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

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

**Report of the Expert Mechanism on the Rights of Indigenous Peoples\***

### *Summary*

The present progress report encompasses the international human rights framework; indigenous peoples' internal decision-making; and participation in decision-making mechanisms linked to both State and non-State institutions and processes affecting indigenous peoples.

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\* Late submission.

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## I. Introduction

1. The programme of action for the Second International Decade of the World's Indigenous Peoples highlights the importance of ensuring effective indigenous peoples' participation in decision-making. One of the five objectives of the programme, as adopted by the General Assembly in its resolution 59/174, is to promote the full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspects of their lives, considering the principle of free, prior and informed consent (A/60/270, para. 9 (ii)).

2. The range of articles in the United Nations Declaration on the Rights of Indigenous Peoples relating to indigenous participation in decision-making highlights the importance of the above-mentioned principle for indigenous rights (see paragraph 8 below).<sup>1</sup> Indeed, indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights. This principle is a corollary of a myriad of universally accepted human rights, and at its core enables indigenous peoples to be freely in control of their own destinies in conditions of equality. Without this foundational right, indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.

3. Importantly, the Declaration distinguishes between internal and external decision-making processes. Thus, indigenous peoples have the right to autonomy or self-government over their internal and local affairs (art. 4), as well as the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (art. 5), and to participate in all decisions affecting them or their rights (art. 18 and 19). In other words, the Declaration affirms indigenous peoples' right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes and the political order of the State. The present report will thus focus on both of these areas in the light of the relevant international framework.

4. While the concept of "external" decision-making processes can be generally understood to mean both State and non-State institutions and processes affecting indigenous peoples, it should be noted that the Declaration refrains from defining the concept of indigenous peoples' "internal and local affairs". Nevertheless, the wording of some of the provisions in the Declaration appears to be conceptually linked to the right to autonomy and self-government, including articles 5 and 14.

5. The principle of participation in decision-making also has a clear relationship with indigenous peoples' right to self-determination, including the right to autonomy or self-government, and the State's obligation to consult indigenous peoples in matters that may affect them based on the principle of free, prior and informed consent. These legal concepts form inherently part of any discussion of indigenous peoples' right to participate in decision-making, and will

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<sup>1</sup> Art. 3–5, 10–12, 14, 15, 17–19, 22, 23, 26–28, 30–32, 36, 38, 40 and 41.

be considered throughout the report as important aspects of the right to participate in decision-making.

6. Finally, as the right to participation applies to indigenous peoples both collectively and individually, and taking into account the fact that the rights specific to indigenous peoples generally are formulated as collective rights, the report will also focus on indigenous peoples' collective right to participate in decision-making.

## **II. International human rights framework**

7. International human rights law refers to the right to participation in both general and specific forms. Participation in its general form is to take part in the conduct of public affairs, whereas electoral participation is a specific form of participation. The right to take part in public affairs is not limited to formal political institutions as it also includes social activities of a public nature. Furthermore, the right to participation is characterized as an individual right as well as a collective right. These fundamental principles are protected under the Universal Declaration of Human Rights: article 21 (1) affirms that "everyone" has the right to take part in the government of his country, directly or through freely chosen representatives; and article 21 (3) establishes that the will of the "people" should be the basis of the authority of government.

8. The Declaration contains more than 20 provisions affirming indigenous peoples' right to participate in decision-making, articulated as, inter alia, (a) the right to self-determination; (b) the right to autonomy or self-government; (c) indigenous peoples' "right to participate"; (d) their "right to be actively involved"; (e) States' duty to "obtain their free, prior and informed consent"; (f) the duty to seek "free agreement" with indigenous peoples; (g) the duty to "consult and cooperate" with indigenous peoples; (h) the duty to undertake measures "in conjunction" with indigenous peoples; and (i) the duty to pay due "respect to the customs" of indigenous peoples. This underscores that indigenous peoples' right to participation is a core principle and right under international human rights law.

9. The articulation of the right to the external dimension of participation has been further elaborated in earlier human rights treaty provisions, including article 25 of the International Covenant on Civil and Political Rights, which establishes the rights of citizens to (a) take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections; and (c) to have equal access to public service.

10. In contrast to all other provisions of the Covenant, article 25 employs the notion of "citizen" when referring to the subjects of the right. Thus, States may require citizenship as a condition for exercising the rights under article 25, although the provision does not prevent States from extending these rights to non-citizens. However, the particular reference to citizenship is a fundamental legal obstacle for a large number of stateless indigenous individuals as their legal status as alien in their country of birth and residence restricts their ability to participate in public affairs.

11. In its general comment No. 25, the Human Rights Committee clarified that the rights under article 25 are related to, but distinct from, the right of peoples to

self-determination, under article 1 (1) of the Covenant (CCPR/C/21/Rev.1/Add.7, para. 2). The Committee concluded that the rights covered by article 1 (1) include the right of peoples to determine freely their political status and to enjoy the right to choose the form of their constitution or government, whereas article 25 deals with the right of individuals to participate in those processes that constitute the conduct of public affairs. In a 1991 case involving indigenous peoples, *Marshall et al. (Mikmaq people) v. Canada*, the Committee further affirmed that the right to participation under article 25 (a) includes the right to take part in the conduct of public affairs, directly or through freely-chosen representatives. The Committee concluded that the provision did not establish a right to direct representation by an indigenous group in a constitution-making process as long as the individual members of the group enjoy rights of participation along with other groups.<sup>2</sup> It should, however, be pointed out that more recently, the Committee has made several explicit references to either article 1 or to the notion of self-determination in the context of indigenous peoples, relevant to indigenous peoples' right to participation.<sup>3</sup>

12. On the other hand, the right to participation relating to certain matters concerning internal or local affairs is evoked under article 27 of the International Covenant on Civil and Political Rights, which protects indigenous peoples' cultural rights. The Human Rights Committee observed that the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of indigenous communities in decisions affecting them (CCPR/C/21/Rev.1/Add.5, para. 7). The right to participation has been further elaborated in subsequent observations and conclusions of the Committee in the context of individual complaints brought under Optional Protocol No. 1. The absence of meaningful consultations with the indigenous community concerned regarding measures that may affect them normally constitutes a denial of their cultural rights under article 27.<sup>4</sup>

13. Articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women make clear that women's right to participation in the political and public life of a State should be on equal terms with that of men, including in the international area. While the Convention does not specifically make reference to the rights of indigenous women, the articles must be read in the light of article 22 of the Declaration, which ensures that the special needs of indigenous women should be protected against all forms of discrimination. Similarly, although the Beijing Declaration and Platform for Action does not explicitly refer to the participation of indigenous women, the Commission on the Status of Women has now called for the participation of indigenous women in both the Beijing Platform and the Millennium Development Goals (E/CN.6/2005/2, paras. 572–595).

14. Participation is also one of the guiding principles of the Convention on the Rights of the Child. Article 12 affirms that children, both individually and

<sup>2</sup> See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)* and Hanski, Raija and Scheinin, Martin (2003), *Leading Cases of the Human Rights Committee*, Vasa, Institute for Human Rights, Åbo Akademi University, pp. 402, 406–409.

<sup>3</sup> See CCPR/C/79/Add.109 and Add.112, CCPR/CO/69/AUS and CCPR/CO/74/SWE.

<sup>4</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. II, annex X, sect. I, para. 9.6.

collectively, have the right to participate in decision-making that may be relevant to their lives and to influence decisions taken in their regard, within the family, school or community. Moreover, the provisions of the Convention should be interpreted in conjunction with article 30 of the Convention, which provides for the right of the indigenous child, in community with other members of his or her group, to enjoy, individually or collectively, his or her own culture, to profess and practise his or her own religion or to use his or her own language.

15. The International Convention on the Elimination of All Forms of Racial Discrimination obliges States to prohibit and eliminate all forms of racial discrimination, including in relation to the enjoyment of political rights, as well as in the conduct of public affairs (art. 5). In its general recommendation No. 23 on the rights of indigenous peoples (1997), the Committee on the Elimination of Racial Discrimination urged States parties to ensure that members of indigenous peoples had equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests were taken without their informed consent.<sup>5</sup>

16. The International Covenant on Economic, Social and Cultural Rights contains provisions affirming the right to participate in the economic, social and cultural life of the State. In its general comment No. 20, the Committee on Economic, Social and Cultural Rights emphasizes that the principle of non-discrimination and equality, as articulated in article 2 (2) and reflected throughout the Covenant, applies to all the rights contained in the Convention.<sup>6</sup>

#### **A. International Labour Organization Convention No. 169**

17. The International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) contains a number of key provisions on indigenous peoples' right to participation. The Convention itself is grounded on the recognition of indigenous peoples' aspirations to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the State in which they live; the rights of consultation and participation thus represent the cornerstone of the Convention. Articles 2 and 33 of the Convention require States to institutionalize the participation of indigenous peoples in policies that affect them as an essential framework for the proper application of the provisions of the Convention. These provisions provide for States to develop coordinated and systematic action, with the participation of indigenous peoples from the outset, to protect the rights of these peoples and to guarantee respect for their integrity.<sup>7</sup>

18. Articles 6, 7 and 15 of Convention No. 169 provide the general legal framework with regard to the consultation and participation of indigenous peoples. Article 6 requires that indigenous peoples be consulted in good faith through appropriate procedures and, in particular, through their representative institutions,

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<sup>5</sup> *Official Records of the General Assembly, Fifty-second Session, Supplement No. 18 (A/52/18)*, annex V, para. 4 (d).

<sup>6</sup> See E/C.12/GC/20, para. 2, and E/C.12/GC/21, paras. 7, 21–24, 36–37.

<sup>7</sup> Submission by ILO.

with the objective of achieving agreement or consent, whenever consideration is being given to legislative or administrative measures that may affect them directly. This applies to all levels of decision-making. Although the obligation to consult under the provisions of the Convention is interpreted as not requiring that an agreement be reached with indigenous peoples, article 6 (2) nonetheless requires that there should be an “objective of achieving agreement or consent” to the proposed measure.

19. Article 7 establishes that indigenous peoples have, inter alia, the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and, to the extent possible, exercise control over their own economic, social and cultural development. These provisions on consultation and participation are key provisions of the Convention and establish an important basis for applying all the other provisions, though a number of other provisions also make references to the duty of States in relation to consultation and participation.<sup>8</sup>

20. Article 15 of Convention No. 169 establishes the principle that indigenous peoples have the right to the natural resources existing on their lands, including the right to the participation, use, management and conservation of these resources. In cases where States retain the ownership of mineral or subsoil resources, article 15 (2) requires, as a fundamental safeguard, that indigenous peoples be consulted prior to undertaking or authorizing the exploration or exploitation of natural resources on indigenous lands, with a view to ascertaining whether and to what degree their interests would be prejudiced.

21. Convention No. 169 establishes five qualitative requirements for States’ consultations with indigenous peoples. Article 6 (1) (a) of the Convention requires that consultations be carried out through indigenous peoples’ representative institutions. ILO supervisory bodies have emphasized that the determination of representativeness “should be a result of a process carried out by the indigenous peoples themselves”.<sup>9</sup> Consequently, it is required that the indigenous peoples or community concerned identify the institutions that meet these requirements, prior to any consultations. Moreover, in the light of the fact that many indigenous institutions have been undermined in discriminatory historical processes that have resulted in an asymmetry in the relationship between States and indigenous peoples, it is of crucial importance that States support the development of indigenous peoples’ own institutions and initiatives and, when appropriate, provide these with the necessary resources.<sup>10</sup>

22. Article 6 (1) (a) of Convention No. 169 establishes that consultations should be carried out through appropriate procedures. ILO supervisory bodies consider procedures to be appropriate if they create favourable conditions for achieving agreement or consent to the proposed measures, regardless of the result obtained.<sup>11</sup> General public hearing processes are normally not regarded to be sufficient to meet

<sup>8</sup> ILO, International Labour Standards Department (2009), *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, p. 59.

<sup>9</sup> ILO Governing Body, two hundred and eighty-second session, November 2001, representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3.

<sup>10</sup> ILO, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, op. cit., chap. V.

<sup>11</sup> ILO Governing Body, two hundred and eighty-ninth session, March 2004.

the requirement of “appropriate procedures”. The ILO Committee of Experts has outlined that the content of the consultation procedures and mechanisms needs to allow the full expression of the viewpoints of the indigenous peoples or communities concerned, in a timely manner and based on their full understanding of the issues involved, so they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.<sup>12</sup>

23. Article 6 (2) of the Convention establishes that consultations should be undertaken in good faith and in a form appropriate to the circumstances. This requires that consultations be carried out in a climate of mutual trust and transparency. Governments must ensure that indigenous peoples have all relevant information concerning the matter at hand and that the information can be fully understood by them. Indigenous peoples must be given sufficient time to allow them to engage their own decision-making process, and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.<sup>12</sup>

24. Furthermore, in accordance with article 6 (2) of the Convention, the objective of the consultation should be to achieve agreement or consent. This requires that agreement or consent be the goal of the parties, and genuine efforts need to be made to reach an agreement or achieve consent.<sup>10</sup> This qualitative requirement is closely and inherently linked to the requirement that consultations be carried out in good faith.

25. Finally, the ILO supervisory bodies have established that there should be a periodic evaluation of the effectiveness of existing consultation procedures or mechanisms between States and indigenous peoples, with the participation of the indigenous peoples concerned, with a view to continue to improve the effectiveness of such procedures or mechanisms.<sup>12</sup>

26. In addition to these standards, Convention No. 169 contains a number of other provisions affirming indigenous peoples’ right to participation:

- (a) The right to participation (art. 2, 5–7, 15, 22, 23);
- (b) The right to be consulted (art. 6, 15, 17, 22, 27, 28);
- (c) The State obligation to cooperate with indigenous peoples (art. 7, 20, 22, 25, 27, 33);
- (d) Indigenous peoples’ right to decide their own priorities (art. 7);
- (e) The obligation to refrain from taking measures contrary to the freely expressed wishes of indigenous peoples (art. 4);
- (f) The obligation to seek agreement or consent from indigenous peoples (art. 6);
- (g) The obligation to seek free and informed consent from indigenous peoples (art. 16);
- (h) Indigenous peoples’ right to exercise control over their own development (art. 7);
- (i) Indigenous peoples’ right to effective representation (art. 6 and 16).

<sup>12</sup> General Observation, 2008 (published in 2009).



## B. Regional instruments and jurisprudence

27. Regional systems have also contributed significantly to a fuller understanding of the content of the right of indigenous peoples to participate in decision-making. In the Inter-American regional human rights system, a draft American declaration on the rights of indigenous peoples is currently being debated.<sup>13</sup> The American Convention on Human Rights generally sets forth only individual rights and does not directly address the corresponding rights of indigenous peoples. Nevertheless, the lack of indigenous specific provisions has not prevented the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights from developing significant case law on indigenous peoples' rights, which have particular relevance to the right to participation in decision-making.

28. Of particular importance regarding the right to political participation is the case of *Yatama v. Nicaragua*. The Inter-American Court held that the electoral law of Nicaragua constituted a disproportionate restriction on the political rights of the candidates of an indigenous and ethnic party because the State's requirements for participation in the municipal elections required a form of organization that was foreign to the customs and traditions of the people.<sup>14</sup>

29. The African Charter on Human and Peoples' Rights specifically refers to both the rights of individuals and the rights of peoples, and provides for the right of all citizens to participate freely in the government of the country (art. 13), among other relevant provisions.<sup>15</sup> In 2000, the African Commission on Human and Peoples' Rights established the Working Group on Indigenous Populations/Communities, whose first report<sup>16</sup> interpreted several provisions of the African Charter in accordance with international standards regarding the rights of indigenous peoples. A recent ruling by the African Commission for the first time dealt directly with the rights of indigenous peoples. In that decision, the Commission condemned the expulsion of the Endorois people from their land in Kenya for tourism development, and found that the evictions violated their human rights to property, health, culture, religion and natural resources. While not dealing explicitly with right of participation, underlying the case was the fundamental issue that the Endorois had been excluded from all decision-making regarding the treatment of their lands.<sup>17</sup>

## C. The right to self-determination

30. The normative international human rights framework for the collective right to participation is the right to self-determination. This is affirmed in common article 1 of the two international human rights covenants of 1966.

<sup>13</sup> Available from [www.oas.org/OASpage/Events/default\\_ENG.asp?eve\\_code=11](http://www.oas.org/OASpage/Events/default_ENG.asp?eve_code=11) (accessed 6 May 2010).

<sup>14</sup> *Yatama v. Nicaragua*, Series C (No. 127), (2005).

<sup>15</sup> The African Banjul Charter on Human and Peoples' Rights (1981), art. 13, 17 (2) and (3), 19–21.

<sup>16</sup> Adopted by the African Commission on Human and Peoples' Rights at its twenty-eighth ordinary session, in 2005.

<sup>17</sup> African Commission on Human and Peoples' Rights, *Endorois Welfare Council v. Kenya*, 4 February 2010.

31. Indigenous peoples' right to self-determination is relevant to participation in decision-making in various ways. Indigenous peoples have the right to make their own independent decisions through which they determine their own political status and pursue their economic, social and cultural development. Self-determination is an ongoing process which ensures the continuance of indigenous peoples' participation in decision-making and control over their own destinies. It means that the institutions of decision-making should be devised to enable indigenous peoples to make decisions related to their internal and local affairs, and to participate collectively in external decision-making processes in accordance with relevant human rights standards.

32. Self-determination is also recognized in article 3 of the Declaration, which imports identical wording from the covenants and recognizes that indigenous peoples are entitled to the right to self-determination, as well as the principle of equality enshrined in article 2, recognizing that both indigenous peoples and individuals are "equal to all other peoples and individuals" in the exercise of their rights.

33. The Declaration also recognizes the related right under article 4 of autonomy or self-government for indigenous peoples over their internal and local affairs, and clarifies that indigenous peoples' right to participation goes beyond the right of indigenous individuals to participate in electoral processes on the same basis as members of the majority population. Article 5 states that indigenous peoples' exercise of their right to autonomy does not in any way limit their right to participate fully in the mainstream political life of the State.

#### **D. Free, prior and informed consent**

34. Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination as defined in international human rights law. Moreover, the principle is of fundamental importance for indigenous peoples' participation in decision-making. This is because free, prior and informed consent establishes the framework for all consultations relating to accepting of projects that affect them, and any related negotiations pertaining to benefit-sharing and mitigation measures. Particular emphasis is placed on free, prior and informed consent for projects or measures that have a substantial impact on indigenous communities, such as those resulting from large-scale natural resource extraction on their territories<sup>18</sup> or the creation of natural parks, reserved forests, game reserves on indigenous peoples' lands and territories.

35. The Declaration contains a number of provisions requiring indigenous peoples' free, prior and informed consent in the context of certain decisions affecting them. The importance of free, prior and informed consent for the realization of the rights articulated in the Declaration is reflected in the fact that six

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<sup>18</sup> See Doyle, Cathal, "Free, prior and informed consent: a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector", prepared for the OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights, Moscow, 3 and 4 December 2008. Available from [www2.ohchr.org/english/issues/indigenous/resource\\_companies.htm](http://www2.ohchr.org/english/issues/indigenous/resource_companies.htm) (accessed 12 May 2010).

of its articles contain explicit requirements concerning such consent. Article 10 establishes that no relocation should take place without the free, prior and informed consent of the indigenous peoples concerned. Article 11 establishes an obligation for States to provide redress through effective mechanisms with respect to property taken without free, prior and informed consent. Article 19 obligates States to consult indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Article 29 (2) establishes that States should take effective measures to ensure that no storage or disposal of hazardous materials takes place on lands or territories of peoples without their free, prior and informed consent. Finally, article 32 provides in more general terms that States should consult indigenous peoples in order to obtain their free, prior and informed consent prior to the approval of any project affecting their lands, territories or resources.

36. International human rights treaty bodies, such as the Committee on the Elimination of Racial Discrimination (see CERD/C/RUS/CO/19, 20, para. 24) and the Committee on Economic, Social and Cultural Rights, have also clarified that indigenous peoples' free, prior and informed consent is required in accordance with State obligations under their corresponding treaties. In its general comment No. 21, the Committee on Economic, Social and Cultural Rights underlined the fact that States parties should respect the principle of the free, prior and informed consent of indigenous peoples in all matters covered by their specific rights (E/C.12/GC/21, para. 37). In this context, the Committee referred to article 6 (1) (a) of ILO Convention No. 169 and article 19 of the Declaration. The Committee on Economic, Social and Cultural Rights has also instructed States to obtain indigenous peoples' consent in relation to extractive industry projects (see E/C.12/1/Add.100, para. 12, E/C.12/1/Add.74, para. 12 and CERD/C/62/CO/2).

37. Other international instruments also recognize the importance of free, prior and informed consent in the context of indigenous peoples' decision-making. For example the Akwe: Kon guidelines for the implementation of article 8j<sup>19</sup> and the programme of work on protected areas of the Convention on Biological Diversity recognize free, prior and informed consent as being of fundamental importance in the context of protection of indigenous peoples' traditional knowledge and intellectual property, and resettlement in the establishment of protected areas.<sup>20</sup>

38. At the regional level, the draft American Declaration on Indigenous Peoples contains a similar clause to article 32 of the Declaration requiring free, prior and informed consent for any plan, programme or proposal affecting the rights or living conditions of indigenous peoples. Importantly, the Inter-American Court of Human Rights, in relation to mining on indigenous peoples' lands, stated that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty not only to consult with the

<sup>19</sup> Akwe: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (2004), available from [www.cbd.int/doc/publications/akwe-brochure-en.pdf](http://www.cbd.int/doc/publications/akwe-brochure-en.pdf) (accessed 7 May 2010).

<sup>20</sup> Convention on Biological Diversity, programme of work on protected areas (art. 8 (a) to (e)), adopted at the 7th Convention on Biological Diversity Conference of Parties in 2004, decision VII/28.

Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.<sup>21</sup>

39. The evolving policies of international financial institutions and development agencies moreover reflect the importance of the principle of free, prior and informed consent. The environmental and social policy adopted by the European Bank for Reconstruction and Development, recognizes that, for the rights of indigenous peoples to be upheld enabling them to engage in partnerships where they so choose, their free, prior and informed consent must be obtained.<sup>22</sup> The Asian Development Bank has also recently revised its policy in relation to indigenous peoples. The current draft of the Safeguard Policy, issued in October 2008, includes the requirement to obtain free, prior and informed consent in relation to projects involving “commercial development of natural resources on lands used by indigenous peoples with impacts on the livelihood, or cultural, ceremonial, or spiritual uses that define the identity and community of indigenous peoples”.<sup>23</sup>

40. Finally, several treaties between States and indigenous peoples affirm the principle of indigenous peoples’ consent as an underpinning of the treaty relationship between States and indigenous peoples.<sup>24</sup>

### III. Indigenous peoples’ internal decision-making processes and institutions

41. Owing to the diversity of situations in which indigenous peoples find themselves today, it is difficult to cover the characteristics of indigenous peoples’ internal decision-making processes and institutions globally. The present section can only generalize on principles of indigenous decision-making processes upheld by societies that find themselves in traditional and contemporary settings.

#### A. Indigenous decision-making processes

42. The everyday lives of indigenous peoples, both egalitarian communities with no obvious hierarchy and more hierarchical ones, are often guided by traditional indigenous legal systems, referred to in certain jurisdictions as “customary laws”. This term refers to a range of legal instruments and can include a variety of distinctive customs, spirituality, traditions, procedures and practices.

43. Traditional decision-making processes can be localized and restricted to the village level, be geographically wide or apply to a whole community of a particular indigenous people. While these traditional legal systems are dynamic and

<sup>21</sup> Case of the *Saramaka People v. Suriname*, series C No. 172, 28 November 2007, para. 134.

<sup>22</sup> European Bank for Reconstruction and Development, Environmental and Social Policy, May 2008, available from [www.ebrd.com/about/policies/enviro/policy/2008policy.pdf](http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf) (accessed 7 May 2010).

<sup>23</sup> Asian Development Bank, Safeguard Policy Statement (second draft), October 2008, pp. 11–12, 19.

<sup>24</sup> In Canada, treaties Nos. 6, 7 and 8 contain provisions on indigenous peoples’ consent. For instance, treaty No. 6, concluded in 1876, provides that “and whereas the said Indians have been notified and informed by Her Majesty’s said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes ... and to obtain the consent thereto of Her Indian subjects inhabiting the said tract” (para. 3).

responsive to the modern world, the laws of a particular community are constantly reinforced through traditional practices, socialization and intergenerational transfer of the knowledge. These laws also guide the bulk of decisions made by the respective indigenous authorities.<sup>25</sup>

44. Decision-making processes include dispute resolution or the adjudication of important matters that often rely upon traditional leaders/chiefs and advisers, a council of elders or, in some communities, the convening of a council when necessary. Wisdom and experience account for a large component of decision-making by the leaders or council members, but, generally, depending on the nature of the concern, all community members are free to participate in discussions directly or indirectly. As much as possible, problems are solved by consensus using procedures that engage all affected parties and exhaust dissent. Where necessary, the physical resolution of differences between parties may involve battles conducted according to rules until an agreement is reached or affirmed. The main aim of any dispute resolution, whether among community members or with others, is primarily to maintain peace, unity and harmony.<sup>25</sup>

45. With the guidance of indigenous laws and dispute-resolution procedures, decisions are generally reached through inclusive and participatory processes. Even in communities with strict systems of hierarchy, the chiefs or headmen are expected to obtain counsel from wise elders, provide a fair hearing to aggrieved parties, and provide an explanation to the community for any disputed decisions. This applies to standard-setting for the community, including guidelines for the management of resources and judicial matters. In the case of major issues that could dramatically affect the survival of a community, such as a dispute over resources, a unanimous decision is often required from a council of elders and the community as a whole.<sup>25</sup>

## **B. Indigenous decision-making institutions**

46. The structure of traditional decision-making institutions varies; systems may be hierarchical or flat, but generally there is a council responsible for administering matters in order to maintain the peace, harmony and well-being of a community. Indigenous institutions usually embody democratic principles in reaching decisions through consensus, and these are manifested in power-sharing and co-responsibility among council members. Personal integrity, reliability, honesty and far-sightedness are characteristics applied in selecting community leaders or council members, besides their knowledge, wisdom and sense of justice. The recognition and transfer of authority and leadership, whether hereditary or through selection, are also guided by oral history and spiritual and ceremonial traditions.<sup>26</sup>

47. Leaders and council members play an important role to ensure cultural, legal, health, economic and political integrity as well as the development and intergenerational transfer of knowledge. Within the council of elders, the village

<sup>25</sup> Submissions by Ramy Bulan and the Indigenous Peoples Network of Malaysia (JOAS) (Malaysia); Les Malezer (Australia); First Nations Summit (Canada); and Asia Indigenous Peoples Pact (AIPP).

<sup>26</sup> Submissions by the New Zealand Human Rights Commission; Ramy Bulan and JOAS (Malaysia); AIPP; Survival International; Les Malezer (Australia); and Wilton Littlechild, Andrea Carmen, Kenneth Deer (North America).

chief is often tasked with the overall administration of the village and presides over community meetings and hearings to ensure security, peace and stability in the community and that indigenous laws and rituals are followed. The role of other council members is often to advise the village chief on important matters of concern according to their specialization and to decide collectively on various matters. Some communities have shamans or priestesses, whose role is to advise the council on spiritual matters. This involves all aspects of life, such as birth, puberty, marriage and death, as well as on security, and traditional occupations upon which a particular community depends.<sup>27</sup>

48. One key concern for traditional decision-making institutions is that the influence of contemporary structures has sometimes led to the council of elders not being maintained. In these cases, only village chiefs are the recognized authority to administer matters that concern the community. Not only does this place a burden on the leadership of the community, it has also effectively eroded the democratic decision-making principles of indigenous communities. Under pressure to act as the spokesperson for Governments, this arrangement has led, in many countries, to a decline in the village chief's objectivity and ability to support the interest of the community. This situation is made worse in some countries where traditional leaders are now appointed by the Government to represent the community, and in some cases by companies that have an interest in influencing the affairs of a particular community.<sup>28</sup> Changes in traditional leadership and representation in this manner have a significant negative impact on the internal decision-making systems of indigenous peoples.

49. Where traditional leaders have been put in place by mainstream authorities, often resources are not made available to support these "new" traditional leaders. Moreover, there is also not enough training and exposure given to appointed community leaders to ensure that legal and administrative decision-making processes result in quality judgements and decisions. Consequently, many indigenous peoples have lost confidence in, or mistrust, their own decision-making institutions. Collective reflections by indigenous communities to revitalize and regain the respect of decision-making processes and institutions are also lacking. Such efforts would represent a major undertaking and need multiple levels of intervention, including promoting respect for capable indigenous institutions, asserting the right to internal decision-making, and advocating for recognition of indigenous customary institutions.

50. Many indigenous peoples continue to utilize, have access to and develop traditional decision-making structures for internal purposes, notwithstanding the lack of formal recognition of these institutions by the State. Some indigenous peoples, nations and communities also prefer to remain unrecognized, and forgo funding, services, programmes and legal protections that come with recognition in order to maintain full control and independence over their structures.<sup>29</sup>

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<sup>27</sup> Submissions by JOAS (Malaysia); Wilton Littlechild, Andrea Carmen, Kenneth Deer (North America); and the New Zealand Human Rights Commission.

<sup>28</sup> Submission by AIPP. See also E/C.19/2010/6.

<sup>29</sup> These include the Sovereign Independent Seminole Nation of Florida and the Western Shoshone National Council, United States of America.

### C. Indigenous parliaments and organizations

51. Some contemporary indigenous decision-making institutions take the form of indigenous parliaments and organizations. These institutions are modelled on traditional decision-making institutions, comprising leaders selected by the people they aim to represent, and are often guided by statutes and adopt functions that promote the integrity and well-being of their constituency or community.

52. The Sami Parliament provides a clear example of an indigenous parliament; the indigenous governance in Kuna Yala represents another institution.<sup>30</sup> It is important to distinguish indigenous parliaments from public governments such as Greenland, where the majority of the people are indigenous. At the same time, an indigenous majority in a country does not automatically mean that indigenous peoples have direct access to participation in decision-making in the structures of the State.

53. Many indigenous peoples and communities have now established organizations at the local, national, regional and international levels to facilitate decision-making internally, and also to engage with the State on various matters.

### D. Indigenous legal systems

54. Indigenous legal systems, which include legislative (indigenous laws), judicial and procedural aspects, are critical to internal decision-making. The judicial and procedural aspects include rulings of indigenous courts by the chiefs and council of elders when administering indigenous laws and addressing disputes. Indigenous legal systems are often based on the principles of collective indemnity and communal solidarity. Fines and compensations are regularly decided upon and meted out to provide wrongdoers an opportunity to ask forgiveness from the aggrieved party and the whole community.

55. Indigenous law can be seen as having two components: personal law and territorial law. Personal law includes aspects related to the family, social, cultural, language, spiritual, and traditional economy and property, while territorial law refers to lands, natural resources and subsurface resources, but also has a social dimension. Indigenous law applies to persons as individuals, as well as to persons in a community.<sup>31</sup>

56. Indigenous legal systems are also linked to indigenous institutions and participatory decision-making processes. Equal opportunities are given to all parties to be heard by the village chief or leader. If the matter cannot be resolved at that level, it can go through a general meeting that includes all members of the community. Such systems usually also allow for intercommunity dispute resolutions, as well as with non-indigenous persons. Indigenous justice systems are seldom adversarial. Adjudicators do not seek to identify and punish the defaulter

<sup>30</sup> The Kuna Yala is an autonomous territory, or *comarca*, in Panama, inhabited by the Kuna indigenous people. The name means “Kuna-land” or “Kuna mountain” in the Kuna language. See Cabedo Mallol, Vicente (2004), *Constitucionalismo y Derechos Indígenas en América Latina*, Collection Armadeus, pp. 243–247.

<sup>31</sup> Submission by AIPP.

(unless deemed necessary), but to reconcile the disputing parties with each other and the rest of society.

57. Often, however, more than one legal system exists in a State, and indigenous peoples face enormous problems in maintaining their traditional legal systems. The main challenge is the non-acceptance of legal pluralism, including the failure of mainstream legal authorities to respect rulings of indigenous chiefs, elders or councils when administering indigenous laws and other disputes, or the failure to recognize such decisions as judicial acts. Other obstacles include limited administrative and financial support by States; the lack of opportunities to enable traditional leaders to update indigenous laws; and the lack of respect for indigenous legal systems by other legal systems.

58. Even in States where legal pluralism is applied, one often sees that the State only recognizes indigenous law in relation to “soft” matters such as social, cultural, family and cultural issues, but not in relation to “harder” issues, such as lands, territories and resources.

### **E. Indigenous women’s role in decision-making**

59. Generally, indigenous women are not part of official decision-making authorities, although they may participate in all deliberations on an equal footing with men. It is important to note that indigenous women have not always been excluded from decision-making, and traditionally played, and may still play, a significant role. For example, in North America prior to colonization, women played a much more prominent role in decision-making, but the recognition of male roles by colonizers contributed to a perception of male dominance that was subsequently perpetuated. Among the Kadazan in Malaysia, the bobohizan or priestess was an active part of the council of elders.<sup>32</sup> Women still play significant leadership roles in the intergenerational transfer of knowledge, particularly conservation,<sup>33</sup> language, culture, spirituality and social relations.

60. Some indigenous laws may also be seen as being unfair to women, whereas the Declaration establishes that laws and practices must be made compatible with internationally recognized human rights standards. Indigenous women now demand representation and ask for customary processes to be reformed, lobbying their traditional institutions to include women representatives at various levels of decision-making, and to recognize women’s potential for leadership. The rising literacy and awareness levels of indigenous women provide scope for greater involvement in seeking participation in governance, including their commitment as keepers of traditional knowledge. Furthermore, most Governments are now more sensitive to the representation of women in decision-making spheres and there is now greater awareness of women’s involvement at the national level. It is also recognized that, since learning takes place in cultural and ceremonial events where women continue to play a crucial role, women should play a decision-making role in such spheres.<sup>34</sup>

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<sup>32</sup> Submission by JOAS (Malaysia).

<sup>33</sup> Convention on Biological Diversity, thirteenth preambular paragraph.

<sup>34</sup> Submission by AIPP.



## F. Transformation and challenges of indigenous governance

61. For indigenous peoples, “transformation” often means the revolution of traditional ways of life and the gradual acceptance of the intrusion of external and foreign factors, be it during colonization, later during nation-state building and continuing today, resulting in the replacement of traditional institutions and the development of “new” institutions in order to fit the new spectrum of legislative and administrative bodies established in post-colonial times. Various factors and influences have brought about numerous challenges in guaranteeing indigenous decision-making processes and institutions, particularly affecting leadership and representation, respect for decisions made, effective participation and grievance/conflict resolution mechanisms.

62. Indigenous communities continue to maintain and adapt decision-making processes and institutions in dynamic ways, as evidenced by the involvement of wider sectors of the community, such as women and youth leaders. It should be noted, however, that while changes, such as the incorporation of voting standards, are sometimes voluntary, in many instances they are not by choice but due to external influences, including the State and other factors. Nevertheless, indigenous peoples continue to adapt their processes to find workable solutions. For example, today, by and large, electoral systems for selecting traditional leadership and for internal decision-making have replaced traditional processes of decision-making, a practice which was once considered culturally foreign to many indigenous peoples. In many ways, voting short-cuts and individualizes decision-making processes; it can often be more limited than traditional procedures in terms of addressing dissent and the concerns of minority voices within a community, and therefore may not encourage cohesion within a community. However, many indigenous communities have managed to integrate key elements and principles of traditional decision-making systems into modern electoral systems, thus maintaining important aspects of internal decision-making processes within more contemporary electoral structures.<sup>35</sup>

63. Nevertheless, there are still many traditional decision-making systems that are intact, active and operate in parallel to hybrid governance systems in indigenous communities. The self-governing Topokafa people of central Sulawesi still maintain their traditional governance structure and religion distinct from the centralized Indonesian structure.<sup>36</sup> The Hopi traditional system in the mesas of Northern Arizona, the traditional form of consensus decision-making among the Pueblos tribes in New Mexico and the Haudenosaune traditional longhouse in the United States of America and Canada are other examples.<sup>37</sup> There are also various other communities, which mainly owing to their isolation and distance from the centre of power, continue to practise their traditional decision-making authorities without interference.<sup>38</sup>

64. Even in areas where traditional decision-making institutions remain intact, there may also be interference and a lack of respect for decisions made by

<sup>35</sup> Submissions by Willie Littlechild and Andrea Carmen (North America), AIPP and JOAS (Malaysia).

<sup>36</sup> Submission by Abdon Nababan (Indonesia).

<sup>37</sup> Submission by Wilton Littlechild and Andrea Carmen (North America).

<sup>38</sup> Submission by AIPP (Asia Prepmeeting report).

indigenous institutions. In most countries, for example in Asia,<sup>39</sup> the establishment of village councils/committees<sup>40</sup> responsible mainly for infrastructure development has compartmentalized community concerns and kept their interest away from maintaining cultural integrity (social, spiritual and cultural aspects of life) and directed the focus towards a different model of development. Related challenges include limited jurisdiction of indigenous institutions in deciding on matters concerning communal land and resources, divisions within indigenous communities and conflicts where indigenous models of development and thinking are not respected or understood. Finally, there is the challenge of effective intergenerational transfer of indigenous knowledge, which further contributes to the decline of indigenous decision-making principles.

65. The deficiencies of including women in traditional decision-making systems also need to be confronted. This challenge provides an opportunity to address issues that Governments, non-governmental organizations and social scientists often point out about indigenous systems.

#### **IV. Participation in decision-making mechanisms linked to both State and relevant non-State institutions and processes affecting indigenous peoples**

##### **A. Participation in electoral politics**

66. The right of indigenous peoples to participate in electoral politics is grounded in the formal legal recognition of indigenous peoples as a specific group of peoples with specific rights. Until very recently, indigenous peoples were often denied this basic recognition, and it was only in the 1960s that indigenous peoples in a number of settler societies with significant indigenous populations, such as Australia, Canada and the United States of America, finally obtained full and unrestricted citizenship rights, including the right to vote.

67. In Latin America, the return to democratic regimes by the late 1980s, coupled with the call by indigenous and other social movements for fundamental changes, saw the passing of new national Constitutions that tried to establish a more propitious legislative and institutional framework for the recognition of truly multi-ethnic, multilingual and pluricultural societies, in which indigenous peoples' right to participate in electoral processes is often the cornerstone of these changes.

68. While clear progress has been achieved in a number of countries, recognition of indigenous rights has not been universal, as many States still do not formally recognize the rights of indigenous peoples in their domestic laws.<sup>41</sup> Indeed, very few Asian or African States expressly recognize in their laws or Constitutions the existence of indigenous peoples within their borders.<sup>42</sup>

<sup>39</sup> Submission by AIPP and JOAS (Malaysia).

<sup>40</sup> While the structure of these bodies is similar to that of the traditional council of elders — where members are selected or appointed from among community members — their aims, values and approaches are very different.

<sup>41</sup> Submission by the national human rights institution of El Salvador.

<sup>42</sup> ILO, International Labour Standards Department (2009), *Indigenous and Tribal Peoples: A Guide to*

69. However, even where new laws or legislative amendments provide for the formal recognition of indigenous participation in electoral politics, or allow for such participation through general equality provisions, the ability to implement these rights often remains a challenge. Such a case was seen, for example, when over 400 indigenous San peoples were denied the right to vote in the Botswana 2009 general election, and 5 San communities inside the Central Kalahari Game Reserve were omitted from the electoral register.<sup>43</sup> Other barriers impeding the full realization of these rights include the requirement of identification cards for voting, which can exclude indigenous peoples who often do not have them; the inaccessibility of polling centres; the limited availability of civic and voter education in indigenous languages; the use of money, coercion and threats; and the delineation of electoral boundaries, which can put indigenous peoples in a disadvantageous situation.

## B. Participation in parliamentary processes

70. Parliament remains the foremost decision-making body in a democracy, where laws are passed, budgets are allocated and the Government is held accountable. Being represented in parliament is thus practically and symbolically important for indigenous communities. A parliament that is unrepresentative will disadvantage or even exclude indigenous communities altogether from the political process, with consequences for the quality of public life and the stability of the political system and society in general.

71. Indigenous peoples worldwide have generally enjoyed increased parliamentary representation in recent years. This has been achieved in various ways, though there are still many challenges faced in improving both representation and its effectiveness.

72. In certain countries, indigenous peoples have been elected to normal parliamentary seats without special measures. This has been most successful in States with large indigenous populations, such as in Bolivia (Plurinational State of)<sup>44</sup> and in Greenland, where all members of Inatsisartut/Parliament and the Naalakkersuisut/Cabinet are of Inuit descent. In other States, where indigenous peoples are not the majority, there is also increased representation; for example, in Nicaragua, indigenous peoples have increased their representation in the National Assembly.<sup>45</sup>

73. Other States have increased indigenous representation through reserved seats for indigenous representatives in parliament, which may also involve specially defined electoral districts. Such is the case, for example, in Aotearoa, New Zealand, since 1867. In some situations, indigenous groups with special political arrangements enjoy representation in local processes.<sup>46</sup> In other circumstances, while there are no formal obstacles to indigenous participation, historical, structural

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*ILO Convention No. 169*, chap. V.

<sup>43</sup> Survival International. See also A/HRC/15, paras. 64–76.

<sup>44</sup> Submission by the national human rights institution of Bolivia (Plurinational State of).

<sup>45</sup> Submission by Nicaragua.

<sup>46</sup> Submissions by Bidhayak Chakma and Myenthein Promila (Bangladesh) and AIPP (Asia Premeeting report).

and social pressures have seen the increased participation of some groups, but not of others.<sup>47</sup>

74. Other aspects of indigenous participation in electoral processes include increased visibility and influence of indigenous political parties. However, it is also important to ensure that mainstream political parties take into account the need for diversity within parties and ensure adequate indigenous representation within their own structures to avoid ongoing exclusion, particularly of numerically small indigenous groups. Special arrangements that provide for indigenous influence in governmental decision-making often include ensuring indigenous representation in elective bodies. Some examples of these initiatives may be found in Burundi and Rwanda, where specific measures have been taken to ensure the representation of the Batwa in parliament.

75. It is possible that more than one measure is needed. For example, in New Zealand, a combination of reserved seats and proportional representation has led to the Maori being represented in parliament in proportion to their population. Other political factors, including in relation to political parties, have also contributed such that Maori interests are currently much better represented in parliamentary decision-making.

76. Where special measures, such as reserved positions, are taken, there is a risk that they might be rendered ineffective. In Nepal, for example, despite the significant number of indigenous representatives in the Constituent Assembly currently drafting the country's new Constitution, the formal representatives were chosen by political parties and are expected to act in strict conformity with the manifestos of those parties.<sup>48</sup>

77. A related risk is that a minority representation will be unable to protect indigenous interests in the face of political opposition. Although parliamentary systems differ, a parliamentarian has to have leadership influence. Without the support of parliamentary leaders, indigenous parliamentarians experience difficulty in getting their proposals onto the parliamentary agenda and in moving them through the parliamentary process.<sup>49</sup>

### **C. Direct participation in governance**

78. Indigenous peoples also participate in the governance and administrative affairs of States through a wide variety of mechanisms. Some States have established an indigenous secretary, commissions or departments that function to ensure that policy decisions made at the national and international levels take into account indigenous peoples' human rights.<sup>50</sup> It should be noted, however, that some indigenous peoples are opposed to such a solution, believing that an indigenous secretary compartmentalizes indigenous issues, which should instead be mainstreamed throughout all political structures.

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<sup>47</sup> Submission by Ramy Bulan (Malaysia).

<sup>48</sup> Submission by Krishna Bhattachan (Nepal).

<sup>49</sup> Submission by UNDP.

<sup>50</sup> Submissions by Nicaragua; Les Malezer (Australia); and JOAS (Malaysia).

79. Some local arrangements provide for communities to define a communal authority chosen according to indigenous customs and traditions to represent them legally, and recognize such communal authority as the administrative and traditional Government (territorial). A challenge here could be in the form of complicated administrative requirements to gain legal recognition.<sup>51</sup>

80. A method commonly used in many countries is to recognize autonomous regions within a State, whereby indigenous peoples can directly govern themselves and define matters within that region. Examples include India<sup>52</sup> and Nicaragua.<sup>53</sup>

81. The introduction of a public Government in areas where indigenous peoples form a majority is another example of direct self-governance. Examples include Greenland<sup>54</sup> and Nunavut,<sup>55</sup> in which the Inuit enjoy a majority in public government bodies.

#### D. Participation in hybrid systems of governance

82. Alternative models include what have been termed hybrid systems of governance, in which indigenous peoples participate in governmental processes by applying, to varying degrees, their own decision-making structures and practices.

83. In the judicial context, some States incorporate indigenous laws into statutory laws, allowing communities to decide matters according to their own laws.<sup>56</sup> In some cases, constitutional recognition is also accorded to customary laws, as in the case of Malaysia, which allows the State of Sabah to enact laws autonomously and establish indigenous legal institutions to implement such laws. Other models include recognizing the jurisdiction of indigenous law over specific areas of cultural importance.<sup>57</sup>

84. Other jurisdictions, such as in Australia, have focused on the participation of indigenous elders, to varying degrees, in hearing cases involving Aboriginal people within the mainstream criminal justice system. The aim is to make court processes more culturally appropriate to engender greater trust between indigenous communities and judicial officers, and to permit more informal exchanges of information about defendants and their cases.

85. When looking at different hybrid judicial models, what is important is that indigenous peoples are fully consulted and participate in deciding the structure of such bodies. Moreover, from the diverse nature of submissions received, it is

<sup>51</sup> Submissions by Nicaragua and AIPP (Asia Prepmeeting report).

<sup>52</sup> India, Constitution, Sixth Schedule, 26 November 1949, para. 3 (1).

<sup>53</sup> The Miskito Coast in Nicaragua. See generally The Mayagna (Sumo), *Awás Tingni Community v. Nicaragua*, judgement of 31 August 2001, Inter-American Human Rights Court (Ser. C), No. 79 (2001).

<sup>54</sup> Submission by Greenland.

<sup>55</sup> Hicks, Jack and Graham White (2000), "Nunavut: Inuit self-determination through a land claim and public government?" in *Nunavut: Inuit regain control of their lands and their lives*, Copenhagen, International Work Group for Indigenous Affairs. Available from [www.jackhicks.com/e107\\_files/downloads/IWGIA\\_Nunavut\\_book.pdf](http://www.jackhicks.com/e107_files/downloads/IWGIA_Nunavut_book.pdf).

<sup>56</sup> Submission by Elina K. Horo (India).

<sup>57</sup> Submission by Chief Wilton Littlechild and Andrea Carmen. See United States of America, Indian Child Welfare Act, 1978.

evident that, while some indigenous peoples may applaud the incorporation of indigenous laws into national laws, this may not always be the case, as some communities feel that the incorporation of these laws into mainstream systems can distort the spirit of these laws or contribute to the loss of indigenous control over their own legal and other systems.

#### **E. State-established councils or committees**

86. While the State can play a pivotal role in helping to establish indigenous organizations, indigenous peoples have been particularly critical of certain State-established councils and committees, especially where such bodies have effectively taken over traditional decision-making processes. Indeed, these structures have been used historically by Governments to convey a semblance of engagement with communities, while serving the purpose of silencing indigenous dissent to Government policies and practices. Indigenous representatives are often appointed to State-controlled committees on the basis of their appeal to Government, while the procedure for appointment itself has often been non-transparent. Moreover, these appointees do not necessarily reflect the position of communities, may have limited knowledge of the subject matter and are inaccessible to the community they purport to represent. Since the Government often pays the salary of appointees, they may be afraid to alienate their employer by criticizing government policy.

#### **F. Consultations and implementation of free, prior and informed consent for development projects**

87. Increasingly, indigenous peoples worldwide are struggling to maintain control over their lands and resources in the face of growing encroachment on their territories by both small- and large-scale development projects. Conflicts regarding the protection and use of natural resources at stake in many such projects are increasing, and both the human and environmental impact of these projects continues to affect indigenous communities. These projects often involve a diverse range of actors, including States and private companies, and sometimes international financial institutions and non-governmental organizations. Many decisions connected to these development projects drastically affect indigenous peoples' rights, yet are taken without their free, prior and informed consent.

88. The legal framework for free, prior and informed consent has been set out above, and its normative character explored by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.<sup>58</sup> Substantively, the right of consultation as generally established by the Declaration on the Rights of Indigenous Peoples requires "effective" participation, not pro forma consultations, the goal of which is to obtain the free, prior and informed consent of indigenous peoples. Importantly, the Declaration affirms that indigenous peoples have the right to self-determination. The emphasis therefore is on the need for consultations that, in the nature of negotiations, are oriented towards mutually acceptable measures to which indigenous peoples consent prior to the decisions on the measures proposed.

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<sup>58</sup> A/HRC/12/34, paras. 36–57.

89. Despite the clear standard that free, prior and informed consent provides, consultations have not always been carried out in this way, and have been manipulated as public relations tools to endorse proposals regarding development projects, by demonstrating so-called support from the community by citing irrelevant comments and downplaying dissenting voices.<sup>59</sup>

90. In order to avoid such manipulation, some communities have established clear protocols to ensure that any consultation with them is based on the standard of free, prior and informed consent. Such an approach has been successful in some circumstances,<sup>60</sup> and indigenous communities need access to capacity-building to be able to continue to develop culturally appropriate protocols and procedures for consultation that are relevant to their communities.

91. States may sometimes impose statutory obligations on third parties involved in a project to provide notice to indigenous peoples. Indigenous peoples have been frustrated, however, by the volume of requests they receive from Government agencies, the absence of adequate funding, and the lack of an effective mechanism for managing the referrals process.<sup>61</sup> While indigenous peoples should be included in administrative procedures, legislative “notice” provisions for third parties may not necessarily meet the standard of consulting with indigenous people in a manner consistent with the international standard of free, prior and informed consent.

## **G. Participation in establishing alternative organizations**

92. To overcome obstacles to meaningful participation in formalized State-driven mechanisms, many indigenous peoples have formed local, regional or international non-political associations to advocate their interests. Indeed, in countries where indigenous peoples have been excluded from formal processes, these organizations have played an important role in representing indigenous peoples and making collective decisions about social, cultural and religious life.<sup>62</sup>

93. The above-mentioned structures often provide links between indigenous groups by forming alliances, and represent a range of diverse and varied interests and peoples. These organizations have also used their collaborative positions to discuss common challenges, and speak out collectively on fundamental issues that affect them.<sup>63</sup> Organizations have worked cross-border, and have drafted international agreements regarding issues affecting them.<sup>64</sup>

94. Nevertheless, a significant challenge is gaining recognition from States, which means that these organizations are often overlooked or excluded from formal decision-making processes.<sup>65</sup>

<sup>59</sup> Submission by Les Malezer (Australia).

<sup>60</sup> Many community protocols for research and management of resources have been developed by indigenous communities, such as those in Sabah (Malaysia), for research and management of resources, the Raika in India, as well as by communities in Australia and New Zealand.

<sup>61</sup> Submission by First Nations Summit (Canada).

<sup>62</sup> Submission by Krishna Bhattachan (Nepal).

<sup>63</sup> Submission by First Nations Summit (Canada).

<sup>64</sup> ILO, International Labour Standards Department (2009), *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, p. 88.

<sup>65</sup> Submission by the National Indian Youth Council (United States of America).

## H. Participation in regional and international forums and processes

95. Indigenous peoples have also been participating actively in international mechanisms in order to achieve greater protection of their rights. Relevant United Nations agencies, treaty bodies and other international mechanisms have enabled direct participation of indigenous peoples at the highest levels.<sup>66</sup> It is noted, however, that ILO does not allow indigenous peoples to participate directly in their conferences, despite repeated calls for this by a number of United Nations bodies.<sup>67</sup>

96. An appropriate goal is the full and direct participation of indigenous peoples in all international processes on matters that particularly concern them. These include biodiversity and climate change negotiations, since they often have a disproportionate impact on indigenous peoples and their territories. However, consistent financial and administrative support is needed to ensure that indigenous peoples maintain appropriate participation in international bodies.

## I. Other issues and challenges

97. While a number of positive steps have been taken regarding indigenous participation in external decision-making processes, the progress is not uniform and still requires serious attention. Even in States where the law appears to demonstrate full recognition of indigenous peoples' rights to participate in all levels of decision-making, there is often a gap between the formal legislative intent and the practical implementation of those rights.

98. One key concern is the question of access to information. Information is necessary to ensure that indigenous peoples participate in decision-making in an informed way. Consistent and wide dissemination of information to indigenous peoples in culturally appropriate ways, and in a timely manner, is often lacking. This is particularly true with regard to new issues, where indigenous peoples may not necessarily have the skills or access to technology to address them properly.

99. It is also important that all sectors of indigenous society have the opportunity to engage and participate in consultative and decision-making structures. This is especially true for women and youth, who are often marginalized from these processes.

100. Finally, decision-making structures need to have legitimacy and credibility within indigenous communities. Selection processes need to be transparent and truly participatory. One challenge is to develop the leadership capacity of indigenous individuals with the long-term goal of ensuring indigenous participation in decision-making, where indigenous peoples feel properly represented, and that their voices are not only heard but taken into account.

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<sup>66</sup> Submissions by UNDP, ILO and the Convention on Biological Diversity.

<sup>67</sup> *Official Records of the Economic and Social Council, Supplement No. 43 (E/2009/43)*.