous individual with long-term goal

Analysis of the report

- Generally, it is comprehensive and substantively grounded
- However, it is inadequate and still needs to elaborate more on issues and challenges in relation to IPs' right to participation in decision-making
- It also needs to develop guidelines for States, non-state institutions including UN agencies and Indigenous Peoples' organizations to take effective measures for implementation of IPs' right to participation in decision-making

Item 4. Implementation of UNDRIP

- EMRIP is not a monitoring body or complain box for UNDRIP
- But EMRIP has also the indirect mandate to promote and respect the UNDRIP in accordance with art.42 of UNDRIP
- Shares what kinds of implementation have been taken by States, non-state institutions and IPs organizations that may facilitate the identification of themes of study in the future
- During the elaboration, particular focus should be made on how States and other relevant institutions implement outcomes of study/studies made by EMRIP

For example, HRC strongly encourages States to disseminate broadly the report of study on IPs right to education and to take it into account when elaborating national plans and strategies

Item 5. Proposal to be submitted to HRC for its consideration and approval

- For agenda item 5, pre-discussion is made in global or regional caucus rather than **individual proposals**, but it doesn't mean that individuals cannot make proposal
- Members of EMRIP and the caucus organize discussion and try to reach agreement for theme to be studied
- The proposal should be cross-cutting issue and relevant to all regions
- The present study on IPs right to participation in decision-making will be continued so that theme for study shall be submitted to HRC in 2011
- It **is important** to take into account sensitivity of State when you make a proposal

Other events during the session

Caucuses

There are meetings of global and regional caucuses during the session. It is good to participate in the meetings. **These venues facilitate the transposal of your concern/s into global or regional dimensions** in order to get more attention

Side events

A number of side events also are organized during the session

Appointment with SR

Appointment with SR is available during the session. But one needs to take the appointment in advance

Building network

There are many IPs organizations from all over the world which attend the session and it is a good opportunity for building network and alliances

Technical Supports

- During the session, DOCIP will provide the following technical supports for IPs representatives;
 - ✓ Computers and Internet access
 - ✓ Translation of documents from and to English, Spanish, Russian and French
 - ✓ Interpretation of caucuses, parallel events and informal conversations
 - ✓ Photocopying machines
 - ✓ Sending and receiving faxes
- For more details, please see the Welcome brochure
- doCip's volunteers will also collect your interventions and post them on its website ([www.docip.org/Documentation/OnlineDocumentation/Conferences/Human Rights Council/Expert Mechanism on the Rights of Indigenous Peoples/2010-3rd session](http://www.docip.org/Documentation/OnlineDocumentation/Conferences/HumanRightsCouncil/ExpertMechanismontheRightsofIndigenousPeoples/2010-3rdsession))
- Thank you for welcoming them kindly!