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

Final 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 study complements the progress report submitted by the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/EMRIP/2010/2) by focusing on examples of good practices of indigenous peoples' participation in different levels of decision-making. The present study should be read in conjunction with the progress report.

* Late submission.

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I. Introduction

1. In its resolution 12/13, the Human Rights Council requested the Expert Mechanism to carry out a study on indigenous peoples and the right to participate in decision-making, to present a progress report to the Council at its fifteenth session and a final study at its eighteenth session.
2. The Expert Mechanism presented its progress report on the study (A/HRC/EMRIP/2010/2) to the Human Rights Council at its fifteenth session, taking into account discussions at the Expert Mechanism's third session, held in July 2010. In that report, the Expert Mechanism analysed the relevant international human rights framework, indigenous peoples' internal decision-making processes and institutions and indigenous peoples' participation in decision-making mechanisms linked to State and non-State institutions and processes affecting indigenous peoples.
3. In its resolution 15/7, the Human Rights Council welcomed the successful completion by the Expert Mechanism of its progress report and encouraged it to finalize the study in accordance with Council resolution 12/13, and requested it to give examples of good practices at different levels of decision-making.
4. The present final report on the study on indigenous peoples and the right to participate in decision-making complements the progress report by focusing on examples of good practices of indigenous peoples' participation in different levels of decision-making.
5. As in the case of the Expert Mechanism's first study, the Mechanism includes advice associated with the corresponding study (see annex), in this case on indigenous peoples and the right to participate in decision-making.
6. The examples of good practices described in the present report are drawn from the Expert Mechanism's own research and submissions received, after calling for information from, inter alia, States, and a technical workshop held in March 2011.
7. The examples outlined below have the potential to assist States, indigenous peoples, international organizations, national human rights institutions and others to protect and promote indigenous peoples' participation in decision-making.
8. At the third session of the Expert Mechanism, many observers provided comments on the State's duty to obtain indigenous peoples' free, prior and informed consent, and were used to inform the present report and, in particular, Advice No. 2 (see annex).

II. Defining good practices

9. First of all, it is difficult to define what actually constitutes a "good" practice involving indigenous peoples' participation in decision-making and, second, to assess whether a practice meets the definition of "good", not least because of the distance separating the Expert Mechanism from the context in which such practices are followed. Third, it has been difficult to acquire comprehensive information from all regions.
10. Mechanisms enabling the participation of indigenous peoples in external, non-indigenous decision-making processes can be problematic for various reasons; they may operate in environments where indigenous peoples are politically, socially and economically non dominant and, while they enhance indigenous peoples' participation, they do not go so far as to level the playing field with non-indigenous individuals and peoples; they do not allow greater indigenous influence over decisions in practice; because they are poorly implemented, or suffer from previously unforeseeable problems; or because

they privilege the participation of certain indigenous individuals over that of others, creating concerns about their ability to achieve equality between individuals.

11. For the above reasons, the Expert Mechanism cannot verify that all practices mentioned in the present report are uncontroversial or objectively good in every respect. Indeed, the Expert Mechanism can only indicate that elements of certain practices appear to have positive aspects based on its research and the submissions received.

12. To assess whether a practice is good, the Expert Mechanism has based its criteria on the Declaration on the Rights of Indigenous Peoples.

13. While not a finite list, the Expert Mechanism regards the factors outlined below as relevant when determining whether a practice is good. The most significant indicator of good practice is likely to be the extent to which indigenous peoples were involved in the design of the practice and their agreement to it. Other indicators include the extent to which the practice:

- Allows and enhances indigenous peoples' participation in decision-making
- Allows indigenous peoples to influence the outcome of decisions that affect them
- Realises indigenous peoples' right to self-determination
- Includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples' free, prior and informed consent

14. Some practices have been included in the report even where they might not be well implemented, in order to highlight the potential that they have to protect and promote indigenous peoples' participation in decision-making.

15. Good practices may be found in, inter alia, a law, a policy programme, a single project and/or in a component of a project.

III. Indigenous peoples' internal decision-making processes and institutions

16. In the context of the present report, internal decision-making processes and institutions are indigenous; in other words, they function in accordance with indigenous-determined practices and for indigenous peoples. That is not to say that internal decision-making processes and institutions need to be traditional in a historical sense; instead, they may include processes and institutions that have evolved over time, which may involve newer practices, sometimes in response to external influences. In some cases, indigenous decision-making processes and institutions may also be established as a result of discussion and dialogue, or even agreement, with the State. Internal decision-making processes are sometimes – though not always – recognized by the State and under State law.

A. Indigenous decision-making processes and institutions

17. Many indigenous institutions have their own decision-making processes, some of which are described in the progress report of the Expert Mechanism.¹ Many of these institutions continue to receive support from communities despite, in some cases, limited (if any) recognition by the State. The right to maintain such distinct decision-making processes

¹ A/HRC/15/35, paras. 42-66.

and institutions is embodied in articles 5, 20 and 34 of the Declaration on the Rights of Indigenous Peoples, among others.

18. Generally, the ongoing functioning of indigenous peoples' internal decision-making processes and associated institutions are positive in that they facilitate the participation of indigenous peoples and individuals in public affairs in ways that are philosophically and culturally consistent with indigenous peoples' understanding of governance. Significantly, indigenous decision-making processes and institutions also express a degree of indigenous peoples' self-determination and autonomy, free from imposed external influence, although the State may still have ultimate authority under State law, including in some of the examples mentioned below.

19. Examples of indigenous decision-making can be found in indigenous management of resources in indigenous conservation areas and territories.² Successful practices include those where indigenous decision-making processes and traditional knowledge are respected by the community and by other authorities. The *sasi* system used in Haruku, Indonesia, where generations of *kewang* or indigenous institutions organize the community to remain committed and united in managing fish stocks and other important coastal resources, is exemplary.³ Another example is the case of the Kaimoana customary fishing regulations in New Zealand, which permit some Maori control of customary fishing in some areas, including by Maori institutions organized in accordance with their own beliefs, albeit significantly and ultimately controlled by the Government.

20. The Kuna Yala *Comarca* is one of five special territorial units in Panama with administrative autonomy through general, traditional, regional and local councils. The *Comarca* is governed by Kuna traditions and customs, and makes its own decisions within the framework stipulated by the Constitution and legislation. Indigenous peoples make the majority of decisions on cultural, economic and political matters affecting their populations, and monitor indigenous rights. The *Comarca* is governed by the Kuna General Council, which is the highest authority, comprising local councils of the 49 communities, each one represented by a chief (*Saila*). The region is run by three general chiefs (*Caciques*) elected by the Kuna General Council. The Kuna General Council meets for four days every six months. In addition to the 49 *Sailas* that represent their communities, participation in the Councils is mandatory for National Assembly representatives, the regional Governor, the four district representatives and the regional directors of each institution established in the *Comarca*. Furthermore, each community is required to include one indigenous woman on its delegation.⁴

21. In the United States of America, many American Indian nations retain residual sovereignty over territories, albeit over areas sometimes far smaller than the areas controlled by them historically. In practice, the doctrine permits, as a matter of United States constitutional law, American Indian nations to make laws in accordance with their own governance structures and to function under their own legal systems. The

² See Indigenous and Community Conserved Areas, "Indigenous and Community Conserved Areas", 2009, available from www.iccaforum.org.

³ He Hong Mu Xiuping and Eliza Kissya with Yanes, "Indigenous knowledge and customary law in natural resource management: experiences in Yunnan, China and Haruku, Indonesia", Asia Indigenous Peoples Pact Foundation, 2010.

⁴ International Labour Organization (ILO), *Indigenous and Tribal Peoples' Rights in Practice: a guide to ILO Convention 169* (Geneva, ILO, 2009). Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf.

constitutional doctrine of congressional plenary power means, however, that Congress can legislate to override American Indian law.⁵

22. In Canada, a number of First Nations have entered into agreements with Canadian provincial and federal Governments to exercise greater self-government over their territories, such as the Nisga'a in British Columbia,⁶ and in accordance with the Canadian policy to recognize the inherent right of First Nations to self-government.⁷ The Nisga'a Lisims Government exercises self-government over a broad range of issues, including education and lands and resources.⁸ On the other side of Canada, the Nunatsiavut peoples of Newfoundland formed a government that self-governs in areas of health, education and culture, in accordance with the 2005 Labrador Inuit Land Claims Agreement.⁹

B. Indigenous parliaments and organizations

23. There is a number of examples of indigenous parliaments and organizations that enable indigenous peoples to influence decision-making in matters that potentially concern them.

24. The Sámi Parliaments are representative advisory bodies that were established in Norway, Sweden and Finland in 1989, 1992 and 1995 respectively to, among other objectives, facilitate consultation with the Sámi people on matters affecting them. The mandate and regulation of the Parliaments differs from one country to the other.

25. In Sweden, the Sami Parliament has been granted special responsibilities relating to participation in decision-making; for example, it decides on the distribution of State grants and the distribution of other financing made available for the Sami; appoints the board of Sami schools; manages Sami language projects; is the administrative agency responsible for reindeer husbandry; participates in social planning and monitors compliance with Sami needs, including the interests of the reindeer industry with regard to land and water; and disseminates information on Sami conditions.¹⁰

26. In Finland, under section 9 of the Sámi Parliament Act of 1995, the authorities are required to negotiate with the Sámi Parliament on all important measures that may directly affect the status of the Sámi as an indigenous people.¹¹

⁵ David Getches, Charles F. Wilkinson and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (Thomson/West, 2005).

⁶ See Nisga'a Final Agreement, available from www.nisgaalisims.ca/nisga-final-agreement.

⁷ See submission of the Government of Canada to the Expert Mechanism on the Rights of Indigenous Peoples, July 2010. See also the submission of the University of Arizona Rogers College of Law Indigenous Peoples Law and Policy Program, "Best Practices for the Participation of First Nations in the Governance of Canada" (1 March 2011). Submissions to the Expert Mechanism are on file with secretariat of the Office of the United Nations High Commissioner for Human Rights.

⁸ Nisga'a Final Agreement (see footnote 7).

⁹ See Department of Labrador and Aboriginal Affairs, Newfoundland Labrador, Canada, www.laa.gov.nl.ca/laa/land_claims/index.html#1.

¹⁰ See contribution of Sweden to the Expert Mechanism on the Rights of Indigenous Peoples, 2010 session, available from www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/contributions.htm.

¹¹ See contribution of Finland to the Expert Mechanism on the Rights of Indigenous Peoples, 2010 session, available from www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/contributions.htm; ILO guide to ILO Convention n. 169 (see footnote 5); and A/HRC/18/35/Add.2.

27. The Government of Norway and the Sami Parliament agreement on procedures for consultation recognizes that the Sami have the right to be consulted on matters that may affect them directly, and sets out procedures applicable to the Government and its ministries, directorates and other subordinate State agencies or activities in matters that may affect Sami interests directly, including legislation, regulation, specific or individual administrative decisions, guidelines, measures and decisions.¹²

28. In the Philippines, the Indigenous Peoples Rights Act 1997 established a consultative body comprising traditional leaders, elders and representatives from the women and the youth sectors of different indigenous peoples, which advises the National Commission on Indigenous Peoples on matters relating to the problems, aspirations and interests of indigenous peoples. In 2003, the Commission adopted a set of guidelines for the constitution and operationalization of the consultative body, which recognize the constitution of consultative bodies at the national, regional and provincial levels, as well as at the community level when the need to hold focused consultations arises. The consultative body evaluates, *inter alia*, important indigenous peoples' issues and concerns and provides input to and makes recommendations on policies for adoption by the Commission.¹³

29. In New Caledonia, Congress is legally required to consult with the Customary Senate, consisting of Kanak Senators from each of the New Caledonian customary areas, when considering any law or policy affecting Kanak identity. When the Customary Senate disagrees with the law or policy, Congress must reconsider its decision, after which the position of Congress applies.¹⁴ While this practice preserves the supremacy of the New Caledonian Congress on matters that are of fundamental importance to the Kanak, it provides the opportunity for Kanak representatives to contribute to congressional deliberations.

30. The Inuit Circumpolar Conference is a good example of regional cooperation between indigenous peoples. The Conference holds quadrennial general assemblies at which issues such as resource development and climate change are discussed. The associated Inuit leaders' summit brings together Inuit leaders of the regional and national Governments of Inuit nations.¹⁵

C. Indigenous legal systems

31. Under articles 5, 27, 34 and 40, the Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples to maintain and strengthen their own legal systems. Articles 8 and 9 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO) also provide further elaboration on these rights. Indigenous legal systems, including legislative, judicial and procedural aspects, can maintain harmony within indigenous society and enhance indigenous peoples' ability to influence decision-making externally.

¹² See contribution of Norway to the Expert Mechanism on the Rights of Indigenous Peoples, 2010 session, available from www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/contributions.htm.

¹³ ILO guide to ILO Convention n. 169 (see footnote 5).

¹⁴ See submission by the Special Rapporteur on the rights of indigenous peoples to the Expert Mechanism on the Rights of Indigenous Peoples, "Some examples of good practices for indigenous peoples' participation in decision making: political participation, consultation standards, and participation in development projects" (11 March 2011).

¹⁵ Submission by Sara Olsvig to the technical workshop on good practices associated with indigenous peoples and the right to participate in decision-making of the Expert Mechanism on the Rights of Indigenous Peoples (9-10 March 2011).

32. Although Bangladesh has a unitary system of government, the legal and administrative system in the Chittagong Hill Tracts is separate and distinct from those in other parts of the country. Informally, the justice system of many indigenous communities is still operational and used to settle disputes over both civil and petty criminal matters. The traditional justice institutions, namely of the three Circle Chiefs, the *Mouza* headmen and the village *Karbaris*, complement State justice institutions and their jurisdiction over matters involving custom-based family laws, and some land and natural resource-related rights are recognized by them.¹⁶

33. Support for the practice of indigenous legal systems in Sabah, Malaysia, to allow such systems to remain autonomous was the result of repeated calls by indigenous leaders and institutions. The financial support of the federal Government to improve the image of native courts in Sabah, which had been neglected for decades, is one such example, to be used for, inter alia, the building of new native courts and a training centre for native court personnel, where knowledge about indigenous legal systems can be handed down to younger leaders.¹⁷

34. The indigenous legal systems in the Ratanakiri and Mondulakiri provinces of Cambodia constitute a good practice, even if they do not have formal State recognition. The systems are usually consistent with indigenous values, including in relation to the participation of all individuals and families affected by an alleged crime. Some villagers explained that they valued indigenous legal systems because of their inclusion of many – the community – and because judgements reflect the views of the majority. Moreover, in some communities, village leaders, responsible for, inter alia, maintaining peace in the community, are selected by consensus and on the basis of criteria that include the extent to which she or he will act in the interests of the collective.¹⁸

35. The Constitution of Mexico recognizes the right of indigenous peoples to self-determination, especially with regard to the election and exercise of their own forms of governance (art. 2). In the same way, the Constitution of Oaxaca (arts. 16 and 25) recognizes the right of indigenous peoples to elect and nominate their authorities and representatives in municipalities in conformity with their legal and political systems.

D. Indigenous women in decision-making

36. Under human rights law and the Declaration on the Rights of Indigenous Peoples, women have the right to equality in the exercise of the right of indigenous peoples to participate in both internal and external decision-making processes and institutions.

37. Within many indigenous societies, women continue to have important decision-making roles, including in cultural and ceremonial events, where interaction, learning and intergenerational transfer of knowledge take place. Through these processes, women have the opportunity to empower themselves and others. Women also make important decisions

¹⁶ Raja Devasish Roy, Sara Hossain, Dr. Meghna Guhathakurta, "Access to Justice for Indigenous Peoples in Bangladesh", United Nations Development Programme (UNDP, Bangkok, 2007). Available from <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/CaseStudy-02-Bangladesh.pdf>.

¹⁷ Jens Dahl, Genevieve Rose, "Development and Customary Law", *Indigenous Affairs*, International Work Group for Indigenous Affairs, 2010. Available from http://issuu.com/iwgia/docs/ia_1_2_2010.

¹⁸ Maria Backstrom, Jeremy Ironside, Gordon Paterson, Jonathan Padwe, Ian G. Baird, "Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulakiri Provinces, Cambodia" (UNDP, Bangkok, 2007).

daily with respect to farming and the choice of crops, as well as on the daily supply of food for the family, thus contributing to the livelihoods of families and communities.

38. Among the Naga women in north-east India, where indigenous communities continue to face conflict, indigenous women have been playing an important role as peacekeepers. Decisions made by the Naga women in tense situations have been acknowledged by many to have helped to diffuse conflicts and maintain peace.¹⁹

39. The Expert Mechanism received information about the NupiKeithel – a traditional indigenous women’s market guild in Manipur, India – as an example of indigenous women’s participation in State decision-making, albeit through peaceful protest and agitation rather than through formalized processes to make the voice of indigenous women heard.²⁰ The Nupi Keithel successfully fought for inclusion in governmental processes to consider the construction of a supermarket in the environs of the markets of the Nupi Keithel. As a result, and consistent with the demands of the Nupi Keithel women, a new building was constructed to house ‘their’ market.

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

A. Participation in electoral processes

40. In Australia, the Indigenous Electoral Participation Program is aimed at empowering indigenous peoples in exercising their right to vote, to improve levels of knowledge of democratic and electoral processes and to increase enrolment.²¹

41. In many countries, indigenous peoples have opted to participate actively in the mainstream electoral process, including by running as candidates or forming separate indigenous political parties.²²

B. Participation in parliamentary processes

42. According to information received in interviews with indigenous parliamentarians, it is important to refer to international norms on indigenous peoples’ rights and to educate and train majority legislators and parliamentary staff about indigenous issues.²³

43. Mechanisms that guarantee the representation of indigenous peoples in State parliaments can provide an important opportunity for indigenous peoples to participate in and influence decision-making on a range of issues. For example, in New Zealand, the

¹⁹ Submission by the Asia Indigenous Peoples’ Pact to the Expert Mechanism, “Good practices of indigenous peoples’ participation in decision making” (March 2011).

²⁰ Submission by the Centre for Organisation Research and Education to the Expert Mechanism, “Human rights and indigenous peoples” (1 March 2011).

²¹ Submission by Oleh Protsyk to the technical workshop on good practices associated with indigenous peoples and the right to participate in decision-making of the Expert Mechanism on the Rights of Indigenous Peoples (9-10 March 2011).

²² Ibid.

²³ Elizabeth Powley, “Diversity in Parliament: listening to the voices of minorities and indigenous peoples”, Inter-Parliamentary Union and UNDP (2010). Available from www.ipu.org/splz-e/chiapas10/interview.pdf.

Maori have had guaranteed representation in Parliament since 1867. Anyone of Maori descent can choose to be on either the Maori electoral roll or the general electoral roll. Since 1996, the number of Maori seats in the House varies according to the proportion of Maori registered on the Maori electoral roll compared to the general electoral roll. Currently, there are seven Maori seats in the House. The House of Representatives also has a Maori Affairs Select Committee, to which the House may refer any issue with implications for the Maori.²⁴ Similarly, in Burundi, the Batwa have permanent seats in the National Assembly, in both houses, and there has been guaranteed Batwa representation on the National Land Commission.²⁵

44. In the Khanty-Mansiysky Autonomous Region of the Russian Federation, an Assembly of Indigenous Peoples is part of the structure of the regional Duma (parliament). The region has a legislated quota of indigenous representation.²⁶ Another positive solution at the provincial level is the additional guarantee of Nenetz direct representation in the relevant autonomous *okrug* (district)²⁷

45. Proportional representation electoral systems can assist in the election of indigenous individuals to State parliaments, as seen under, for example, the interim Constitution of Nepal.²⁸ However, measures may also be needed to ensure that the election of indigenous individuals translates into influence in decision-making.

46. The Greenland branch of the Inuit Circumpolar Conference, which represents the indigenous peoples of Greenland, cooperates closely with the public government of Greenland to establish better hearing and consultation mechanisms with regard to oil and gas exploration projects, mining projects and other mega-industries in Greenland. Moreover, while any Greenlander can vote for Parliament, not only Inuit, the majority of representatives on the Greenland Parliament are de facto Inuit.²⁹

47. In Denmark, two seats are reserved in Parliament for Greenlandic members of Parliament and, while any Greenlander parliamentary representative is eligible for the seats, to date, they have only been held by Inuit persons.³⁰

48. The ability of indigenous peoples to influence parliamentary decision-making is enhanced when parliaments create internal bodies to address matters of central concern to indigenous peoples, such as the Indigenous Affairs Commissions in the Mexican Congress, which can influence the drafting of laws.³¹

49. In South Africa, the Traditional Leadership and Governance Framework Act of 2003 provides that any parliamentary bill pertaining to the customary law or customs of traditional communities must, before it is passed by the House of Parliament where it is

²⁴ See contribution of New Zealand to the Expert Mechanism on the Rights of Indigenous Peoples, 2010 session, available from www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/contributions.htm.

²⁵ Constitution of Burundi, as referred to by the Indigenous Peoples of Africa Co-ordinating Committee; see www.ipacc.org.za/eng/default.asp. See also Minority Rights Group International, Burundi, available from www.minorityrights.org/?lid=4703&tmpl=printpage.

²⁶ A/HRC/15/37/Add.5. See also Kathrin Wessendorf, *An Indigenous Parliament? Realities and Perspectives in Russia and the Circumpolar North* (International Work Group of Indigenous Affairs, April 2005).

²⁷ Ibid.

²⁸ A/HRC/12/34/Add.3.

²⁹ Submission by Olsvig (see footnote 16).

³⁰ Ibid.

³¹ Submission by Protsyk (see footnote 22).

introduced, be referred by the Secretary of Parliament to the National House of Traditional Leaders for its comments.³²

50. In Colombia, the Constitution reserves parliamentary seats for indigenous peoples, chosen directly by indigenous communities, with two (out of 102) seats in the upper Senate elected by indigenous communities, and one (out of 166) in the lower Chamber of Representatives.³³

C. Direct participation in governance

51. Direct indigenous participation in the implementation of international instruments designed to protect and promote the rights indigenous peoples is to be commended. Nepal ratified ILO Convention No. 169 in 2007 and established a high-level Government task force to review existing Government programmes and policies and to prepare a comprehensive plan for the implementation of the Convention. The task force comprised representatives from 15 relevant ministries as well as indigenous representatives from the National Foundation for the Development of Indigenous Nationalities and the Nepal Federation for Indigenous Nationalities.³⁴

52. Argentina established the Indigenous Participation Council with a mandate to ensure the participation of indigenous peoples in the alignment of domestic legislation with ILO Convention No. 169.³⁵ The Council set up a bureau for the coordination of representatives at the regional level and a coordinating council, which oversees the National Register of Indigenous Communities and identifies problems and establishes priorities for solving them, as well as setting up the programme of activities of the National Institute for Indigenous Affairs for the long and medium term.³⁶

53. In Kenya, national consultations on the Constitution included specific meetings of indigenous peoples leading to the recognition of land rights for hunter-gatherers in the Constitution adopted in 2010.³⁷

54. In South Africa, the main focus of the National Khoi-San Consultative Council has been to “engage the Government on the issue of recognition of indigenous peoples’ traditional structures and authority.”³⁸

55. At the local Government level in New Zealand, there is the positive example of the Bay of Plenty Regional Council, which allows the Maori to register on a separate Maori roll

³² Ibid.

³³ Submission by Catherine Iorns to the technical workshop on good practices associated with indigenous peoples and the right to participate in decision-making of the Expert Mechanism on the Rights of Indigenous Peoples (9-10 March 2011).

³⁴ ILO, Guide to ILO Convention 169 (see footnote 5).

³⁵ Ibid.

³⁶ Ibid.

³⁷ Samburu Women for Education and Environment Development Organization, as reported in “Kenya’s New Constitution Benefits Indigenous Peoples”, Cultural Survival, 8 December 2010, available from www.culturalsurvival.org/news/kenya/kenyas-new-constitution-benefits-indigenous-peoples.

³⁸ ILO and the African Commission on Human and Peoples’ Rights, “South Africa: Constitutional, Legislative and Administrative Provisions concerning Indigenous Peoples”, 2009, available from www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_SouthAfrica.pdf.

with the number of councillors determined by the number of people who register on the roll.³⁹

56. The Democratic Republic of the Congo adopted the Law on the Promotion and Protection on the Rights of Indigenous Peoples in 2010. The Special Rapporteur notes that, by all accounts, the law was developed in a participatory manner, through consultations with indigenous peoples themselves, Congolese and international non-governmental organizations, United Nations agencies and relevant Congolese public institutions.⁴⁰ Under the law, consultation with indigenous peoples is generally mandated when there is “the consideration, formulation or implementation of any legislative, administrative or programmatic measure that may affect indigenous peoples” and is required in relation to measures that affect indigenous lands or resources or the establishment of protected areas that affect their way of life. Consultations must be conducted in good faith with a view to obtaining the free, prior and informed consent of the concerned indigenous peoples.⁴¹

57. Another example is the establishment of the Indigenous Peoples’ Council to engage directly with the National Reform Committee in the national reform process in Thailand. The formation of an independent local indigenous council in areas populated largely by Karen indigenous peoples acted as a mechanism for their participation in the establishment of a district office, later becoming a body representing the voice of indigenous peoples in the development of the district.⁴²

58. In Australia, the National Congress of Australia’s First Peoples is a recently-established company with the objective of providing a national voice for Aboriginal and Torres Strait Islanders.⁴³ It has the potential to play an important role as a vehicle for Aboriginal input into formal State governance structures in the interests of the recognition of the rights of Aboriginal and Torres Strait Islanders.

59. The Maya K’iches of Totonicapán participate in decision-making through a municipal council. The council is made up of 48 representatives, each from the 48 districts of Totonicapán, elected according to the Mayan tradition. The council deliberates on matters concerning the administration of Totonicapán in the areas of education and cultural, environmental and judicial issues.⁴⁴

60. In Guatemala, the Academy for Mayan Languages is an autonomous State entity that promotes the development of Mayan languages in the country. It includes a representative for each of the 22 linguistic groups and has played a key role in promoting the law on national languages and a unitary normative framework on the writing of Mayan languages.⁴⁵

61. The Guatemalan Association of Indigenous Mayors and Authorities is composed of municipal indigenous mayors elected according to indigenous practices and originating in

³⁹ See also A/HRC/18/35/Add.4.

⁴⁰ Special Rapporteur on the rights of indigenous peoples “Some examples of good practices” (see footnote 15).

⁴¹ Ibid.

⁴² Submission by Suraporn Suriyamontorn (Network of Indigenous Peoples in Thailand) to the Expert Mechanism on the Rights of Indigenous Peoples.

⁴³ National Congress of Australia’s First Peoples available http://natiotu.customers.ilisys.com.au/wp-content/uploads/2010/11/fact_sheet-what_is_the_congress.pdf.

⁴⁴ Submission by the Government of Guatemala to the Expert Mechanism (March 2011).

⁴⁵ Ibid.

the Agreement on Identity and the Rights of Indigenous Peoples. The Association draws attention to the interests of indigenous peoples in the local Government context.⁴⁶

62. The United States Voting Rights Act of 1965, designed to give American Indians a greater voice in national, State and local laws, has facilitated the participation of native Americans in decision-making, especially at the local level.⁴⁷

63. The Special Rapporteur on the rights of indigenous peoples considers that, in Peru, aspects of the draft law on consultation may be described as positive and mentions, in that regard, the support it has received from national indigenous organizations. In accordance with the Declaration on the Rights of Indigenous Peoples, it states that consent is an objective of consultations and, secondly, it provides a practice solution in those instances in which agreement is not achieved; that is, the final decision rests with the State, but the State must provide a justification for that decision and still respect the human rights of affected indigenous communities, and that decision is subject to judicial review.⁴⁸ However, the process leading to the adoption of the law appears to have stalled.

D. Participation in hybrid systems of governance

64. In New Zealand, some *iwi* (tribes) have entered into agreements with the Government to co-manage natural resources, such as lakes, illustrating that indigenous peoples can participate directly in decision-making in partnership arrangements with State agencies.⁴⁹ Similarly, in the United States, the federal Government has delegated responsibility for the management and hunting of bowhead whales in Alaska to the relevant Alaskan whaling communities through community membership in the Alaska Eskimo Whaling Commission, which operates to protect indigenous whale hunting and culture within the rules of the International Whaling Commission.⁵⁰ In Canada, at the centre of the Nunuvut Land Claims Agreement of 1993, are lands and resources co-management boards that guarantee Inuit meaningful involvement and participation in decisions relating to the preservation and future development of lands in the Nunuvut settlement area.⁵¹

65. In the Chittagong Hill Tracts area of Bangladesh, indigenous institutions and elected councils at the district and regional levels share administrative authority with the central Government through its district and subdistrict officers.

E. Free, prior and informed consent

66. Although a relatively new concept internationally, free, prior and informed consent is one of the most important principles that indigenous peoples believe can protect their right to participation. Effective implementation can be in the form of specific laws and policies. Examples, as mentioned above, include that of the Democratic Republic of the Congo, which has enacted legislation providing for consultation with a view to obtaining the free, prior and informed consent of indigenous peoples.

⁴⁶ Ibid.

⁴⁷ Special Rapporteur on the rights of indigenous peoples "Some examples of good practices" (footnote 15).

⁴⁸ Ibid..

⁴⁹ See for example the website of the Ministry for the Environment of the Government of New Zealand at www.mfe.govt.nz/publications/rma/nps-settlements-june09/html/page3.html.

⁵⁰ See submission by Iorns to the technical workshop on good practices (see footnote 35).

⁵¹ Ibid.

67. In 2005, Novatek, the second largest natural gas company in the Russian Federation working in the autonomous district of Yamal-Nenetz, designed a socio-economic programme for and with the Nenetz peoples affected by its activities, drawing on meetings with community members and leaders. In November 2008, an agreement was signed with the local Nenetz organization defining the terms of cooperation between the company and indigenous peoples. The company provided support for infrastructure and allowed indigenous peoples to maintain their traditional livelihoods and economy while benefiting from job opportunities in oil and gas developments.⁵²

68. In Bolivia (Plurinational State of), in 2010, the Ministry of Hydrocarbons and Energy coordinated a consultation process on a proposed hydrocarbon exploration project in the indigenous territory of Charagua Norte and Isoso, located in the Santa Cruz region. Ultimately, the process resulted in a signed agreement between the Government and the Guaraní Peoples Assembly of Charagua Norte and Isoso documenting community consent prior to the initiation of exploration activities by the company Pluspetrol of Argentina. The consultation process reached a positive outcome largely thanks to the willingness of the Ministry of Hydrocarbons and Energy to respect the use of traditional Guaraní institutions and systems. Importantly, the process began from the proposals of the indigenous communities themselves and guaranteed free, prior and informed consent for affected communities.⁵³

69. In Malaysia, notwithstanding issues relating to implementation, domestic laws such as the Sabah Forest Enactment and Sabah Parks Enactment have provisions to ensure indigenous peoples are consulted before forest reserves and protected areas are established. These provisions can form the basis on which indigenous peoples can require the Government to obtain their consent before any development project is implemented.⁵⁴

70. In Australia, under the Aboriginal Land Rights (Northern Territory) Act of 1976, Aboriginal land councils must, under section 23AA, “give priority to the protection of the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Council” and “promote effective consultation with the traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Council”. Under section 45, a mining interest may not be granted in respect of Aboriginal land unless an agreement has been reached between the Aboriginal land council and the intending miner.

71. Canadian courts have established a duty to accommodate and consult with First Nations in relation to activities that can affect them, including the development of forest areas.⁵⁵ Moreover, during consultation, indigenous peoples must be fully informed in order to ensure that they properly understand what is being proposed.

72. Canadian courts have also ruled that acts interfering with aboriginal and treaty rights must be justified and, to be justified, the Government must consult with the relevant indigenous peoples.

⁵² A/HRC/EMRIP/2009/5.

⁵³ See Oxfam, “Case study: Bolivian Government Consultation with the Guaraní Indigenous Peoples of Charagua Norte and Isoso: proposed hydrocarbons exploration project in San Isidro Block Santa Cruz, Bolivia”, 15 November 2010, available from www.oxfamamerica.org/publications/bolivian-government-consultation-with-guarani-indigenous-peoples.

⁵⁴ Submission by the Asia Indigenous Peoples’ Pact to the Expert Mechanism (see footnote 20).

⁵⁵ See *Haida Nation v British Columbia* (2004), SCC 73 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* (2004), SCC 74. See also the submission by the Government of Canada to the Expert Mechanism (July 2010).

F. Participation in regional and international forums and processes

73. The Guidelines on Indigenous Peoples' Issues of the United Nations Development Group are an important example of the mainstreaming and integration of indigenous peoples' issues in the United Nations system, including in operational activities and programmes at the country level. The Guidelines, designed with the input of the Permanent Forum on Indigenous Issues, sets out broad, normative policy and operational frameworks for implementing a human-rights based and culturally-sensitive approach to development for and with indigenous peoples. The Guidelines also contain a list of resources on good practices and lessons learned in programming on indigenous peoples' issues.⁵⁶

74. The annual Asia regional preparatory meetings to devise strategies and plans of action in relation to the various United Nations mechanisms and procedures as well as other relevant international bodies and agencies, organized by the Asia Indigenous Peoples Pact with the active participation of self-selected representatives of indigenous peoples, indigenous experts and representatives of United Nations agencies, has been cited as an example of best practice. The meetings are followed up by Asia Caucus meetings during the sessions of the Permanent Forum on Indigenous Issues and the Expert Mechanism to formulate common statements and recommendations and to plan activities for advocacy, networking and generating support.⁵⁷

75. Another example of a good practice of indigenous participation at the international level was the role played by the global indigenous peoples' caucus in the negotiation and adoption of the Declaration on the Rights of Indigenous Peoples.

76. The Advisory Council of the Andean Community (Bolivia (Plurinational State of), Colombia, Ecuador and Peru) is a consultative body that provides advice on political, cultural, social and economic aspects of subregional integration as it affects indigenous peoples. The body comprises one indigenous delegate from each State, chosen from among the highest ranks of indigenous national organizations according to procedures that are established at the national level.⁵⁸

77. In Bangladesh and India, efforts by the ILO regional office to include indigenous representatives in the consultation and implementation of its activities are examples of good practices. In Bangladesh, ILO supported an activity to bring together representatives of indigenous parliamentarians and peoples to draft recommendations and proposals relating to their constitutional recognition, which was subsequently submitted to the Constitutional Reform Committee.⁵⁹

78. Six indigenous peoples' organizations participate formally and permanently in the Arctic Council, made up of eight States, although they do not have the same powers as the States.⁶⁰

79. The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries has been consulting with indigenous peoples on its programme guidelines for seeking the free, prior and informed consent of indigenous peoples and other forest-dependent communities,⁶¹ although the Special Rapporteur notes ways in which the draft guidelines could be improved (for

⁵⁶ Available from www.undg.org/index.cfm?P=270.

⁵⁷ See submission by the Asia Indigenous Peoples Pact (see footnote 20).

⁵⁸ ILO, Guide to ILO Convention 169 (see footnote 5).

⁵⁹ Asia Indigenous Peoples Pact (see footnote 20).

⁶⁰ Submission by Olsvig (see footnote 16).

⁶¹ For example, in Arusha from 27 to 30 January 2011.

example, in his letter of 28 February 2011 to the Senior Policy Adviser of the United Nations Development Programme).

G. Other examples of good practices

80. Most national human rights institutions established in accordance with the Paris Principles have a mandate to advise Governments in formulating legislations and procedures. As such, as independent bodies, they can play an important role in bringing together representatives of Government and indigenous peoples, thus promoting the participation of indigenous peoples in discussions and decisions on issues that concern them. Such institutions can also stress the need for all stakeholders to ensure that indigenous representatives are involved in decision-making.

81. The Human Rights Commission of Malaysia has adopted cooperative and responsive approaches to developing solutions designed to improve the status and recognition of indigenous peoples' rights to land, through its national inquiry into the land rights of indigenous peoples. The methods of the inquiry will include calling for public submissions and holding consultations and public hearings where indigenous peoples would be among the key stakeholders. The research, which includes community mapping activities, would ensure the participation of indigenous peoples and organizations in obtaining data for Geographic Information System maps showing indigenous lands claims.⁶²

82. In Indonesia, Aliansi Masyarakat Nusantara, the national indigenous network, has signed a memorandum of understanding with the national human rights institution to deal with allegations of human rights abuse and to promote the Declaration on the Rights of Indigenous Peoples. Similar examples to promote the Declaration with indigenous peoples that enables indigenous peoples' participation in decision-making are now part of the activities of the Asia Pacific network of national human rights institutions.

83. Academia and United Nations agencies have promoted the principles of non-discrimination, participation, accountability and empowerment, which have permitted disadvantaged and vulnerable groups to secure more inclusion in governance. In particular, the publication by the Asia-Pacific Regional Centre of the United Nations Development Programme, *Towards Inclusive Governance: Promoting the Participation of Disadvantaged Groups in Asia-Pacific*, contains lessons learned in eight Asia Pacific countries. The case studies advocate the inclusion of excluded groups, including indigenous peoples, to ensure their effective representation and to create conditions conducive to greater respect, promotion and fulfilment of the human rights of all peoples.⁶³ This example constitutes a good practice by a United Nations agency to encourage and promote indigenous decision-making institutions and processes in various situations.

⁶² Submission by the Malaysian Human Rights Commission to the Expert Mechanism.

⁶³ United Nations Development Programme, *Towards Inclusive Governance* (2007), <http://www.snap-undp.org/elibrary/Publications/TowardsInclusiveGovernance.pdf> (accessed 17 April 2011).

Annex

Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making

1. Indigenous peoples have been among the most excluded, marginalized and disadvantaged sectors of society. This has had a negative impact on their ability to determine the direction of their own societies, including in decision-making on matters that affect their rights and interests. This can still be a major factor contributing to their disadvantaged position. Decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages, and their lands, territories and resources. In many cases, however, indigenous peoples practiced or continue to practice their own forms of governance.

2. The right of indigenous peoples right to participation is well established in international law. More recently, the indigenous rights discourse has seen increased focus on rights not only allowing indigenous peoples to participate in decision-making processes affecting them, but to actually control the outcome of such processes.

3. This spectrum of rights is well illustrated by the Declaration on the Rights of Indigenous Peoples, which contains more than 20 general provisions pertaining to indigenous peoples and decision-making. These rights range from the right to self-determination encompassing a right to autonomy or self-government to rights to participate and be actively involved in decision-making processes. Other provisions establish specific duties for States to ensure the participation of indigenous peoples in decision-making, inter alia, to obtain their free, prior and informed consent; to seek the free agreement of indigenous peoples; to consult and cooperate with indigenous peoples; and to take measures in conjunction with them.⁶⁴

4. As a normative expression of the existing international consensus regarding the individual and collective rights of indigenous peoples in a way which is coherent with already existing international human rights standards, the Declaration on the Rights of Indigenous Peoples provides a framework of action aiming at the full protection and implementation of the rights of indigenous peoples, including their right to participate in decision-making.

5. With regard to participatory rights, international human rights law refers to the right to participate in public affairs in both general and specific forms, including in various human rights treaties, such as article 25 of the International Covenant on Civil and Political Rights and Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO).⁶⁵ Participation in public affairs in its general form includes involvement in the conduct of public affairs. Electoral participation is only one specific expression of the right to participation. Moreover, the right to take part in public affairs is not limited to participation in formal political institutions, as it also includes participation in civil, cultural and social activities of a public nature. The right to participate in public affairs has conventionally been understood as a civil and political right of the individual. In

⁶⁴ Arts. 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, 41.

⁶⁵ Arts. 2, 5-7, 15-17, 20, 22, 23, 25, 27, 28, 33.

the context of indigenous peoples, however, the right also takes on a collective aspect, implying a right of the group as a people to have decision-making authority.

6. The right of indigenous peoples to participate in decision-making is also affirmed in international jurisprudence more generally, such as the decision of the Inter-American Court of Human Rights, in which the Court recognized their right to organize themselves in ways that are consistent with their customs and traditions under State electoral laws.⁶⁶ The African Commission on Human and Peoples' Rights has expressed concern about the exclusion of indigenous peoples from decision-making on the treatment of their lands.⁶⁷

7. Article 6 of ILO Convention No. 169 requires that consultations with indigenous peoples be carried out through institutions that are representative of indigenous peoples. Indigenous peoples should control the process by which representativeness is determined, in accordance with human rights standards as set out in, inter alia, the Declaration on the Rights of Indigenous Peoples.⁶⁸

8. The requirement that consultations be carried out through appropriate procedures implies that general public hearing processes are not normally regarded as sufficient to meet this procedural standard. Consultation procedures need to allow for the full expression of indigenous peoples' views, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and consensus may be achieved.

9. Moreover, consultations should be undertaken in good faith and in a form appropriate to the relevant context. This requires that consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus.

10. As indicated above, the duty to consult indigenous peoples is further reflected in a number of provisions of the Declaration on the Rights of Indigenous Peoples.⁶⁹ Like ILO Convention No. 169, Declaration articles 19 and 32(2) require States to consult indigenous peoples in good faith, through appropriate procedures, with the objective of obtaining their agreement or consent when measures that may affect indigenous peoples are considered.

11. Moreover, a number of United Nations human rights treaty bodies have established that States have a duty, within the framework of their treaty obligations, to effectively consult indigenous peoples on matters affecting their interests and rights and, in some cases, to seek to obtain the consent of indigenous peoples.⁷⁰

⁶⁶ Inter-American Court of Human Rights, *Yatama v. Nicaragua*, judgement of 23 June 2005.

⁶⁷ African Commission on Human and Peoples' Rights, *Endorois Welfare Council v. Kenya*, 4 February 2010.

⁶⁸ A/HRC/EMRIP/2010/2.

⁶⁹ Arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38.

⁷⁰ See A/HRC/EMRIP/2010/2. See also CCPR/C/79/Add.109 and Add.112, CCPR/CO/69/AUS and CCPR/CO/74/SWE; *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. II, annex X, section I, para. 9.6; CERD/C/CAN/CO/18, paras. 15 and 25; CERD/C/NZL/CO/17, para. 20; CERD/C/IDN/CO/3, para. 17; CERD/C/COD/CO/15, para. 18; CERD/C/ECU/CO/19, para. 16; CERD/C/USA/CO/6, para. 29; CERD/C/NAM/CO/12, para. 18; CERD/C/SWE/CO/18, para. 19; CCPR/C/NIC/CO/3, para. 21; CCPR/C/BWA/CO/1, para. 24; CCPR/C/CRI/CO/5, para. 5; CCPR/C/CHL/CO/5, para. 19; *Official Records of the General Assembly, Fifty-second Session, Supplement No. 18 (A/52/18)*, annex V; and E/C.12/GC/21.

12. The duty of States to consult with indigenous peoples and to obtain their consent are also expressed in the jurisprudence of, inter alia, the universal periodic review of the Human Rights Council,⁷¹ the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights,⁷² the African Commission on Human and Peoples' Rights,⁷³ the Special Rapporteur on the rights of indigenous peoples,⁷⁴ in international policy,⁷⁵ some of which is described in the Expert Mechanism's progress report on indigenous peoples and the right to participate in decision-making.⁷⁶ In the progress report, the Expert Mechanism noted that several treaties between States and indigenous peoples affirmed the principles of indigenous peoples' consent as an underpinning of the treaty relationship between States and indigenous peoples.⁷⁷

13. The meaningful and effective participation of indigenous peoples in decision-making is of fundamental importance to their enjoyment of a large number of human rights. For instance, the right of indigenous peoples to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services is crucial for their enjoyment of the right to education.⁷⁸ When implemented as a treaty right, the right to education offers a framework for reconciliation. Truth and reconciliation commissions offer a model for improved relations between States and indigenous peoples as well.⁷⁹

14. The participation of indigenous peoples in decision-making is of crucial importance to good governance. One of the objectives of international standards on indigenous peoples' rights is to fill the gap between their rights on the one hand and their implementation on the other hand.

15. Many indigenous peoples, however, remain vulnerable to top-down State interventions that take little or no account of their rights and circumstances. In many instances, this is the underlying cause for land dispossession, ethnic conflict, human rights violations, displacement and the loss of sustainable livelihoods.

16. The duty to consult indigenous peoples applies whenever a measure or decision specifically affecting indigenous peoples is being considered (for example, affecting their lands or livelihood). This duty also applies in situations where the State considers decisions or measures that potentially affect the wider society, but which affect indigenous peoples, and in particular in instances where decisions may have a disproportionately significant effect on indigenous peoples.⁸⁰

17. With regard to the right to self-determination, the Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples, in exercising their right to self-determination, have the right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making

⁷¹ See, for example, Human Rights Council decision 12/106.

⁷² For example, *Yatama v. Nicaragua* (see footnote 70) and *Saramaka People v. Suriname*, judgement of 28 November 2007.

⁷³ *Endorois Welfare Council v. Kenya* (see footnote 71).

⁷⁴ A/HRC/12/34.

⁷⁵ For example, see the Akwe: Kon Voluntary Guidelines for the implementation of article 8(j) of the Convention of Biodiversity, and the European Bank for Reconstruction and Development, Environmental and Social Policy (May 2008).

⁷⁶ A/HRC/EMRIP/2010/2.

⁷⁷ Ibid. In Canada, treaties 6, 7 and 8 contain provisions on indigenous peoples' consent.

⁷⁸ A/HRC/12/33.

⁷⁹ A/HRC/15/36, para. 11.

⁸⁰ See A/HRC/12/34, paras. 42-43.

processes that affect them. This is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live.

18. Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1(1) of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent derive from their right to self-determination.

19. As a result of articles 5 and 18 of the Declaration on the Rights of Indigenous Peoples, and within the ambit of the right to self-determination, indigenous peoples have the right to make independent decisions in all matters relating to their internal and local affairs, and to effectively influence external decision-making affecting them if they choose to participate in external decision-making.

20. International standards concerning the State's duties to consult indigenous peoples and to seek to obtain their free, prior and informed consent provide the foundation to ensure that indigenous peoples have the ultimate say over external decision-making in matters that affect them.

21. As mentioned above, the right to free, prior and informed consent is embedded in the right to self-determination. The procedural requirements for consultations and free, prior and informed consent respectively are similar. Nevertheless, the principle of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right.

22. The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights.

23. The Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance for their rights, survival, dignity and well-being. In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, *inter alia*, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned. Premised on the right to self-determination, article 10 of the Declaration prohibits the forcible removal of indigenous peoples from their lands and territories. In contrast, ILO Convention No. 169, article 16(2), includes procedural elements that permit forced relocation as an exceptional measure, without the consent of the indigenous peoples concerned. The Declaration moreover requires States to obtain the free, prior and informed consent of indigenous peoples in certain other situations, as reflected in articles 11(2), 19, 28(1), 29(2) and 32(2).

24. The duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The State's duty to obtain free, prior and

informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent.

25. The elements of free, prior and informed consent are interrelated; the elements of “free”, “prior” and “informed” qualify and set the conditions for indigenous peoples’ consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples.

26. The element of “free” implies no coercion, intimidation or manipulation; “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.⁸¹

Measures

27. Free, prior and informed consent implies that States have a duty to obtain indigenous peoples’ consent in relation to decisions that are of fundamental importance for their rights, survival, dignity and well-being. States should ensure that consultations and negotiations with indigenous peoples are carried out with their representatives, which should also comply with human rights standards as set out in the Declaration on the Rights of Indigenous Peoples.

28. States have a duty to respect the fact that indigenous peoples have the right to participate in all levels of decision-making, including in external decision-making, if the indigenous peoples concerned so choose and in the forms of their choosing, including, where appropriate, co-governance arrangements.

29. States should respect and assist both traditional and contemporary forms of indigenous peoples’ governance structures, including their collective decision-making practices.

30. States should enact and implement constitutional and other legal provisions that enhance indigenous peoples’ participation in decision-making consistent with the Declaration on the Rights of Indigenous Peoples, in particular where that is sought by affected indigenous peoples.

31. Indigenous women often face exceptional impediments to participation in decision-making. States, international organizations, indigenous peoples and other decision-making entities should therefore facilitate the participation of indigenous women in their activities and increase their access to address difficulties facing indigenous women seeking to participate in decision-making.

32. States and relevant international and domestic organizations should ensure that indigenous peoples have the financial and technical capacity to engage in consultation and consent-seeking exercises and to participate in regional and international decision-making processes.

33. 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

⁸¹ For an interpretation of free, prior and informed consent, see E/C.19/2005/3.

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.

34. States should respect the right of indigenous peoples to self-determination, to be exercised within existing State borders through autonomous or self-governing mechanisms. States should ensure that indigenous peoples have means for financing their autonomous functions, in accordance with article 4 of the Declaration on the Rights of Indigenous Peoples.

35. The United Nations should, in accordance with the Declaration on the Rights of Indigenous Peoples, establish a permanent mechanism/system for consultations with indigenous peoples' governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure that such bodies have a consultative status enabling them to participate effectively at all levels of the United Nations.

36. ILO should enable effective representation by indigenous peoples in its decision-making, and especially with regard to the implementation and supervision of ILO Conventions and policies relevant to indigenous peoples.

37. National human rights institutions, as independent bodies, should play an important role in bringing together representatives of Government and indigenous peoples, thus promoting indigenous peoples' participation in discussions and decisions on issues that concern them. National human rights institutions can also stress the need for all stakeholders to ensure indigenous representatives are involved in decision-making. Such institutions, through their own programmes, could also actively involve indigenous peoples in decision-making on related issues.
