Intervention on Article 5, Jurisdiction

18 October 2018

Thank you Mr. Chairperson.

International law respects, promotes and protect the right of indigenous peoples to their customary laws and justice systems. In relation to Article 5, we recommend that an additional provision be included that will acknowledge the jurisdiction on customary justice systems in the settlement of disputes.

To support this recommendation, we refer the OEIGWG to provisions of the International Labour Organization Convention 169, more specifically Articles 8, 9 and 10[[1]](#footnote-1). Reference is also made to a the relevant provisions of the UN Declaration on the Rights of Indigenous Peoples including Article 5, 27, 34, and 40.[[2]](#footnote-2) Additionally, we refer to the study submitted by the Expert Mechanism on the Rights of Indigenous Peoples submitted to the UN Human Rights Council in 2014 (A/HRC/27/65). This study advised States to “recognize indigenous peoples’ right to maintain, develop and strengthen their own juridical systems, and must value the contribution that these systems can make to facilitating indigenous peoples’ access to justice.”

As an example of a provision respecting indigenous peoples customary laws jurisdiction, we refer to the American Declaration on the Rights of Indigenous Peoples, Article XXII on Indigenous Law and Jurisdiction.[[3]](#footnote-3) This Declaration provides that:

“1. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

2. The indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems.”

Thank you.

1. ***Article 8***

   1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

   2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

   3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

   ***Article 9***

   1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

   2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

   ***Article 10***

   1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

   2. Preference shall be given to methods of punishment other than confinement in prison. [↑](#footnote-ref-1)
2. **Article 5**

   Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

   **Article 27**

   States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

   **Article 34**

   Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they

   exist, juridical systems or customs, in accordance with international human rights standards.

   **Article 40**

   Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies

   for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. [↑](#footnote-ref-2)
3. **Article XXII. Indigenous law and jurisdiction**

   1. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

   2. The indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems.

   3. The matters referring to indigenous persons or to their rights or interests in the jurisdiction of each state shall be conducted so as to provide for the right of the indigenous people to full representation with dignity and equality before the law. Consequently, they are entitled, without discrimination, to equal protection and benefit of the law, including the use of linguistic and cultural interpreters.

   4. The States shall take effective measures in conjunction with indigenous peoples to ensure the implementation of this article. [↑](#footnote-ref-3)