

COUNCIL MONITOR

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Human Rights Monitor Series

COUNCIL UPDATE – ITEM 5, EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES AND GENERAL DEBATE HUMAN RIGHTS COUNCIL, 12TH SESSION 28 SEPTEMBER 2009

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Overview

On 28 September 2009 the Human Rights Council (the Council) considered both the report of the Special Rapporteur on the situation of human rights of indigenous peoples (under Item 3) and the report of the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) (Item 5) together, a move that was welcomed by States and indigenous representatives as facilitating synergies among these mandates and making it easier for persons to be present for both discussions. However, a number of indigenous organisations were critical of the fact that other NGOs had usurped the little space available for the interactive dialogue with the Special Rapporteur at the expense of indigenous organisations who had travelled long distances to participate and who should be given priority.

The Special Rapporteur on the situation of human rights of indigenous peoples, Mr James Anaya, presented his annual report focused on the duty of States to consult with indigenous people on matters that affect them. States generally welcomed his findings on this topic. They also endorsed his efforts to ensure coordination and no duplication with the work of the Expert Mechanism and the Permanent Forum on Indigenous Issues (the Permanent Forum).

The presentation of the Chairperson of the Expert Mechanism related to its work on the right to education for indigenous peoples, and the status of implementation of the *Declaration on the Rights of Indigenous Peoples*. The report was warmly welcomed by all delegations and NGOs that spoke, as was the Expert Mechanism's proposal that it next take up the study of the participation of indigenous peoples in decision making.

Special Rapporteur on indigenous peoples

The Special Rapporteur on the situation of human rights of indigenous peoples, Mr James Anaya, presented his annual report and several reports on country visits to the Council.¹ The annual report focuses on the duty of States to consult with indigenous people on matters that concern them. Mr Anaya explained that this duty has strong normative and legal foundations and is grounded in the right of indigenous people to self-determination. He noted that the failure to comply with this duty is a major challenge across the world. He also explained that while the duty does not grant indigenous people a veto power over government decisions, efforts should be made to ensure their consent.

Mr Anaya explained his intentions to continue to cooperate with the Expert Mechanism and the Permanent Forum, and noted that he had contributed to the former's study on the right to education. As a result of the work of the Expert Mechanism, Mr Anaya noted that he now sees studies as a secondary part of his work.

Regarding his **visit to Brazil**, Mr Anaya stated that while there are important constitutional protections in place, there continue to be multiple impediments to the enjoyment of rights by indigenous people. Mr Anaya was encouraged by the Government of **Nepal**'s resolve to advance the rights of indigenous people, but noted a history of discrimination and lack of participation in the political process by indigenous people. On the follow up report to the past **visit to Chile**, Mr Anaya highlighted challenges in relation to consultation with indigenous people, land and resource rights, and Government action in response to protests by the Mapuche people. Finally he noted that he had recently visited **Botswana and Australia** and would present reports on those visits next year.

Mr Anaya also highlighted that many governments had not responded to his communications regarding alleged human rights violations. Finally, he drew attention to allegations of violations received from indigenous people in **Peru and Panama** that he had investigated.

Concerned countries

Bolivia stated that the UN *Declaration on the Rights of Indigenous Peoples* is enshrined in the constitution and that the Government has started work to implement the Special Rapporteur's recommendations.

Botswana welcomed the visit of the Special Rapporteur and the constructive dialogue it had had with him. It explained the Government's position that all people in Botswana are indigenous to the country.

Brazil stated its commitment to the full participation of indigenous people in the registration and demarcation of land. It also recognised the key challenges that still remain to fully guarantee the rights of indigenous people in the country.

Chile stated that it had begun examining the Special Rapporteur's report and would continue its dialogue with him. It noted that poverty remains high among indigenous people, and that in general much still need to be done to improve their situation.

Nepal stated that it has a multi-ethnic, multi-cultural and multi-lingual society and that it attaches importance to the mandate of the Special Rapporteur. It suggested that the remarkable progress in the country in relation to economic, social and cultural rights should be recognised.

Panama welcomed the Special Rapporteur's report and noted that the Government has sought clarification regarding the case examined by Mr Anaya on police action against the indigenous community affected by the hydroelectric dam. It also explained that a draft agreement has been reached between the Government and indigenous groups on settlement and benefits following the displacements as a result of the construction of a hydroelectric dam.

¹ A/HRC/12/34 (annual report), A/HRC/12/34/Add. 2 (mission to Brazil), A/HRC/12/34/Add. 3 (mission to Nepal), A/HRC/12/34/Add. 4 (mission to Botswana), A/HRC/12/34/Add. 6 (mission to Chile), A/HRC/12/34/Add. 8 (mission to Peru).

Peru stated that the Special Rapporteur's report 'passed a true light' on the actual situation of indigenous people refuting allegations that grave violations, including extrajudicial killings and disappearances, had taken place. It agreed with Mr Anaya's assessment of the complexity of events and noted that an independent commission has been set up to investigate the clashes between police and indigenous protesters.

Interactive dialogue

Several States echoed the Special Rapporteur's findings regarding the duty to consult with indigenous peoples.² In response to Denmark's question on how big a problem lack of consultation is, Mr Anaya explained that it is a problem in all parts of the world and that in many cases there is flagrant disregard for the duty to consult. He suggested that governments adopt specific laws on consultation with indigenous people.

Sweden (on behalf of the EU) asked which confidence-building measures the Special Rapporteur would recommend to establish a climate of confidence with indigenous groups. It also wondered how the challenges regarding indigenous representation in the consultation process could be overcome. Australia raised a similar point asking how governments can consult to ensure that particular attention is given to the elderly, women, children, and persons with disability among indigenous people. In response, Mr Anaya stated that there must be confidence in indigenous people's own methods of consultation and their representative bodies. He noted that indigenous women are often at the forefront of these consultation processes. New Zealand asked for further examples of decisions that particularly affect indigenous communities and not other groups in a multicultural society. Canada asked for guidance on how to proceed where despite efforts consultations have reached an impasse.

Several States also endorsed the Special Rapporteur's comments regarding coordination and collaboration with other UN mechanisms underlining that there should be no duplication.³ Sweden (on behalf of the EU) asked how coordination between the various mechanisms could be improved to ensure that there is no duplication and to promote a better understanding of respective roles and functions. Mr Anaya noted that this could be done through regular contact with the Expert Mechanism and the Permanent Forum to plan and coordinate the work and that this has been done so far. New Zealand asked which additional initiatives could allow the mechanisms to work better together. Canada wanted to know if the Special Rapporteur was planning to coordinate with other bodies, in particular the treaty bodies in relation to individual cases. Mr Anaya replied that he has held regular meetings with the Committee on the Elimination of Racial Discrimination.

The Permanent Forum requested the Special Rapporteur to focus on the situation of indigenous people that are divided by international borders which impact on their enjoyment of human rights.

Some States also spoke of their domestic legal protection of indigenous people's rights and efforts to consult with them.⁴ Australia commented on Mr Anaya's recent visit stating that it will give full consideration to his report. Colombia stated that it will take all measures to bring perpetrators of violence against indigenous people to justice.

Many NGOs drew attention to the precarious situation of indigenous people in specific countries. The Canadian Commission on Human Rights noted the disadvantaged situation of indigenous people in Canada and underlined that the Government has still not endorsed the *Declaration on the Rights of Indigenous People*. The International Federation of Human Rights Leagues stated that Peru is not complying with the Special Rapporteur's recommendations and continues to grant land concessions on indigenous lands. The Colombian Commission of Jurists stated that Colombia has not implemented the recommendations made following the Special Rapporteur's visit in 2004 and that serious and systematic human rights violations continue. *Conectas Direitos Humanos* highlighted violations against indigenous people in Brazil and urged the Government to implement all the Special Rapporteur's recommendations and consult with indigenous people on all decisions that affect them.

² US, Canada, Norway, Sweden (on behalf of the EU).

³ Sweden (on behalf of the EU), Norway, New Zealand, Venezuela, US.

⁴ Norway, Australia, Ecuador, Mexico, Finland.

Report of the Expert Mechanism on the Rights of Indigenous Peoples

The report of the second session of the Expert Mechanism was presented by its Chairperson-Rapporteur, Ms Jannie Lasimbang.⁵ The two main issues of the session were the discussion of the draft report on the right of indigenous people to education⁶ and the implementation of the *Declaration on the Rights of Indigenous Peoples*. Ms Lasimbang did not reiterate the content of the report on the right to education, but noted that States and others have recognised it as a ‘useful tool in ensuring quality education that is culturally appropriate’. She stated that the Expert Mechanism would welcome the Council’s positive consideration of the study. Concerning the *Declaration*, the Chairperson made it clear that the Expert Mechanism was not a monitoring body, but that the *Declaration* was reflected in the Expert Mechanism’s founding resolution and so provides the normative framework to guide its work. The Expert Mechanism received a lot of information on implementation, and while there have been positive developments in various countries, one outstanding problem remained the lack of participation in decision making by indigenous peoples. It was on this basis that the Expert Mechanism proposed to the Council that its next study address the right of indigenous peoples to participate in decision making.

The Chairperson presented additional proposals to the Council, including that: States consider the creation of specific national institutions dealing with indigenous peoples’ rights; the Council hold panel debates on the rights of indigenous peoples with the inclusion or relevant UN and regional mechanisms; that the situation of indigenous peoples be considered in the UPR; that the Council request the General Assembly to extend the mandate of the Voluntary Fund for Indigenous Peoples to assist indigenous participation in the Council and treaty body sessions. Ms Lasimbang also noted the efforts of various indigenous mechanisms to complement each other, and commended the fact that the Expert Mechanism was presenting alongside the Special Rapporteur on indigenous peoples as a positive move in strengthening synergies.

General debate on Item 5

Sweden (on behalf of the EU) used the general debate to address a number of issues related to various Council mechanisms, including the need for **special procedures** to be independent, and that **country mandates** are ‘central to giving a voice to victims that otherwise would not have been heard’. The system requires cooperation from States in order to function effectively, and Sweden noted that currently responses from States to their communications rest at less than 50%, which needed drastic improvement.⁷ Ironically, however, the Sami Council later accused Sweden of not having cooperated with the Special Rapporteur on indigenous peoples in relation to treatment of the Sami. Latvia addressed cooperation with special procedures through the need for increased **standing invitations** as a means of exhibiting a readiness and willingness to cooperate. It noted that the UPR had assisted in bringing the number of standing invitations to 67, and requested that OHCHR display on their website the number of new standing invitations that have come about through the UPR.

Sweden (on behalf of the EU) also stated that procedural difficulties with the Council’s **complaint procedure** needed to be overcome if it was to function as expected.

While welcoming the work the **Advisory Committee**, Sweden (on behalf of the EU) reiterated its view that any proposals from this body ‘should not automatically become a decision of the Council when not initiated by States’. Japan also expressed its satisfaction with the Advisory Committee’s **draft principles and guidelines on the elimination of discrimination against persons with leprosy**, and stated that it would table a resolution at the Council seeking inputs from States on the draft.

⁵ A/HRC/12/32.

⁶ A/HRC/12/33.

⁷ Denmark extended lack of cooperation by States to the UN human rights treaty bodies also.

Morocco, on behalf of the Platform for Human Rights Education and Training,⁸ updated the Council on the **seminar on the Draft Declaration on Human Rights Education** that took place in Marrakech on 16 and 17 July 2009 to look at the elements of a declaration and to give high level support to the initiative.⁹ The seminar was attended by 30 States and 24 international experts, and addressed the normative framework, the obligations and role of States, the role of other stakeholders, and the scope of human rights education in its various forms. Morocco called the Council to support the finalisation of the Declaration by the Advisory Committee through a consensus resolution at the current session. The National Human Rights Commission of Morocco stressed that the role of national institutions still needed to be reflected in the draft *Declaration*.

Norway focused on the outcomes of the second session of the **Expert Mechanism**, and agreed that the **right to education of indigenous peoples** should be better taken up through the UPR. The Russian Federation, on the hand, claimed that the UPR leaves it entirely to States to determine which issues to raise in the Working Group, yet States may consider that indigenous issues are relevant. The International Organization of Indigenous Resource Development supported the report's assessment of treaty based obligations to education and its assessment of fiscal allocation, noting that Canada will need to amend its practice in accordance with these conclusions. Norway supported all other proposals, including for the Expert Mechanism to take up a study on **indigenous participation in decision-making**, and called for language in the new Council resolution reflecting the important role that **national institutions** can play. The US also stated that it was impressed by the 'cooperative tone and rich discussion' of the last Expert Mechanism session, and that it looked forward to joining the dialogue on the decision-making study.

Denmark, Finland and the Sami Council (an NGO) supported having the presentations of the Expert Mechanism and the Special Rapporteur together, and both stressed the need for proper follow-up to former's report, including at the national level and through the Council. Finland expressed its support for the continuation of the **Voluntary Fund**,¹⁰ particularly in bringing indigenous peoples to treaty body sessions.

Sweden expressed gratitude to the work of **OHCHR**, and in an indirect reference to the Council's previous debate under Item 2,¹¹ stated that due consideration should still be given to efficiency, competence and integrity in choosing its staff.

Brazil and Australia used the general debate to update the Council on national initiatives to protect and promote the rights of indigenous peoples. The Russian Federation stated that it is looking forward to the visit of the Special Rapporteur on the rights of indigenous peoples as an opportunity to receive useful technical assistance and an objective assessment of its efforts.

There was **very little time for NGO interventions** on 28 September, which were concluded on 30 September, leaving the spokesperson of the Indigenous World Association to complain that people had come from around the world to speak during the interactive dialogue with the Special Rapporteur, only to be sidelined by NGOs in Geneva (although this accusation appeared unfounded as none of the individuals who spoke during the interactive dialogue were from Geneva-based NGOs) and were now being given less than ten minutes in the general debate.¹² He protested that this had happened before and that they should not be denied the right to speak.

The continuation of the general debate on 30 September was characterised by a high number of references to **country situations**, particularly from South Asia. This resulted in interventions from the President of the Council which provided a very narrow interpretation of the scope of the general debate, claiming that NGOs should not

⁸ Costa Rica, Italy, Morocco, Slovenia, Philippines, Senegal, Switzerland.

⁹ Supported also by new Platform member Senegal.

¹⁰ Also Norway and Venezuela.

¹¹ See General debate under Item 2, at <http://www.ishr.ch/content/view/471/513/>

¹² This was supported by the Sami Council and International Organization of Indigenous Resource Development, the only organisations able to speak on the general debate on 28 September.

reference the plight of indigenous peoples in particular countries, and therefore parts of statements were ruled out of order. The International Club for Peace Research deplored the treatment of the Baloch in Pakistan, Interfaith International spoke of the indigenous people in the Sindh province of Pakistan, the Foundation for Aboriginal and Islander Research Action addressed violence and killings against indigenous peoples in Peru, Colombia, West Papua and Tanzania, and Amnesty International brought to the Council's attention the fact that Paraguay failed to respect two rulings of the Inter-American Court of Human Rights, and does not therefore respect the rights of indigenous peoples.

Further information

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- Web site of the International Service for Human Rights, providing up-to-date information before, during and after sessions of the Council: <http://www.ishr.ch/council>. During the session, ISHR will provide information about the Council's proceedings on a regular but not daily basis. You can subscribe to receive alerts of our publications by sending an email to information@ishr.ch.
- Oral statements made at the Council, as well as other informal documents and draft resolutions are available on the 'OHCHR extranet' at <http://portal.ohchr.org/portal/page/portal/HRCExtranet>. Username: 'hrc extranet' Password: '1session'.
- Web site of the Office of the High Commissioner for Human Rights (OHCHR) on the 12th session of the Human Rights Council: <http://www2.ohchr.org/english/bodies/hrcouncil/12session>. For direct access to reports considered, check <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm>.

NGOs and human rights defenders seeking more specific information or individual advice on the Council session, please contact the ISHR secretariat by email or phone at +41 (0) 22 919 71 00.

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