

# PERMANENT FORUM ON INDIGENOUS ISSUES

The Forum's 9<sup>th</sup> session and evolution as a hybrid body in the UN's human rights system



Maori group from New Zealand.

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## STATE SUPPORT FOR THE DECLARATION ON INDIGENOUS RIGHTS GROWS

The 9<sup>th</sup> session of the Permanent Forum on Indigenous Issues<sup>1</sup> (the Forum) opened on 19 April in New York to a surprise announcement from the New Zealand Government that it had reversed its position on the UN *Declaration on the Rights of Indigenous Peoples* (the Declaration) and would support it.<sup>2</sup> The estimated 2,000 indigenous people, NGOs, States, and UN agencies in attendance welcomed the news with a rousing standing ovation. The next day, the United States announced it would begin consultations with indigenous peoples to review its position on the Declaration. This means that all four States that voted against the adoption of the Declaration in the General Assembly in 2007 now either support it, or are actively reviewing their position; several others are yet to express a view.<sup>3</sup>

## SPECIAL RAPPORTEUR ON INDIGENOUS PEOPLES: SUPPORT FOR THE DECLARATION SHOULD NOT BE QUALIFIED

In his response to the increasing State support for the Declaration, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (the Special Rapporteur), Mr James Anaya, welcomed the change of heart by Australia and New Zealand, but sent a pointed message to Canada and the US. He advised that any future statements of support should 'be informed by the spirit and objectives of the Declaration' as well as the practical challenges facing indigenous peoples. This in turn prompted the Forum to recommend that Canada and the US 'work in good faith with indigenous peoples for the unqualified endorsement and full implementation' of the Declaration.<sup>4</sup>

1 Created in 2000, the Permanent Forum on Indigenous Issues is an advisory body to the UN Economic and Social Council (ECOSOC) and is composed of 16 independent experts. Eight are nominated by governments and eight by indigenous peoples. It addresses indigenous issues in the areas of economic and social development, environment, health, human rights, culture, and education. In 2008, the Forum expanded its mandate to include responsibility to 'promote respect for and full application of the Declaration and to follow up the effectiveness of the Declaration'. According to its mandate, the Permanent Forum provides expert advice to ECOSOC and to UN programmes, funds, and agencies; raises awareness about indigenous issues; and promotes the integration and coordination of activities relating to indigenous issues within the UN system. More information is available from the Forum's website: <http://bit.ly/asBp7q>.

2 The New Zealand Government's statement included a number of reservations to its support of the Declaration. More information is available at <http://bit.ly/aE76sp>.

3 Australia, Canada, New Zealand, US voted against the Declaration. Eleven States abstained, but of these, Colombia and Samoa have since come out in support of the Declaration. Azerbaijan, Bangladesh, Bhutan, Burundi, Georgia, Kenya, Nigeria, Russian Federation, Ukraine have not revised their positions.

4 Para.92 of the report of the Forum's 9<sup>th</sup> session, available at <http://bit.ly/9YPyBe>.

Following a comment from the Indigenous Youth Caucus<sup>5</sup> that the Declaration was a ‘potentially empty instrument’, the Special Rapporteur remarked that this had ‘struck fear’ in his heart and should spur States to into action to address the ‘deep, systemic and widespread’ nature of the violations indigenous peoples still experience.

There is a well-established practice of the Special Rapporteur holding an interactive dialogue with the Forum each session. At this session, Mr Anaya developed an additional informal component to his participation. In advance of the session on the Forum’s website, he advised that he would be available for informal appointments with indigenous participants to hear about human rights violations. In response to the demand from participants, the Special Rapporteur agreed to offer this opportunity at the Forum’s next session. Although this informal approach is an ad hoc measure, it was welcomed by indigenous peoples. Many of them have been critical that the Forum’s mandate does not equip it to deal with individual or group complaints. They also complained that it has failed to develop a mechanism to ensure reports of serious violations are redirected to other UN mechanisms better equipped to respond to them.

## NEW METHODS OF WORK: THE FORUM EMBARKS ON COUNTRY VISITS

Just as the Declaration is establishing itself on a more solid footing, so too is the Permanent Forum. New and innovative methods of work are being used to give effect to the Forum’s mandate to ‘promote the full application of the Declaration’ (Article 42). A significant new approach evident this session was the Forum’s country visits to Bolivia and Paraguay to investigate forced labour and servitude in indigenous communities in the Chaco region.<sup>6</sup> The effectiveness of these visits was increased by the inclusion of the relevant UN country teams, as well as specialised UN organisations like the International Labour Organisation and the Office of the High Commissioner for Human Rights. This has added a new and potentially far-reaching dimension to the way the Forum will work with States and the UN system in the future.

Each visit resulted in a report from the Forum that included comprehensive, time-bound recommendations for both States, as well as recommendations regarding the technical assistance the UN should provide to them. Each State submitted a

response, which were included among the documentation for the 9<sup>th</sup> session.<sup>7</sup>

Although a number of other parts of the UN system undertake country visits, the Forum has distinguished itself by also incorporating a follow-up mechanism from the outset. This took the form of an in-depth dialogue during the Forum’s current session that involved Forum members, representatives of each State, members of the respective UN country teams, and indigenous peoples from the affected communities. Not only did this shine a much needed spotlight on the grave human rights violations these indigenous communities face.<sup>8</sup> It also demonstrated how the Forum can act as an intermediary to bring these groups together, in a spirit of cooperation, to develop a common plan of action to address the violations, and monitor its implementation.

The Forum’s in-depth dialogue with the States bore many of the hallmarks of a review of a state party by a UN treaty body. However there were some key differences, notably that indigenous community leaders were able to take an active part and directly challenge statements made by the States. Input from UN agencies was also publicly presented (rather than being delivered in a closed meeting); and the recommendations issued by the Forum were addressed to the States, indigenous communities and UN country teams (rather than just State parties).

The in-depth dialogue involving the indigenous leaders also revealed how useful the Forum’s intervention had already been in their communities, as well as its potential for indigenous peoples to hold their governments more accountable in the future. Indigenous leaders emphasised how the country visits had motivated their governments to search for solutions and begin working with their communities on long-standing grievances and abuses. However, they also presented their own perspectives on the State performance since each visit in 2009, pointing out where bottlenecks and inaction had set in, and making their own recommendations to the State representatives. A key recommendation was that each State should submit a report to the next session to update the Forum on the implementation of its recommendations.

The challenge for the Forum is to remain engaged with all parties in Bolivia and Paraguay to ensure progress continues, a goal that it has committed to.<sup>9</sup> This is not only a challenge in political terms, it is also a significant time and resource chal-

5 The caucus is an informal group of indigenous youth from around the world who are registered participants at the Forum. Although its membership differs each year, they usually meet daily to discuss issues, draft statements and make recommendations that are submitted to the Forum. Their voice carries considerable weight with Forum members and participants alike.

6 The Forum members who visited both Bolivia and Paraguay were: then Forum Chairperson, Ms Victoria Tauli-Corpuz, and members Mr Lars Anders-Baer, Mr Bartolomé Clavero and Mr Carlos Mamani. They were assisted by two officials of the UN Department of Economic and Social Affairs (DESA) and accompanied by a range of representatives from UN agencies working in Bolivia, Paraguay and Peru.

7 All documentation for Forum’s the 9<sup>th</sup> session is available at: <http://bit.ly/9YPyBe>

8 The reports of the country visits confirmed violations of international human rights law including forced labour and servitude; child labour; systematic violence against indigenous peoples; restrictions on freedom of association and movement; deprivation of territory, lands and resources; food insecurity; and lack of access to justice and healthcare. See E/C.19/2010/6 and E/C.19/2010/5 available at <http://bit.ly/9YPyBe>

9 Paras. 70 and 90 of the Forum’s report of the 9<sup>th</sup> session.

lenge for the Forum, which has an expanding work load and a very limited budget.

However, if tangible results are achieved, it may well prove to be an effective way of directly engaging more States in the work of the Forum, as well as tackling some of the worst human rights violations. The potential for the Forum to produce more targeted and concrete recommendations as a result of this approach has been welcomed by a range of UN agencies, many of whom had previously struggled to identify how they could give effect to the Forum's more general recommendations. Providing other parts of the UN human rights system (such as treaty bodies, special procedures, and the universal periodic review) are alerted to the Forum's recommendations, there is also scope to hold States accountable for their follow-up in a range of processes outside the Forum itself.

It remains to be seen how eager States will be to invite the Forum to undertake these investigative visits. They are comparable to the country visits undertaken by special procedures which are not renowned for their popular demand.<sup>10</sup> However, in an encouraging sign, the Forum has already undertaken a third visit following an invitation from Colombia, and this will be the topic of an in-depth dialogue at its next session.

It was also encouraging that over 20 States (the largest number to date) took part in the discussion on the special theme of the 9<sup>th</sup> session: 'Indigenous peoples: development with culture and identity - Articles 3 and 32 of the UN *Declaration on the Rights of Indigenous Peoples*'.<sup>11</sup> Nonetheless, in its informal dialogue with States, several States were critical of the limited opportunities in the programme for 'spontaneous dialogue' with indigenous participants.<sup>12</sup> This is a long-standing problem that has proven difficult to address given the session only lasts two weeks, the Forum's work load continues to grow, and several thousand indigenous people participate each year.

## IMPLEMENTING THE DECLARATION: THE ROLE OF TREATY BODIES

For the first time, the Forum directed a number of detailed and concrete recommendations to the UN treaty bodies.<sup>13</sup> These are intended to draw States' attention to their treaty

obligations in respect of human rights of indigenous peoples (as set out in the Declaration), and the fact they should be reporting on these matters under the treaties. This could prove an effective means of countering the misperception that the Declaration is 'aspirational,' rather than much of it being grounded in binding international human rights obligations.

For example, the Human Rights Committee (the Committee), which oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR), was asked by the Forum to 'require' States parties to report on how they are giving effect to indigenous peoples' right to self-determination under Article 1 of the ICCPR and Article 3 of the Declaration. The Forum also asked that States 'consult and cooperate' with indigenous peoples when drafting their reports.<sup>14</sup> Further, the Committee was encouraged to update a range of its general comments that pre-date the adoption of the Declaration, such as General Comment no. 12 on the right to self-determination. The Forum also made itself available to 'work closely' with the treaty bodies to assist them with operationalising the Declaration,<sup>15</sup> and issued a standing invitation to several of them to participate in future sessions.

Given the role of treaty bodies in developing jurisprudence and interpretation of international human rights law, this direct cooperation between the two entities could be mutually beneficial. It would allow for sharing of perspectives, experiences, and best practices. Together with the Forum's more established practice of encouraging UN agencies, and more recently UN country teams, to use the Declaration to inform their work with indigenous peoples, this cooperation with the treaty bodies could add an important new dimension to the goal of improving indigenous peoples' daily lives.

## INDIGENOUS PEOPLES' RIGHTS IN AFRICA: A MORE CONCRETED RESPONSE NEEDED

Concern about the alarming level and serious violations African indigenous peoples experience was prominent throughout the session. It was a point emphasised by: the Special Rapporteur and the Chairperson of the Expert Mechanism on the Rights of Indigenous Peoples;<sup>16</sup> the Congolese member of the Forum;<sup>17</sup> and the African Caucus.<sup>18</sup> All speakers emphasised that tradi-

10 For an overview of visits undertaken and requested, see <http://bit.ly/98NL9N>.

11 The theme was particularly relevant to the upcoming High-level summit at the General Assembly on the Millennium Development Goals. Recommendations related to the MDGs are in paras. 14, 15, 39, 46, 49, 62, 123, 124, 162 of the Forum's report of the 9<sup>th</sup> session. The special theme also prompted the Forum to recommend to the UN Development Programme (UNDP) that all of its Human Development Reports 'should reflect indigenous peoples' views of development' and be written 'with the participation of indigenous peoples themselves' (para. 36 of the Forum's report of the 9<sup>th</sup> session).

12 Switzerland was frustrated that the dialogue segments require all speakers (States, indigenous peoples, UN agencies) to join the speakers' list, and all interventions are prepared statements. Australia, Brazil, Thailand shared this frustration.

13 The Forum has made recommendations to treaty bodies previously, but they have been quite general in scope.

14 Paras. 42, 49 and 50 of the Forum's report of the 9<sup>th</sup> session.

15 The treaty bodies dealing with: civil and political rights; economic, social and cultural rights; children's rights, and racial discrimination. Para. 49 of the Forum's report of the 9<sup>th</sup> session.

16 Both experts drew attention to their cooperation with the African Commission on Human and Peoples Rights and its Working Group on indigenous populations/communities in Africa.

17 Ms Liliame advised that although awareness of the adoption Declaration was growing in Africa, States were taking their time to incorporate it into domestic law and policy, even though atrocities still occurred and most indigenous peoples suffered extreme poverty and marginalisation. She spoke of Africa being 'taken over' by corporations that neither respected indigenous land and resource rights, nor their right to free prior informed consent for development on their land.

18 The caucus is an informal group of African indigenous peoples who are registered participants at the Forum. During the session they

tional practices and land rights of Africa's indigenous peoples, if they were recognised at all, frequently come into conflict with the objectives and policies of States, corporations, and the surrounding dominant societies, threatening the very survival of indigenous cultures and communities. Namibia<sup>19</sup> encouraged the Forum to engage in greater depth with the African Commission on Human and Peoples' Rights and to develop more direct and regular contact with the States of the region. Further, Namibia recommended the Forum work with indigenous organisations in the region to build their capacity, as 'States alone cannot do it all'.

Although a handful of recommendations in the outcome document of the session noted the concern about the situation in Africa and encouraged UN agencies to direct resources and capacity-building programmes to the region,<sup>20</sup> this is not sufficient to address the level of need.

## FUTURE WORK: CRITICAL ISSUES ON THE HORIZON

Forum members are increasingly undertaking research projects on a range of complex problems that confront indigenous communities. This session there were ten such reports on issues ranging from the 'doctrine of discovery',<sup>21</sup> to indigenous peoples and corporations, and the impact of the global economic crisis on indigenous communities. The consideration of these reports took up much of the second week of the session. Given the breadth of the problems they address, each of these issues will be the subject a further report at the next session. In addition, six new studies have been commissioned for the 10<sup>th</sup> session.<sup>22</sup> The Forum also agreed to hold a three-day expert meeting in January 2011 on 'indigenous peoples and forests'.<sup>23</sup>

meet to discuss issues, prepare statements and make recommendations to the Forum.

19 Namibia included an indigenous chief in its official delegation to the Forum, and submitted a report to the both the eighth and 9<sup>th</sup> sessions.

20 Paras. 49, 73, 110 and 132 of the Forum's report of the 9<sup>th</sup> session.

21 This doctrine, also known as the 'Doctrine of Christian Discovery' has its roots in a 'papal bull', a legal decree issued by the Pope in 1455. The Holy See firmly rejected this suggestion when the report was presented at the 9<sup>th</sup> session. The doctrine allowed the Christian states and monarchies of Europe that 'discovered' land, territory, and resources to assume sovereignty over them, providing the inhabitants were 'heathens' or 'pagans'. The doctrine resulted in the dominance of indigenous peoples in Africa, Asia, and North and South America, as well as centuries of virtually unlimited resource extraction from their traditional territories. This in turn resulted in their dispossession, impoverishment, and the myriad of problems they face today. See E/C.19/2010/13 available at <http://bit.ly/ccR6oa>.

22 Paras. 18, 139-144 of the Forum's report of the 9<sup>th</sup> session. The studies will cover: indigenous peoples' model of development; impact of land management practices and climate change on reindeer herding; forced labour; forests; international criminal law and the judicial defence of indigenous peoples' rights; and the Chittagong Hill Tracts Accord.

23 Paras. 153-161 of the Forum's report of the 9<sup>th</sup> session. This theme was the focus of a half-day discussion during the 9<sup>th</sup> session of the Forum. The expert meeting will bring together the Forum's work on a range of related issues, including extractive industries on indigenous lands, climate change mitigation and adaptation strategies, carbon offset schemes in forests, biodiversity conservation and in-

The 10<sup>th</sup> session of the Forum will be held in New York from 16 to 27 May 2011. It will review recommendations from previous sessions related to the themes: economic and social development; environment; and free, prior and informed consent.<sup>24</sup> The half-day discussion will be on indigenous peoples' right to water. The Forum will also focus on the situation of indigenous peoples in Latin America and the Caribbean. Looking further ahead, the special theme for the 11<sup>th</sup> session in 2012 will be 'The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the Declaration)'. ■

digenous traditional knowledge.

24 At the 6<sup>th</sup> session of the Forum (2007), it decided that each even numbered year would hold a thematic dialogue, and each odd year would review a number of recommendations from previous sessions.