

**Human Rights Council**  
**Expert Mechanism on the Rights of Indigenous Peoples**

Third session, 12-16 July 2010

Agenda Item 3: Study on indigenous peoples and the right to participate in decision-making

**Statement by the Arctic Caucus**

Thank you Mr. Chairperson,

In the outset, please allow the Arctic Caucus to congratulate you on your appointment as Chairperson of EMRIP. Allow us also to extend our gratitude to all the members for providing this Progress Report, which we believe constitute a very sound basis for completing a full Study on indigenous peoples' right to participate in decision making. A particular thanks to Ms. Lasimbang and Mr. Henriksen as the main co-authors of the study.

Having said that, we would like to offer some general comments on the Progress Report.

As highlighted also by the Expert members when introducing the Progress Report, the Report throughout distinguishes between indigenous peoples' participatory rights through (i) the regular political channels of the state, on the same basis as other citizens, and (ii) indigenous peoples' own decision-making institution, existing side-by-side with the majority society's political system. We see the logic behind this division, as many indigenous individuals suffer from discrimination and are denied basic political rights. But we do underline that rights to participate in the political system of the state are precisely civil and political rights of *individuals*, as also pointed out by the Special Rapporteur. Rights to vote, run for election etc. are not participatory rights of indigenous *peoples*. These rights are exercised collectively through self-governance and autonomy, as enshrined in the UN Declaration on the Rights of Indigenous Peoples Articles 3-5. Although we reiterate that we do not deny the importance of individual civil and political rights, we believe that the focus

of this study - as the title suggests - shall be on participatory rights of indigenous peoples.

Mr. Chairperson,

That note brings the Arctic Caucus to respond to the Expert members' request when introducing the Progress Report, i.e. that we specifically comment on Section II. D. of the Report - the relationship between the rights enshrined in ILO 169 and the UN Declaration respectively, in the particular context of the meaning of "consent" in the phrase free, prior and informed consent.

The ILO 169 was adopted more than 20 years ago. International law has progressed considerably since then. Importantly, ILO 169 is not a Convention on peoples' rights. That follows indirectly from the exclusion of the right to self-determination in the Convention, and explicitly from Article 1 (3) underlining that the reference to "peoples" in ILO 169 does not mean that the Convention confirms peoples' rights. Since ILO 169 is not a peoples' rights convention, it focuses on consultation, and not on self-determination, i.e. consent.

Now, the intention of the Arctic Caucus is not to undermine the importance of fair, transparent and open consultation processes. On the contrary, we want to emphasize the importance of state's obligation to conduct such consultation processes, respecting the rights of indigenous peoples as enshrined in the UN Declaration Article 27. But, we underline, one must look at the concept of consent and consultation as two separate processes, where the consent process is to be perceived as a right to make a choice, to say yes or no. And it is the latter right that is more complex, and on whose content and scope the Study should particularly shed light.

As mentioned, international law has evolved considerably since the adoption of the ILO 169. During the last two decades, all the most central human rights conventions - the CCPR, CESCR and the CERD - have been interpreted by their respective treaty body to proclaim peoples' rights of indigenous peoples - including the right to self-determination. Further, all regional human rights courts and commissions - the AfCommHPR, the ACHR, the ACommHR and the ECHR have recognized that indigenous peoples hold rights as peoples. Throughout the world, states with

indigenous peoples have taken steps towards introducing self-governing and autonomous arrangements for indigenous peoples, including all states with indigenous peoples in the Arctic region. And, in 2007, the UN member states reaffirmed this development when voting in favour of the UN Declaration on the Rights of Indigenous Peoples. These developments have confirmed – beyond doubt – that indigenous peoples have the right to self-determination, a right embracing a right to consent or not consent in decision making processes affecting indigenous peoples, including their traditional lands and natural resources. The Arctic Caucus is not suggesting that this right of indigenous peoples can be exercised without consideration of the rights and interests of the majority people and society as a whole. It has to be exercised with respect for the majority people's right to self-determination. But it is at its core precisely a right to self-determination – a right to consent or not consent – not a right to consultation.

In conclusion, 20 years ago ILO 169 focused on a right to a process – a right of indigenous *populations* to be involved in decision-making affecting them. Contemporary international law of indigenous *peoples* is less concerned with the process, and more on what happens when such processes do not result in agreement.

Mr. Chairperson,

For these reasons, the Arctic Caucus submits that Section II. D. of the Study *must* focus on the right to consent or not consent. As peoples, the indigenous peoples of the Arctic have moved beyond a mere right to consultation. We need this body to carry out focused and insightful work on what happens in those situations when we cannot reach an agreement with our majority peoples or industries wanting to access our territories. If the Study focuses on consultation, it leaves out the developments in international law the last 20 years, resulting in a right to self-determination of indigenous *peoples* – enveloping the concept of free, prior and informed *consent*.

The Progress Report has outlined the content of the law in a very good and helpful manner. What the Study needs to focus on is how these rights play out in practice. The Arctic Caucus would like to see concrete and detailed work on how indigenous peoples' right to consent and not consent can be operationalized within a state system. We believe, particularly given the word-limitation of UN documents that the study should give limited attention to consultation rights of populations, as

enshrined in ILO 169, and to civil and political rights of individuals. What we need are insightful work on how the right to self-determination is implemented in states hosting more than one people.

We thank you Mr. Chairperson.