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The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people¹

Mandate Holder

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Mandate

Over the last two decades the situation of the indigenous peoples and the enjoyment of their human rights has become a key issue. The mandate was therefore established in 2001² in response to the growing international concern regarding the marginalization and discrimination against indigenous people worldwide. The Special Rapporteur is mandated to investigate violations of indigenous people's human rights and fundamental freedoms, to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy them, and to work on topics which may contribute to advancing the debate on fundamental issues of the "Draft United Nations declaration on the rights of indigenous peoples".

Activities

- Analysis of country situations and other activities of the Special Rapporteur;
- Mission to South Africa from 28 July to 8 August 2005;
- Mission to New Zealand from 16 to 26 November 2005.

Annual report³

Scope

The report deals with constitutional reform, legislation, and international standards and decisions regarding the promotion and protection of the rights of indigenous peoples and their effective application. The report also provides information on communications with Governments between 1 January and 31 December 2005.

Summary and key conclusions

- During the first International Decade of the World's Indigenous People (1994-2004), many countries introduced legislative processes and constitutional reforms recognising indigenous peoples and their rights.
- Despite those advances, there is still an "implementation gap" between legislation and day-to-day reality.
- On the American continent, numerous constitutional reforms relating to indigenous peoples have been carried out or new special laws enacted. Many Andean countries have recognised legal pluralism and ratified the International Labour Organisation (ILO) *Convention No.169 on Indigenous and Tribal Peoples*.
- Legislation on the subject has also been enacted in other parts of the world, including the Russian Federation and some Asian and African countries. By and large however, indigenous peoples are not constitutionally recognised and barely taken into account in domestic legislation of African States.
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¹ Summaries prepared by Cléa Thouin, Intern, ISHR, supervised and edited by Meghna Abraham, Information Program, ISHR.

² Commission *Resolution 2001/57*.

³ E/CN.4/2006/78, 16 February 2006.

- International standards, even when ratified, do not always and automatically become part of domestic law. They are sometimes ignored by public officials as well as in the case law of the courts. Another problem reported is the lack of consistency between different laws, such as those relating to mining or natural resources management, and indigenous or human rights legislation.
- Indigenous people have increased their **participation in electoral politics**, but this level of participation continues to be low and is often diluted through negotiations with other interest groups.
- Two main problems are that there are many cases in which legislation on indigenous issues is **inconsistent with other laws**, and in most constitutional reforms there is a **delay in the adoption of statutory and secondary laws** to implement these new provisions.
- There are often difficulties regarding the **effective recognition of indigenous law**, even in those countries where legal pluralism is officially recognised, as important constitutional changes have not been accompanied by the necessary updating of criminal law.
- Some countries, notably the Philippines, Viet Nam, and Australia, have established **public institutions** for reviewing their indigenous legislation and its implementation, but there are frequent claims that these are not representative of indigenous communities and peoples but made up of Government officials.
- One of the main obstacles to the enforcement of indigenous rights legislation arises from the institutional structures of **public administration**, often riddled with bureaucratic inertia, rigid regulatory practices, lack of flexibility and creativity, vertical authoritarianism in decision-making, absence of popular participation, inefficient reporting and results-assessment mechanisms, and corrupt practices.
- **Courts** also play an important role in the interpretation and application of domestic legislation and international human rights standards and significant progress has been achieved in this regard in a number of countries, such as Canada, Colombia and Venezuela.
- Indigenous peoples have had increasing recourse to the **protection mechanisms of the international system** in order to claim their rights, but this system does not always provide satisfactory results. The Special Rapporteur has reviewed some of these mechanisms⁴, including the Human Rights Committee, the ILO Committee of Experts, and the Inter-American Court of Human Rights.
- Generally speaking there are no proper **mechanisms for monitoring the effectiveness of indigenous legislation** and evaluating its day-to-day application in public administration and society, and **consultation and participation mechanisms** are often inadequate.

Key recommendations

- States should develop **coordinated and systematic policies**, with the participation of indigenous peoples, which would cut across all relevant State bodies, as well as monitoring and evaluation mechanisms;
- States should establish **bodies for consultation and participation** on all general and particular measures that affect indigenous peoples;
- **Parliaments** should establish commissions on indigenous affairs and on human rights;
- Necessary laws and regulations should be enacted as soon as possible for the effective implementation of laws and standards on indigenous peoples;
- **Ombudsman-type bodies** should be strengthened and provided with the necessary resources;
- The Commission should consider the possibility of elaborating an **international code of conduct for transnational corporations for the protection of the rights of indigenous peoples** and States should ensure that the subject of indigenous peoples is kept on the agenda of the **Human Rights Council**.

Mission to South Africa⁵

Scope

Mission to South Africa from 28 July to 8 August 2005. The Special Rapporteur held consultations with national and regional authorities, representatives of non-governmental organisations, members of the academic world and members of the indigenous communities.

Summary and key conclusions

⁴ Pp.13-19.

⁵ E/CN.4/2006/78/Add.2, 15 December 2005.

- South Africa is still dealing with the legacy of the racist apartheid policy, under which all indigenous peoples of South Africa were oppressed and discriminated against. The indigenous Khoi-San were dispossessed of their lands and territories and their communities and cultures were destroyed. The tragic consequences of apartheid cannot be overcome in a few years, and the Special Rapporteur is fully conscious of the tremendous efforts that have been made by the democratic Government of South Africa to redress the many injustices inherited from the old regime;
- There are **six large groups who identify themselves as indigenous** and all face different challenges within the national society. Indigenous people are still not officially recognised as such, and statistics provided by the State do not reflect their presence. They have in principle equal access to all social services provided by the Government but they tend to be more marginalised than other sectors and are more concentrated at the lower end of the socio-economic scale;
- There have however been **tremendous efforts** by the Democratic Government of South Africa to redress these injustices through appropriate legislation and policies and it has declared its commitment to address the demands of the indigenous groups;
- There have been successes in land restitution claims but, because of internal divisions and without adequate follow-up support from the government, these lands cannot be turned into productive enterprises;
- **Indigenous women** require specific measures to empower them to overcome the constraints faced by them;
- The claim of the **Boerevolk** to be considered as an indigenous nation does not meet the criteria of 'indigeneity' as these have been set out in international legal standards and discourse at the present time.

Key recommendations

- Indigenous people should be **recognised** as such **constitutionally**;
- More **coordination** within the government is required;
- Actions should be undertaken towards the removal from all legitimate claimants to indigenous identity of the stigma attached to having been classified as 'Coloureds' during the apartheid regime, and that the National Khoi-San Council receive statutory recognition;
- The Government should maintain a **national register of officially recognised indigenous** communities and give statutory recognition to their associations and chieftaincies wherever relevant;
- **Convention No. 169 concerning Indigenous and Tribal People in Independent Countries** (1989) of the International Labour Organisation must be ratified promptly;
- The restitution of land claims must not be limited to the cut-off date of 1913 and the **land restitution process must be accelerated**. The government must also provide indigenous communities with the resources and technical cooperation to pursue these claims successfully;
- A systematic study of the land needs and land rights of indigenous communities needs to be commissioned;
- **Disaggregated data** must be collected in all areas and specific policies and programs should be designed to target indigenous communities;
- The **access of indigenous people to the justice system** must be improved and a system of visiting or roving tribunals should be instituted for distant communities;
- **Special training** should be provided for personnel in the judiciary and in the police;
- Political parties, non-governmental organisations, the academic community and the United Nations country team should all engage more systematically with indigenous communities.

Mission to New Zealand⁶

Scope

The report covers a mission to New Zealand from 16 to 26 November 2005, during which the Special Rapporteur met with high Government officials, including the Minister of Maori Affairs, Maori leaders, indigenous and civil society organisations, representatives of the Human rights Commission, the Waitangi Tribunal and the Maori Land Court, as well as academics.

Summary and key conclusions

- The relations between the Maori people and the Government are based on the **Treaty of Waitangi** (the Treaty) signed in 1840. It recognised the Maori's inherent property rights, customary use of lands and

⁶ E/CN.4/2006/78/Add.3, 13 March 2006.

resources, cultural heritage and traditional chieftainship authority. However, it is not directly enforceable under New Zealand law unless its provisions are explicitly incorporated into legislation;

- As a result of land sales and breaches of the Treaty by the Crown, the Maori lost most of their land, resources, self-governance and cultural identity. A **shift** from the old **assimilationist model** to a **bicultural approach** since 1975 has led to numerous settlements of Maori land claims through the Waitangi Tribunal and the enactment of new legislation;
- The Special Rapporteur considers that New Zealand's human rights legislation does not provide sufficient protection mechanisms regarding the collective rights of Maori;
- Currently, the Maori hold around 17 per cent of Parliament and a Maori Party has recently emerged. While Maori **representation** is still low at the local level, the Local Government Act 2002 requires that local authorities must take them into account when making significant decisions;
- While tribes and sub-tribes are acknowledged traditional units of Maori social organisation, they have no formally recognised governance powers. Some Maori movements have advocated for a degree of self-determination consistent with the Treaty;
- One of the most pressing current human rights concerns for the Maori relates to **land issues**. By 2005, 94 per cent of Maori ancestral land had been appropriated by a variety of processes and only a very small fraction of land has been returned through land claims;
- Recommendations made by the **Waitangi Tribunal** are not binding on the Crown and whether the process results in any redress depends on the Government's and the claimants' willingness to reach an agreement. Successive New Zealand Governments have accepted that Maori have a moral and political right to redress under the Treaty but have not a legal right;
- The settlement process is also criticised for forcing claimants to waive their entitlement to the protection of the courts in order to receive a settlement;
- There has been an important controversy around the **Foreshore and Seabed Act of 2004**, which is said to extinguish inherent customary Maori property rights, as protected under the Treaty, replacing them with the possibility to apply to the courts to protect customary uses and practices if the claimant fulfils a number of difficult and potentially costly requirements;
- The Government has committed itself to **reducing existing inequalities** between Maori and non-Maori, notably with regard to **social indicators**, such as health, housing, education, employment and income, and progress has been made in the past five years. Nevertheless there are persistent disparities;
- Prosecution and conviction rates are considerably higher for Maori than for non-Maori, and while Maori culture has been rapidly and pervasively revived, the schooling system has been performing on average less well for Maori and the media continue to produce an unbalanced and racist picture of Maori.

Key recommendations

- The Government should ratify ***ILO Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries***;
- A **constitutional reform** should be designed to regulate the relation between the Government and the Maori people on the basis of the Treaty of Waitangi and the right to self-determination;
- **Tribes** should be considered as likely units for strengthening customary self-governance of Maori;
- The **Waitangi Tribunal** should be granted legally binding and enforceable powers and should be allocated more resources;
- The **Foreshore and Seabed Act** should be **repealed** or **amended** to recognise the inherent rights of Maori;
- The **Treaty settlement process** should be amended to allow for more self-determination with regard to Maori participation in this process.

Analysis of country situations and other activities of the Special Rapporteur⁷

Scope

The report contains information on the communications sent from 1 January to 31 December 2005, summaries of replies to these communications and observations by the Special Rapporteur. The report also contains tables providing a summary of communications sent to and replies received from Governments aggregated by region, and statistics on joint communications, aggregated by type of communication.

Summary and key conclusions

⁷ E/CN.4/2006/78/Add.1, 18 January 2006.

- The communications concern **15 country situations** and represent, as in previous years, an increase in the number of communications and reports received by the Special Rapporteur;
- The main sources of these communications were non-governmental organisations, indigenous organisations, intergovernmental organisations and other United Nations procedures concerned with the protection of human rights;
- The information received shows that indigenous people continue to suffer from serious human rights violations in many parts of the world, such as extra-judicial executions, arbitrary detention, forced evictions, sexual abuse by members of security forces, and lack of access to basic social rights;
- In many cases, violations suffered by individuals also have devastating effects on entire communities;

Please note that countries that have replied to current or previous communications are marked with an asterix:

- The Special Rapporteur transmitted communications to Australia*, Bolivia*, Botswana, Brazil*, Chile*, Colombia*, Guatemala, Guyana, Honduras, Mexico*, Myanmar, Nicaragua, the Philippines*, the Russian Federation*, and Thailand.

Other communications and information received

- The Special Rapporteur continued to receive information on the situation of communities such as the pygmies in the Congo or the Tartars of the Crimea in Ukraine;
- The Special Rapporteur also received general information on **indigenous children in situations of conflict**, as well as a number of studies on issues of great importance to indigenous peoples, such as the management of local government in various Asian countries;
- The Special Rapporteur received information from the United States of America on the situation facing some indigenous communities such as the Navajo people and various Apache communities;
- The Special Rapporteur also received information on the situation of the O'odham people and on the border-related problems faced by this community, which lives on the border between the United States of America and Mexico.

Related and future activities

- The Special Rapporteur plans to visit Ecuador at the beginning of 2006, and wishes to visit Kenya, the Russian Federation and Malaysia. His requests in 2004 and 2005 to visit Botswana remain unanswered;
- The Special Rapporteur has envisaged two possibilities for following up on his country visits:
 - o Analysing the information provided by Governments, indigenous and United Nations organisations on action taken to implement the recommendations contained in country reports and submitting a progress report⁸ on this subject;
 - o Making follow-up visits to some of the countries visited.

Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur⁹

Scope

The report contains information on the work carried out by the Special Rapporteur in preparation for the study regarding best practices in implementing the recommendations contained in his reports.

Summary and key conclusions

- The report contains a descriptive summary of the **principal recommendations made by the Special Rapporteur** in his three thematic reports and his reports on missions to Guatemala, the Philippines, Mexico, Chile, Colombia, and Canada;
- The **thematic reports** concerned the impact of large-scale development projects on the rights of indigenous peoples; indigenous people's access to the justice system and indigenous customary law; and obstacles and disparities facing indigenous peoples in access to and quality of education;
- The Special Rapporteur requested **information from Governments** to develop a special questionnaire to obtain information for the study. **12 replies** were received, from Argentina, Belarus, Canada, Denmark, El Salvador, Estonia, Finland, Germany, Lebanon, Mexico, Switzerland and Tunisia;

⁸ E/CN.4/2006/78/Add.4, 26 January 2006.

⁹ E/CN.4/2006/78/Add.4, 26 January 2006.

- Chile, Guatemala, Mexico and the Philippines also provided an account of measures taken to implement the Special Rapporteur's recommendations;
- The Special Rapporteur also requested **information from United Nations programs and agencies**. The Food and Agriculture Organisation, the UN Educational, Scientific and Cultural Organisation, the World Health Organisation, the World Food Programme, the Office of the High Commissioner for Refugees, the UN Development Programme, the UN Population Fund, the UN Institute for Training and Research, the Office of the High Commissioner for Human Rights and the World Bank replied;
- The Special Rapporteur attended a meeting for the representatives of UN programs and agencies to discuss progress and difficulties encountered in implementing his recommendations;
- **Indigenous and civil society organisations** in the countries visited by the Special Rapporteur have established mechanisms and projects to monitor the implementation of his recommendations;
- In **Chile**, indigenous organisations, human rights organisations and academic institutions have been working together to disseminate the Special Rapporteur's report and to establish a plan to monitor its implementation. Indigenous organisations have requested support from OHCHR in organising consultations with the Government and a mechanism to monitor indigenous peoples' rights has been set up at the University of Temuco, which will be used to monitor implementation of recommendations;
- In the **Philippines**, a number of working groups have been set up;
- In **Colombia**, preparations are underway to implement the Special Rapporteur's recommendations. One proposal is for a visit to check on the situation in a number of small communities in the Amazon region that are in danger of extinction;
- The Special Rapporteur hopes to be able to submit the study to the Commission at its 63rd session;
- The Special Rapporteur envisages a certain amount of **follow-up to his country visits**, including follow-up visits to Guatemala and the Philippines and support for a meeting on follow-up to his recommendations, to be organised with the Government of Chile and OHCHR.

Key recommendations

- In providing **information to the Special Rapporteur**, Governments, UN programs and agencies, and civil society organisations should look both at information of a general nature and **more specific measures**.

Summary report of the main conclusions and recommendations from the International Seminars on Constitutional Reforms, Legislation and Implementation of Laws regarding the Rights of Indigenous Peoples¹⁰

Scope

The report contains a summary of the conclusions and recommendations from the International Seminars on Constitutional Reforms, Legislation and Implementation of Laws regarding the Rights of Indigenous Peoples held on 25 and 26 July 2005 organised with the Inter-Parliamentary Union (IPU) and from 12 to 14 October 2005 with the Indigenous Peoples Law and Policy Program of the University of Arizona College of Law.

Summary and key conclusions

The OHCHR-IPU international experts seminar

- The main objective was to discuss the **role of legislators** in protecting and promoting indigenous peoples' rights and to analyse good practices and obstacles encountered in implementation of relevant legislation;
- A growing interest by indigenous peoples in pursuing political change through parliaments coupled with the opening of new spaces for indigenous peoples to participate in the political process, notably through quota policies, has led to an **increasing number of indigenous representatives**;
- There have also been other significant and positive developments, such as the recognition of indigenous peoples' identities and rights in some countries' constitutions and laws;
- The **participation of indigenous peoples** in political life however **remains generally low** and there is still an **implementation gap** as regards existing laws and provisions;
- Participants recognised the **dynamic role** that an **individual legislator** could play, notably as a mediator and educator to fellow legislators, and by using this position to monitor and advocate indigenous concerns.

¹⁰ E/CN.4/2006/78/Add.5, 17 January 2006.

The OHCHR-University of Arizona experts seminar

- The main focus was on the analysis of existing domestic and international legal protection of indigenous peoples, and on the identification of effective approaches to bridge the gap between these legal protections and their **effective implementation** at national level;
- Despite reforms, there is still a substantial disconnect between the norms and principles adopted at the international level and domestic legal provisions, and lack of implementation is a serious concern;
- The **obstacles to effective implementation** include lack of political will, conflicts between different laws, absence of adequate economic resources, and ignorance on the part of domestic institutions with regard to the country's international human rights commitments;
- The lack of adequate **mechanisms for consultation** prior to the development of legal provisions and adequate **monitoring mechanisms** for their implementation were identified as major issues of concern;
- Participants discussed the issue of empowerment, the role of transnational and national corporations, and the important role played by courts, international human rights mechanisms and jurisprudence.

Key recommendations

The OHCHR-IPU international experts seminar

- Indigenous parliamentarians should establish **coalitions** to increase their influence;
- **Committees on indigenous questions** are very important and follow-up to their reports should be ensured;
- Indigenous peoples should be given the possibility of contributing to the preparation of bills and laws;
- **International bodies** are very important mechanisms to lobby for indigenous rights;
- IPU and OHCHR should consider preparing a **study on the involvement of indigenous peoples in public affairs**, as well as on indigenous peoples' **self-government arrangements**;
- **OHCHR** should consider including an offer of **support** and **advice to parliaments** on human rights issues, including indigenous peoples' rights, in its country engagement strategy.

The OHCHR-University of Arizona experts seminar

- **Constitutional recognition** of indigenous peoples' rights is needed and Governments should take the necessary measures to ensure their effective implementation;
- International and State agencies should develop **indicators on achievements** and **monitoring mechanisms** regarding legislation relevant to indigenous peoples;
- National legislation should be brought into **conformity with the provisions of international law**;
- Existing specific mechanisms that support indigenous peoples in the assertion of their rights at various levels should be strengthened;
- **Dialogue among indigenous peoples** from various parts of the world should be promoted and strengthened.