

NEW YORK MONITOR

International Service for Human Rights



Human Rights Monitor Series

NEW YORK MONITOR PERMANENT FORUM ON INDIGENOUS ISSUES 8TH SESSION 18-29 MAY 2009

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Overview

The United Nations (UN) Permanent Forum on Indigenous Issues (the Forum) held its eighth session from 18 to 29 May, 2009 at UN headquarters in New York with input from member States,¹ over 2,000 indigenous representatives and some 35 UN bodies and other intergovernmental organisations.

For the first time since its establishment, the Forum undertook a review this year to assess progress in the advancement of indigenous peoples' rights, focusing on developments and implementation of previous Forum recommendations in economic and social development, indigenous women, and the Second International Decade of the World's Indigenous Peoples. With its new mandate of promoting respect for and full application of the UN Declaration on the Rights of Indigenous People (the Declaration), the Forum is highlighted in Article 42² of the Declaration as one of the UN bodies that shall promote respect for and full application of the provisions of the

¹ Among the member States continuously present were Colombia, Denmark, Greece, the Holy See, Mexico, Myanmar, Namibia, Pakistan, the Russian Federation, Suriname, and Viet Nam, among others.

² Article 42 of the Declaration on the Rights of Indigenous Peoples states, "The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration." The full text of the DRIP is available at www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf

Declaration and follow up on its effectiveness), review of the implementation of this historic document also made up a central part of discussions during the eighth session. Another new initiative this year was the introduction of in-depth dialogues with multiple UN agencies.

Generally, statements made at the Forum called attention to some familiar themes regarding the need for increased participation of indigenous peoples in all decision-making processes which affect them; respect for their right to free, prior and informed consent; respect for traditional knowledge and languages and capacity building. This emphasis was especially prominent in the context of issues regarding extractive industries, such as oil and mining,³ and adaptation to climate change; areas which have been top concerns for indigenous peoples for years and issues which are addressed specifically in the Declaration. The Forum also allocated a special segment to the Arctic, continuing its tradition of highlighting a specific region of the world at each session.

In its final report,⁴ the Forum adopted new recommendations on these and other issues, and charged particular Forum members to undertake initial research in under-studied areas.

Human rights developments and outcomes

As in previous years, human rights were a predominant theme during the Forum. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr S. James Anaya, presented a report, as did a representative of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Mr John Ruggie. The Office of the High Commissioner for Human Rights (OHCHR) was one of the six UN agencies that took part in the in-depth dialogue with the Forum.

Discussion of the report of the expert group meeting on the incorporation of article 42 into the Forum's work

In an effort to carry out its new function relating to article 42 effectively, the Forum decided in 2007 to create a standing agenda item on the Declaration during the human rights discussion. In January 2009 an international expert group meeting was held to discuss the incorporation of Article 42 into the Forum's work, and the Forum examined and discussed the report during the eighth session. Mr Les Malezer, Rapporteur of the expert group meeting, presented the report⁵ and the meeting's final recommendations. These included: that the Forum invite States, indigenous peoples and UN agencies to submit written reports to it providing substantive information on the implementation of the Declaration at the national and local levels; and that the Forum encourage States to incorporate adequate information on the implementation of the Declaration in the 'core report' to the human rights treaty bodies.⁶ Both of these recommendations were integrated into the Forum's final report (see section below in this report on Human Rights Recommendations).⁷

³ See 'Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility (E/C.19/2009/CRP. 8), which was presented to the Forum and discussed during the session.

⁴The final report consists of the following documents: **E/C.19/2009/L.2/Rev.1** Follow-up to recommendations of the Permanent Forum on economic and social development, indigenous women and the Second International Decade of the World's Indigenous People; **E/C.19/2009/L.3** Follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs; **E/C.19/2009/L.4** Provisional Agenda for ninth session; **E/C.19/2009/L.5** Recommendations on the Arctic; **E/C.19/2009/L.7** Future work of the Forum; **E/C.19/2009/L.8** Draft Decision I; **E/C.19/2009/L.9** Draft Decision II. **E/C.19/2009/L.9** Draft report. These documents are available in all languages at <http://ods.un.org/>

⁵E/C.19/2009/2 'Report of the international expert group meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of article 42 of the United Nations Declaration on the Rights of Indigenous Peoples'. The report is available at www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_2_en.pdf

⁶ Participants at the EGM also discussed the importance of member States addressing article 42, and the DRIP in general, when submitting reports to other human rights bodies, especially the Human Rights Council under the universal periodic review.

⁷ Other EGM recommendations, including the controversial recommendation to appoint a eight-member task team to examine the reports and communicate with the submitting parties, were not included in the Forum's final report.

At the expert group meeting meeting, participants also discussed the need for the Forum to develop general comments, or interpretive statements, on key articles of the Declaration, and recommended that it adopt a general comment on article 42 during the eighth session. Consequently, Forum member Mr Carsten Smith⁸ introduced a general comment⁹ on the issue under the human rights agenda item, which the Forum ultimately adopted.¹⁰ The comment emphasises that the Permanent Forum's task is to help 'transform the Declaration in its entirety into living law and that "Article 42 introduces a new function and responsibility [for the Forum].' The comment also notes that 'accepted guidelines for interpretation [of article 42 would] in this case be: the working of the Forum so far, the purpose of article 42, and the normal way of protecting human rights within the UN system.'¹¹

Report of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises¹²

Ms Rachel Davis, presenting on behalf of the Special Representative, introduced his 'protect, respect and remedy' framework.¹³ The framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. Ms Davis noted that the Special Representative 'welcomes input from indigenous peoples' when it comes to operationalising the framework, but exactly how this input was to be delivered to the Special Representative was not entirely clear. Additionally, interaction regarding the Special Representative's report was limited to statements mainly made by a few State representatives, who did not address directly the Special Representative's report or direct questions to Ms Davis.

Despite the lack of substantive dialogue, the Forum devoted a few paragraphs to the work of the Special Representative in one of its final reports containing recommendations.¹⁴ In this report the Forum stresses its support for the work of the Special Representative and his 'protect, respect and remedy' framework, and urges the Special Representative to take indigenous peoples' perspectives into account when carrying out his work. The Forum adopted three recommendations that were nearly identical to the recommendations communicated to the Forum by the Special Representative, as presented by Ms Davis. These included the recommendation that transnational corporations and other business enterprises adopt minimum standards consistent with the Declaration; that States and businesses ensure that projects affecting indigenous peoples comply with the Declaration, and that corporations create grievance mechanisms and that States enforce corporate compliance with relevant laws and standards.

Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people¹⁵

In an oral presentation,¹⁶ the Special Rapporteur discussed the activities that he had undertaken over the course of his first year and described how these activities fell into four main areas: the promotion of best practices, thematic

⁸ Mr Smith is the government-nominated Forum member from Norway.

⁹ The general comment is divided into three areas: Article 42 as basis for a new function [of the Forum]; the legal character of the Declaration, and the effect of Article 42 on the Forum's mandate.

¹⁰ 'Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples,' The draft comment is available in the Annex of E/C.19/2009/L.3, 'Follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs'.

¹¹ Annex of E/C.19/2009/L.3

¹² The Special Representative's website is available at http://www2.ohchr.org/english/issues/trans_corporations/index.htm

¹³ The UN press release on the presentation and interactive dialogue is available at <http://www.un.org/News/Press/docs/2009/hr4980.doc.htm>

¹⁴ E/C.19/2009/L.2/Rev.1 'Follow-up to the recommendations of the Permanent Forum on economic and social development, indigenous women and the Second International Decade of the World's Indigenous People.'

¹⁵ The Special Rapporteur's website is available at www2.ohchr.org/english/issues/indigenous/rapporteur/

¹⁶ The Special Rapporteur's statement is available at www.un.org/esa/socdev/unpfii/documents/8Session_SR_Statement_UNPFII.doc.

studies, reports on country visits, and responding to allegations of human rights violations regarding indigenous peoples.¹⁷ Mr Anaya, who has held the position of Special Rapporteur since March 2008, discussed how his role differed to that of the Forum and the Expert Mechanism on the Rights of Indigenous Peoples,¹⁸ while pointing out that all three had a ‘common purpose’ of advancing the rights of indigenous peoples everywhere.

The Special Rapporteur communicated that the thematic studies portion of his work would be secondary to the other areas since the Human Rights Council, via *Resolution 6/36* of 2007, had given the mandate of carrying out such studies to the Expert Mechanism. He stressed that responding to human rights violations would be a ‘principal’ area of activity, and that he relied heavily on the reports of indigenous peoples’ organisations, NGOs, and other sources to provide him with accurate information so that he could initiate investigations into alleged violations. He noted that the majority of the human rights violations that he had encountered over the past year dealt with free, prior and informed consent, land rights, and specific threats of violence.

The Special Rapporteur shed light on the process by which he carries out an investigation into an alleged human rights violation, emphasising the role of indigenous peoples in communicating with him in this regard, and encouraging Forum participants to ‘send [him] information about the concerns they are facing in their respective communities.’ He noted that the ‘exhaustion of domestic remedies is not required, nor a legal argument about the case.’¹⁹

Only a few individuals targeted questions to the Special Rapporteur during the interactive dialogue that followed his presentation, including Forum member Paimanach Hasteh,²⁰ who wanted to know the main challenges that the Special Rapporteur faced; to which he responded ‘time and resources’ and the need for more cooperation from member States. Most speakers gave examples of human rights violations or suggested general recommendations for the Forum to take up, but they did not necessarily relate to the work of the Special Rapporteur directly.

In-depth dialogue with UN agencies, including OHCHR

The need to improve mainstreaming of indigenous issues and the Declaration into the mandate of key UN agencies spurred yet another new element to the Forum this year. The new voluntary in-depth dialogue with six key UN agencies included presentations from the OHCHR, the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), and the Department of Economic and Social Affairs (DESA) of the UN Secretariat.

It was the first time many of the Forum’s participants were presented with the opportunity to directly address these agencies, which often play crucial roles in decision making and strategic planning for the development of the world’s indigenous peoples.

Each agency presented their work and general activities and discussed how these activities may affect indigenous peoples. Some agency representatives admitted that their prior projects and programmes had been ‘on top of or over’ indigenous peoples instead of ‘with’ them, though many showed a willingness to engage in partnership with indigenous peoples in future work, asking for suggestions on how to move programmes forward in favour of indigenous peoples. Nearly all the agencies expressed the need to begin or to continue to train their field officers or headquarters’ staff on the Declaration. However most also acknowledged that budgetary restraints were significant and that this consequently restricted their ability to carry out desired projects or programmes concerning indigenous peoples.

¹⁷ The UN press release of the presentation and interactive dialogue is available at <http://www.un.org/News/Press/docs/2009/hr4984.doc.htm>

¹⁸ Further information on the Expert Mechanism is available at <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm>

¹⁹ This is according to the document entitled ‘Submitting Information to the Special Rapporteur’ that was passed out at the eighth session by the Special Rapporteur.

²⁰ Ms Hasteh is the government-nominated Forum member from Iran.

In the interactive dialogues that followed the presentations, indigenous peoples' organisations raised a number of issues, including the need to: raise awareness of and sensitivity to indigenous issues among UN agency workers, make agencies more accessible and enable increased indigenous participation in UN strategic planning. During the dialogues, it was noted that some Forum members had submitted questions to the UN agencies in advance of the eighth session. Although some of these questions were reiterated publicly at the meeting, several participants encouraged the Forum in the future to share all these questions/answers before the session begins to prevent repetition of questions and allow for improved dialogue. Despite the fact that many of the UN agencies did not discuss directly how they were addressing article 42 of the Declaration, the in-depth dialogue process was informative for many participants as it helped them better understand the intricacies and organisation of the participating UN agencies so that indigenous peoples might better utilise them in the future. However there was not always enough time for participants to interact with the agencies, and it is not yet clear whether the rotational system of different agencies coming to the Forum each year would make it difficult to hold them accountable from one year to the next.

Some UN agencies were represented by a large contingency of staff and presenters – DESA had at least seven representatives who spoke on DESA's behalf – while other agencies, such as OHCHR, only had one representative present at the Forum.²¹ The size of the delegation did not necessarily influence the quality of the dialogue, however. The in-depth dialogue with the representative of OHCHR, Mr Antti Korkearvi of the Minority and Indigenous Peoples Unit, was comprehensive and interactive in comparison to some of the other larger delegations' presentations.

Mr Korkearvi presented OHCHR's preparatory report 'Information received from the United Nations system and other intergovernmental organisations: Office of the High Commissioner for Human Rights',²² which provides information on how the OHCHR is incorporating the Declaration into its varied projects and programs – from creating pocket-sized versions of the Declaration in various languages to capacity-building and aware-raising workshops in the field. In his presentation of the report, Mr Korkearvi said that OHCHR has a 'long and distinguished record' when it comes to indigenous peoples' concerns and rights. He noted that OHCHR held a side event about the Declaration at the Durban Review Conference this year, and that OHCHR considered all recommendations from the Forum 'very seriously,' especially those that referred to indigenous peoples in voluntary isolation and those that dealt with indigenous peoples affected by extractive industries.

Mr Korkearvi responded to each of the concerns presented from the floor from Forum members and indigenous peoples' organisations, addressing questions as varied as OHCHR website accessibility, the appropriate response of the Forum to State violations of human rights, the creation of a separate indigenous peoples' unit within OHCHR, and indigenous employment within OHCHR, among others. On the handling of complaints of human rights violations in the Forum and the human rights system in general, Forum member Mr Smith pointed out that the Forum was an important body for hearing indigenous peoples' statements on the abuses they suffer, but not an adequate body for managing responses to such human rights violations. Since the Forum is only an advisory body 'without any formal mandate to act upon violations,' Mr Smith wanted to know the specific procedure whereby the Forum could submit complaints presented during the annual session to the relevant UN body. Mr Korkearvi responded that OHCHR can facilitate submission of complaints to the appropriate treaty bodies, and highlighted the role of the Special Rapporteur, who attends all Forum sessions.

Several important aspects of the OHCHR's preparatory report to the Forum were not addressed in the interactive dialogue. This included OHCHR concern about the absence of Forum members' contributions on reports and studies that OHCHR undertakes, including the general comment on indigenous children by the Committee on the Rights of the Child and the High Commissioner's report on climate change and human rights for the tenth session of the Human Rights Council. OHCHR's request for input from the Forum on how it could improve its annual report since 'the reports generate very few questions from members and almost no dialogue with observers, including States and indigenous peoples' also did not generate any response during the interactive dialogue.

²¹ Mr Antti Korkearvi, of the Minority and Indigenous Peoples Unit of OHCHR, was also accompanied by an assistant from OHCHR, but she did not present.

²² E/C.19/2009/3/Add.2 is available at www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_3_Add_2_en.pdf

Human rights recommendations

The Forum's final report containing its recommendations and decisions are contained in several documents.²³ The main human rights related recommendations are contained in the 'human rights' report²⁴ and included that:

- the Secretary-General allocate sufficient funds and human resources to the Forum so that it might meet the requirements of implementing article 42;
- relevant treaty bodies take into account the Declaration, and that States incorporate information concerning implementation of the Declaration in their universal periodic review (UPR) reports;
- States establish national dialogues with indigenous peoples' concerning human rights based on the Declaration in those States where such dialogues do not currently exist;
- UN agencies, funds and programmes, as well as the African Commission on Human and Peoples' Rights, integrate relevant provisions of the Declaration into their policies, programmes, projects and strategies.

Other key recommendations addressing human rights were also contained in the Forum's final report on 'Follow-up to the recommendations of the Permanent Forum on economic and social development, indigenous women and the Second International Decade of the World's Indigenous People'.²⁵ Noting that the Declaration is 'a human rights instrument irrespective of the position of individual States'²⁶ and that the Forum expects it to be used 'as an effective guide for domestic public policy, law and practices regarding indigenous peoples' rights', recommendations in this report, inter alia, included:

- that transnational corporations and other business enterprises adopt minimum standards consistent with the Declaration as a requirement of due diligence;
- the coordination of a workshop on indigenous peoples' health, especially in the area of sexual and reproductive health;
- that the Inter-agency Support Group on Indigenous Peoples' Issues convene an international expert seminar on indicators of the well-being of indigenous peoples to discuss indicators that could be used in monitoring the situation of indigenous peoples and the implementation of the Declaration;
- that the operational frameworks of all agencies and member States of the UN, incorporate the rights affirmed in the Declaration, in particular as they relate to the right to free, prior and informed consent by indigenous peoples.

The Forum also followed up its half-day discussion on the Arctic with several recommendations that attempted to address human rights challenges, particularly in relation to how climate change (and the government policies that are developed to address it) are affecting traditional subsistence activities such as reindeer herding, and making access to safe drinking water and maintenance of food sovereignty difficult, including that:

- Nordic countries ratify the Nordic Sámi Convention;²⁷
- Finland and Sweden recognise Sámi rights to land, fishing, reindeer grazing and hunting;
- States obtain the free, prior and informed consent and participation of indigenous peoples when dealing with trade activities that may affect them;
- States seek the participation of indigenous peoples in the formulation of domestic policies concerning

²³See footnote 3 in this report.

²⁴E/C.19/2009/L.3 'Follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs'

²⁵E/C.19/2009/L.2/Rev.1

²⁶The DRIP gained momentum this year when Australia officially endorsed it after previously having voted against it. Three countries remain formally opposed to the DRIP, including the United States, Canada, and New Zealand. New Zealand has given some indication that it might follow the example of Australia. Colombia, which had abstained from voting on the document in 2007, had also sent a letter stating its support of the Declaration.

²⁷This convention recognizes the Sami as one indigenous people residing across national borders in all three Nordic countries. A set of minimum standards is proposed for the rights of developing the Sami language, culture, livelihoods and society. The convention has not yet been ratified in the Nordic countries.

climate change.²⁸

Future work

The Forum also discussed and made arrangements for next year's session, which will take place from 19 to 30 April 2010. Prominent agenda items for the ninth session include human rights, which will again focus on implementing the Declaration and a dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. A half-day discussion on North America, and in-depth dialogues with six other UN agencies and/or funds will also take place.²⁹

Several studies by Forum members will also be undertaken during the year, including in the following areas:

- consideration and recognition of the rights of Mother Earth to be conducted by Mr Carlos Mamami Condori and Mr Bartolomé Clavero³⁰
- impacts of the global economic crisis upon indigenous peoples by Ms Victoria Tauli-Corpuz³¹
- impact of climate change adaptation and mitigation measures on reindeer herding by Mr Lars Anders-Baer³²
- indigenous fishing rights in the seas by Mr Carsten Smith and Mr Mick Dodson.

Given that the theme of next year's session will be 'Indigenous peoples: development with culture and identity' the focus of which will be self-determination as expressed in articles 3 and 32 of the Declaration, the Forum decided³³ that a three-day international expert group meeting on the issue will take place prior to the session.³⁴

Conclusion

This year, the Forum began the important task of reviewing the implementation of its previously made recommendations – an important activity if indigenous peoples human rights, as expressed in the Declaration, are to become more than 'merely ink on paper.'³⁵ Another significant benefit of holding the review session, and of alternating thematic and review sessions, was the reduction in the number of recommendations produced from previous years – an important step in the process of streamlining the Forum's, as well as the work of the Forum's Secretariat.

Moving forward, the Forum continues to face challenges in the management of its agenda and in developing a workable format and working methods for discussions. These challenges range from choices about balancing speaking opportunities between State and non-State representatives,³⁶ allotting time to specific agenda items over others; ensuring space for the public discussion of best practices for implementing standards as well as the spotlighting of human rights violations, and making necessary recommendations while ensuring that it makes the time to effectively review those recommendations.

²⁸ E/C.19/2009/L.5, 'Recommendations of the Permanent Forum on the Arctic'.

²⁹ The provisional agenda is contained in document E/C.19/2009/L.4.

³⁰ E/C.19/2009/L.7. Mr Mamami and Mr Clavero are government-nominated representatives from Bolivia and Spain, respectively.

³¹ E/C.19/2009/L.2/Rev.1.

³² E/C.19/2009/L.5.

³³ This draft decision still needs to be adopted by ECOSOC. See **E/C.19/2009/L.8** Draft Decision I

³⁴ E/C.19/2009/L.10 and L.5.

³⁵ Mr Balkassm noted during the concluding meeting that 'much remains ink on paper' when it comes to the implementation of indigenous peoples' rights.

³⁶ For example, under the human rights agenda item, more than 200 indigenous peoples and indigenous peoples' organizations (IPOs) requested to make statements and recommendations, but the Forum was unable to accommodate them all. Consequently, the Forum decided it would allocate more time to human rights agenda item at its next session.

Background

The UN Permanent Forum on Indigenous Issues (the Forum) was established as a subsidiary organ of the UN Economic and Social Council (ECOSOC) on 28 July 2000. In practical terms, this places the Forum at the highest level of the United Nations possible without amendment to the UN Charter, making it one of the most significant achievements of the first International Decade for the World's Indigenous people (1994–2004). Its establishment is a testament to the indigenous peoples who lobbied States over many years for the recognition of their human rights and the need for a place within the United Nations system they could call their own.

The Forum is made up of 16 members, each appointed for a three year term. Eight members are nominated by governments and elected by ECOSOC, and eight are appointed by the President of ECOSOC following consultations with indigenous peoples' organisations. This makes the Forum unique within the UN system because it is the only body of the ECOSOC whose members are not solely determined by States.

The functions of the Forum are to:

- provide expert advice and recommendations on Indigenous issues to ECOSOC, as well as to programmes, funds and agencies of the United Nations, through ECOSOC;
- raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system; and
- prepare and disseminate information on indigenous issues.

The Forum meets in New York once every year for two weeks, usually in May. Indigenous peoples' organisations are welcome to attend and participate in the meetings of the Forum, along with States, UN agencies and subsidiary bodies, inter-governmental organisations and non-governmental organisations in consultative status with ECOSOC. Although they are classed as observers and have no voting rights, all participants have speaking rights during the Forum's meetings. This offers indigenous peoples unprecedented scope to contribute to the programming and policy directions of the agencies of the United Nations, and to hold UN agencies and States accountable for their performance on indigenous issues. This may mean that with time, the Forum helps to mainstream indigenous peoples' rights throughout the work of the UN system.

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