



**“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”**

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**Background Note**

**Review of the findings and jurisprudence of treaty bodies and other United Nations human rights mechanisms relating to treaties, agreements and other constructive arrangements (2007-2012)**

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*Summary*

The present note has been prepared by the Secretariat and provides a brief, non-exhaustive, examination of the jurisprudence and findings of human rights treaty bodies, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the Expert Mechanism on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues relating to treaties, agreements and other constructive arrangements between States and indigenous peoples. It intends to assist the participants of the Expert Seminar on treaties, agreements and other constructive arrangements between States and indigenous peoples by providing examples of pertinent jurisprudence and findings from United Nations human rights mechanisms. The note is the result of a desk review of jurisprudence and findings from 2007 to 2012 which coincides with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

## **United Nations Declaration on the Rights of Indigenous Peoples**

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) contains express references to treaties, agreements and other constructive arrangements in both the preambular paragraphs and the main body of the declaration.

### *Preambular paragraph 8*

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

[...]

### *Preambular Paragraphs 14 and 15*

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

[...]

### *Article 37*

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

The UNDRIP obliges the United Nations, its bodies and specialized agencies to promote respect for and full application of the UNDRIP.

## *Article 42*

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

The UNDRIP has been the subject of many pronouncements from United Nations human rights mechanisms since its adoption by the General Assembly on September 13, 2007. The Committee on Economic, Social and Cultural Rights (CESCR) has encouraged a State party “to continue with its efforts to promote and implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>1</sup> The Committee on the Rights of the Child (CRC) has noted that the UNDRIP “provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas.”<sup>2</sup> The Committee on the Elimination of Racial Discrimination (CERD) has requested a State party to use the UNDRIP “as a guide to interpret [their] obligations under the Convention relating to indigenous peoples”<sup>3</sup> and encouraged the negotiation of treaty agreements to build constructive and sustained relationships with indigenous peoples.<sup>4</sup>

Recommendations and findings of United Nations bodies relating to treaties, agreements and constructive arrangements revolve around key themes including the requirement of consultation and consent and the need for implementation. The broad range of substantive content that may be included in treaties, agreements and constructive arrangements is also reflected in the recommendations and findings of United Nations bodies.

### **Consultation and Consent**

The need for agreement regarding the processes and procedures of consultation has been stressed by United Nations bodies. The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has expressed that the fundamental requirement for mutual consent to be obtained is foundational to treaties between indigenous peoples and States, as recognized by numerous United Nations studies. The Special Rapporteur on the rights of indigenous peoples (Special Rapporteur) has identified the entering into of an agreement between a State and an indigenous representative body concerning consultation procedures to apply in matters that may affect indigenous interests as good practice with respect to implementation of the

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<sup>1</sup> Nicaragua, E/C.12/NIC/CO/4, 28 November 2008, para. 35.

<sup>2</sup> CRC/C/GC/11, 12 February 2009, GENERAL COMMENT No. 11 (2009) Indigenous children and their rights under the Convention, para. 10.

<sup>3</sup> United States, 08 May 2008, CERD/C/USA/CO/6, para. 29.

<sup>4</sup> Australia, CERD/C/AUS/CO/15-17, 13 September 2010, para. 15.

duty of States to consult with indigenous peoples.<sup>5</sup> He has also recommended that States, in consultation with indigenous peoples, consider delimiting certain areas within which indigenous authorities can act as primary or sole decision-makers, particularly in relation to concerns that affect indigenous people in particular, including issues related to indigenous lands, languages, traditional livelihoods and cultures.<sup>6</sup>

The significance of the free, prior and informed consent of indigenous peoples has been raised by United Nations bodies. The EMRIP has reported that there are some indigenous nations that are treaty-based governments and that the “treaties between these indigenous nations and the [State] provide for a fundamental right to participate in all decision-making processes on matters that affect them on the basis of mutual consent.”<sup>7</sup> It has been further noted by the EMRIP that several treaties between States and indigenous peoples affirmed the principles of indigenous peoples’ consent as underpinning the treaty relationship between States and indigenous peoples.<sup>8</sup>

The lack of effective mechanisms for consultation with indigenous peoples has been noted by the CERD and it has highlighted in particular the need to obtain prior, informed and voluntary consent for development projects, resource exploitation and tourism affecting the way of life of indigenous peoples.<sup>9</sup> The Permanent Forum on Indigenous Issues (PFII) has also noted that the right to free, prior and informed consent is vital for the full realization of the rights of indigenous peoples and must be recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples.<sup>10</sup>

Individual State parties and groups of State parties have received recommendations from the Special Rapporteur that they continue and enhance their efforts to implement the right of the indigenous peoples to self-determination and to more genuinely influence decision-making in areas of concern to them, in part, through more effective consultation arrangements that seek to ensure that decisions directly affecting indigenous peoples are not taken without their free,

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<sup>5</sup> A/HRC/18/35/Add.2, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Addendum The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, para 17.

<sup>6</sup> A/HRC/18/XX/Add.Y Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, para. 75.

<sup>7</sup> A/HRC/18/42, Final report of the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples, para. 22.

<sup>8</sup> A/HRC/EMRIP/2010/2, Progress report on the study on indigenous peoples and the right to participate in decision-making, para. 40.

<sup>9</sup> Panama, CERD//C/PAN/CO/15-20, 19 May 2010, para. 14.

<sup>10</sup> E/2011/43-E/C.19/2011/14, Permanent Forum on Indigenous Issues Report on the tenth session (16-27 May 2011), para 36.

prior and informed consent.<sup>11</sup> He has further noted that consent to the impacts of a project must be given in a free and informed manner prior to the decision of the State to permit the initiation of project development and that commitments should be expressly framed in an agreement which takes into account the affected rights of each of the affected indigenous communities, including rights to lands and natural resources.<sup>12</sup>

United Nations bodies have also highlighted the need for good faith consultation to build confidence and dialogue in which both state and indigenous peoples are on even footing to reach mutually satisfactory agreements. The CERD has expressed concern about negotiations between indigenous peoples and private firms relating to the exploitation of resources, construction and tourism. It has noted that negotiations left to private firms have resulted in agreements that are partial and not in conformity with international standards and that the balance of power in such negotiations and agreements weighs heavily against the indigenous communities.<sup>13</sup> Similarly, the Special Rapporteur has expressed concern to individual State parties noting that negotiated agreements that have provided benefits for indigenous traditional owners relating to mining and other natural resource exploitation on lands subject to native title claims indigenous rights are often inadvertently undermined because the terms of such agreements are kept secret, the traditional owners have limited time to negotiate, legal representation is often inadequate, Government involvement does not always align with indigenous interests and such agreements have not been developed in ways that maximize benefits for future generations.<sup>14</sup>

The CERD has urged a State party to engage, in good faith, in negotiations based on recognition and reconciliation with indigenous peoples.<sup>15</sup> Continued efforts to seek “in good faith agreements with [indigenous] peoples with regard to their lands and resources claims under culturally-sensitive judicial procedures, find means and ways to establish titles over their lands, and respect their treaty rights” have been recommended by the CERD.<sup>16</sup> Similarly, a broader understanding of cooperation in instances where agreements have been concluded for the development of natural resources on or near indigenous lands has been

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<sup>11</sup> A/HRC/18/XX/Add.Y Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, para. 75

<sup>12</sup> A/HRC/18/35/Add.8, Informe del Relator Especial sobre los derechos de los pueblos indígenas, James Anaya (Adición: La situación de los pueblos indígenas afectados por el proyecto hidroeléctrico El Diquís en Costa Rica), para 15.

<sup>13</sup> Panama, CERD//C/PAN/CO/15-20, 19 May 2010 , para. 14.

<sup>14</sup> A/HRC/18/35/Add.4, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Situation of indigenous peoples in Australia, para. 27.

<sup>15</sup> Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 22.

<sup>16</sup> Canada, CERD/C/CAN/CO/19-20, para. 20.

encouraged by the Special Rapporteur and he has noted that rather than limit the interaction between extractive industries and indigenous people to compensation agreements, administrators should encourage ownership interest and profit-sharing in extractive industries, when indigenous communities are so inclined.<sup>17</sup>

The building of confidence also depends on a true partnership supported by adequate resources. The Special Rapporteur has noted that States must duly address the imbalance of power present in projects “by ensuring arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous positions in the consultations.”<sup>18</sup>

### **The Broad Scope of Treaties, Agreements and Other Constructive Arrangements**

The broad scope of the subject matter addressed in treaties, agreements and other constructive arrangements is reflected in the findings and recommendations of United Nations bodies. The EMRIP has noted that when indigenous peoples conduct cultural ceremonies and songs that express treaty-making principles, these ceremonies and songs protect their traditional lands, territories and resources.<sup>19</sup> The PFII has recommended the consideration of treaties and treaty principles in relation to the issue of indigenous peoples’ development with culture and identity.<sup>20</sup> The EMRIP has also expressed that in some States the support of indigenous languages and cultures is consistent with obligations in treaties, agreements and other constructive arrangements.<sup>21</sup>

It has also recognized treaty rights, including associated rights to water, as a key element in the comprehensive discussion of indigenous peoples’ understanding and interpretation of treaties, agreements and constructive arrangements between indigenous peoples and States.<sup>22</sup> The EMRIP has noted that “[s]everal treaties between indigenous peoples and States

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<sup>17</sup> A/HRC/15/37/Add.5, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (Addendum Situation of indigenous peoples in the Russian Federation), para 86.

<sup>18</sup> A/66/288, Report of the Special Rapporteur on the rights of indigenous peoples, para 88.

<sup>19</sup> A/HRC/EMRIP/2012/3, Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, para. 23, footnote 20.

<sup>20</sup> E/2010/43-E/C.19/2010/15, Permanent Forum on Indigenous Issues Report on the ninth session (19-30 April 2010), para 7.

<sup>21</sup> A/HRC/EMRIP/2012/3, Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, para. 47.

<sup>22</sup> E/2011/43-E/C.19/2011/14, Permanent Forum on Indigenous Issues Report on the tenth session (16-27 May 2011), para 80.

acknowledge the right of indigenous peoples to education and educational services as a treaty right”<sup>23</sup> and “[w]hen implemented as a treaty right, the right to education can offer a framework for reconciliation.”<sup>24</sup> Similarly, a State party has been encouraged by the CERD to include references to a treaty in national curriculum and ensure that references to the treaty in the curriculum are adopted or modified in consultation with indigenous peoples.<sup>25</sup> The EMRIP has also noted that States should finance autonomous arrangements to permit indigenous peoples to exercise their right to educational autonomy as part of the right to self-determination.<sup>26</sup>

The Special Rapporteur has recommended the involvement of indigenous authorities in efforts to seek a negotiated solution to an armed conflict and that support be given to dialogue and peace building initiatives proposed by the indigenous authorities and their organizations.<sup>27</sup> His recommendations also include the conclusion of political agreements, in coordination with indigenous authorities and organizations, on the clearing of explosive devices that have been left abandoned after fighting in urban and rural areas during an armed conflict.<sup>28</sup> He has further recommended that agreements be reached with indigenous peoples on a draft law regarding consultation and that care be taken to ensure that it is consistent with the applicable international standards, the decisions of the State’s Constitutional Court and relevant international mechanisms.<sup>29</sup>

The use of dialogue processes aimed at achieving consensus which include mechanisms to render agreements feasible and to resolve questions which that may arise has been recommended by the Special Rapporteur noting that both process and agreements must be

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<sup>23</sup> Expert Mechanism Advice No. 1 (2009) on the right of indigenous peoples to education, para 6.

<sup>24</sup> Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making, para. 13.

<sup>25</sup> New Zealand, CERD/C/NZL/CO/17, 15 August 2007, para. 20.

<sup>26</sup> A/HRC/EMRIP/2009/2, Expert Mechanism Advice No. 1 (2009) on the Right of Indigenous Peoples to Education (Annex to the Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education), para 14.

<sup>27</sup> A/HRC/15/37/Add.3, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur, para. 59.

<sup>28</sup> A/HRC/15/37/Add.3, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur, para. 60.

<sup>29</sup> A/HRC/15/37/Add.3, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur, para. 78.

compatible with international standards concerning the rights of indigenous peoples.<sup>30</sup> He has recommended that a State assume a posture of respect and good faith in responding to the concerns of indigenous peoples associated with project developments that affect them as well as the implementation of all necessary measures to mitigate or compensate indigenous communities for the prejudicial effects of such projects and to reach agreements with them.<sup>31</sup>

### **Implementation of Treaties, Agreements and other Constructive Arrangements**

The Special Reporter has observed that increasing indigenous participation in and influence over settlement policies, procedures, and outcomes could go a long way in alleviating discontent felt by indigenous groups in relations to a treaty settlement process.<sup>32</sup>

He has further stated that “States should also recognize that the right to self-determination of indigenous peoples constitutes a duty for States to obtain indigenous peoples’ free, prior and informed consent, not merely to be involved in decision-making processes, but a right to determine their outcomes. Treaties, as evidence of the right to self-determination, and the relationship they represent are the basis for a strengthened partnership, consistent with the Declaration on the Rights of Indigenous Peoples.”<sup>33</sup>

The CERD has noted concern that claims of indigenous land rights in one State were being settled primarily through litigation at a disproportionate cost for the indigenous communities concerned due to the strongly adversarial positions taken by governments.<sup>34</sup> It has recommended that a permanent commission of inquiry charged with making recommendations on claims brought by indigenous peoples relating to actions or omissions of the State for breach of the promises made in a treaty be granted legally binding powers to adjudicate treaty matters and be provided with increased financial resources.<sup>35</sup> It has further recommended that treaties concluded with indigenous peoples should provide for periodic

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<sup>30</sup> A/HRC/12/34/Add.8, Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya (Adición: Observaciones Sobre La Situación de los Pueblos Indígenas de la Amazonía y los Sucesos del 5 de julio y Días Posteriores en Las Provincias de Bagua y Utcubamba, Perú), para 39.

<sup>31</sup> A/HRC/18/35/Add.3, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (Addendum: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories), para 71.

<sup>32</sup> A/HRC/18/35/Add.4, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (Addendum The situation of Maori people in New Zealand), para 42.

<sup>33</sup> Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making, para. 34.

<sup>34</sup> Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 22.

<sup>35</sup> New Zealand, CERD/C/NZL/CO/17, 15 August 2007, para. 18.

review, including by third parties, where possible.<sup>36</sup> The Special Rapporteur has in one case encouraged the review of constitutional arrangements as they relate to indigenous peoples to address insecurity and instability associated with the lack of constitutional security for treaty principles.<sup>37</sup> He has also expressed support for efforts to create a regional treaty specifically concerning indigenous peoples.<sup>38</sup> The Human Rights Committee (HRC) has recommended that a State party continue to review a treaty within the domestic legal system, including the desirability to incorporate it into domestic law, in consultation with indigenous groups and to ensure that the views expressed by different indigenous groups during consultations in the context of a historical treaty claims settlement process are duly taken into account.<sup>39</sup> The CERD has also recommended the incorporation of a treaty into domestic State law noting that the manner in which the treaty is incorporated should be consistent with the letter and the spirit of the treaty, in particular regarding the description of the State's obligations.<sup>40</sup>

Agreements between indigenous peoples and a State to co-manage natural resources, such as lakes have been cited by the EMRIP to illustrate that indigenous peoples can participate directly in decision-making in partnership arrangements with State agencies.<sup>41</sup> The Special Rapporteur has recommended that efforts should be made to reach agreements in accordance with the organizational patterns and leadership structures of diverse indigenous communities regarding the terms of a national emergency response program and any similar programmes affecting such communities and that this approach could lead to arrangements that vary from one community to another for measures such as income management, alcohol regulation, and delivery of services.<sup>42</sup>

The Special Rapporteur has recommended the involvement of all groups that have an interest in the issues under consideration in treaty settlement negotiations and, in consultation with the indigenous peoples, the strengthening of available mediation or other alternative dispute resolution mechanisms in order to address any conflicts regarding participation or

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<sup>36</sup> Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 22.

<sup>37</sup> A/HRC/15/37/Add.9, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (Addendum Preliminary note on the mission to New Zealand (18 to 24 July 2010), para 9.

<sup>38</sup> A/HRC/18/35/Add.2, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Addendum The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, para 13.

<sup>39</sup> New Zealand, CCPR/C/NZL/CO/5, 7 April 2010, para. 20.

<sup>40</sup> New Zealand, CERD/C/NZL/CO/17, 15 August 2007, para. 14.

<sup>41</sup> A/HRC/18/42, Final report of the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples, para. 61.

<sup>42</sup> A/HRC/18/35/Add.4, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Situation of indigenous peoples in Australia, para. 41.

representation in settlement negotiations.<sup>43</sup> He has further recommended to a State that, in consultation with indigenous peoples, it should explore and develop means of addressing indigenous peoples concerns regarding a treaty settlement negotiation process, especially the perceived imbalance of power between indigenous peoples and Government negotiators including consideration of forming an independent and impartial commission or tribunal that would be available to review Treaty settlements.<sup>44</sup> He has also noted that agreements between oil companies and indigenous people, in areas where territories of traditional use are established, if coupled with adequate governmental oversight, could constitute good practice.<sup>45</sup> The CERD has also recommended that a State give serious consideration to the establishment of a Treaty Commission with a mandate to resolve treaty rights issues.<sup>46</sup>

## **Conclusion**

There is a developing body of jurisprudence relevant to treaties, agreements and other constructive arrangements between States and indigenous peoples. In addition to the human rights treaty bodies and human rights mechanisms examined above, further articulation of the obligations and rights pertinent to treaties, agreements and other constructive arrangements is occurring in regional and domestic forums. The human rights mechanisms of the United Nations are instrumental in the promotion and interpretation of this developing area of international human rights law.

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<sup>43</sup> A/HRC/18/35/Add.4, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (Addendum The situation of Maori people in New Zealand), para 73.

<sup>44</sup> A/HRC/18/35/Add.4, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (Addendum The situation of Maori people in New Zealand), para 75.

<sup>45</sup> A/HRC/15/37/Add.5, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (Addendum Situation of indigenous peoples in the Russian Federation) para 42.

<sup>46</sup> Canada, CERD/C/CAN/CO/19-20, para. 20.