

The United Nations Declaration on the Rights of Indigenous Peoples



A Manual for National Human Rights Institutions



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions

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A Norwegian Saami woman during the eleventh session of the United Nations Permanent Forum on Indigenous Issues. UN Photo/Mark Garten; Indigenous children from the Embera people, Colombia.

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Foreword

The UN Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007, provides a global framework for efforts to advance indigenous peoples' rights. Together with other human rights instruments and growing human rights jurisprudence concerning indigenous peoples, the Declaration contains crucial guidance for building societies that ensure full equality and rights of indigenous peoples.

The Declaration has already prompted concrete improvements. At the United Nations and in regional organisations, human rights concerns of indigenous peoples have become an integral part of debates ranging from environment to development issues. At the national level, the Declaration has inspired new legislation and mechanisms for dialogue with indigenous peoples.

Despite these positive signs, the promise of the Declaration is far from being universally fulfilled. As the findings of human rights mechanisms demonstrate, indigenous peoples in many parts of the world continue to be systematically discriminated and silenced. Rights of indigenous peoples are frequently the first victims of development activities in indigenous lands, often pursued with no regard to the principle of free, prior and informed consent and other guarantees of the Declaration.

The present publication – a joint initiative of my Office and the Asia Pacific Forum of National Human Rights Institutions – is part of our continuing efforts to fill these gaps, to promote the Declaration and to further its practical implementation. It aims at increased engagement by one key actor in ensuring that human rights, including indigenous peoples' rights, become a reality: national human rights institutions. As examples contained in this publications show, national human rights institutions can play a crucial role in the protection and promotion of indigenous peoples' rights. Through their legal status and mandate, they have the potential to be strong allies with, and advocates for, indigenous peoples. As conduits between the national, regional and international human rights spheres, national human rights institutions are uniquely placed to contribute to the genuine implementation of the Declaration and the progressive realization of the rights of indigenous peoples.

The first part of this publication introduces the background and context of the Declaration, while the second and third parts focus on measures which national human rights institutions can take at the national and international level to protect and promote indigenous peoples' rights. The publication is accompanied by an audio-visual resource, which features interviews with indigenous peoples, representatives of national human rights institutions and international human rights experts.

I hope that this publication will foster a greater awareness of the rights of indigenous peoples among national human rights institutions, will guide and support them in this critical work and contribute to their capacity and commitment to work with indigenous peoples in order to realize the rights set out in the Declaration.



Navi Pillay
United Nations High Commissioner for Human Rights

August 2013

List of abbreviations

APF	Asia Pacific Forum of National Human Rights Institutions
Declaration	United Nations Declaration on the Rights of Indigenous Peoples
ILO	International Labour Organization
NGO	Non-governmental organization
NHRI	National human rights institution
OHCHR	Office of the United Nations High Commissioner for Human Rights
UPR	Universal periodic review

Introduction for users

This Manual aims to support and strengthen the work of national human rights institutions (NHRIs) – whether they are human rights commissions or ombudsman offices – in the promotion, protection and enjoyment of the rights of indigenous peoples, especially NHRIs that are established in accordance with the Paris Principles.¹

It is designed to assist these institutions learn about the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) by providing a broad understanding of the legal nature of the rights it contains, as well as the relevant obligations of States, in order to ensure that indigenous peoples' rights are fully realized.

We hope that the information provided will also be useful to indigenous community leaders and other stakeholders on how to make use of the NHRIs that operate in the countries in which they live.

BACKGROUND

The publication of this Manual reflects the conclusions reached at the 14th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF), where it was agreed that APF member institutions would work in partnership to develop a toolkit to promote greater understanding and implementation of the Declaration.² This Manual also supports the strategies for future action outlined in the outcomes of the International Meeting on the Role of National Human Rights Institutions in Promoting the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, held in Bangkok in December 2009.³ The recommendations from this meeting outlined a range of strategies that clearly articulated the critical role of NHRIs in the promotion and protection of indigenous peoples' human rights at the national and local levels. Specifically, it was noted that NHRIs, in conjunction with the Office of the United Nations High Commissioner for Human Rights (OHCHR), should cooperate to provide user-friendly toolkits, adapted to local and regional contexts, to assist local and national implementation of the Declaration.

RATIONALE

Despite some positive developments, most of the world's indigenous peoples continue to face impediments to the full enjoyment of their individual and collective human rights:

Indigenous peoples are more likely to receive inadequate health services and poor education – if any at all. Economic development plans often bypass them or do not take into sufficient consideration their views and particular needs. Other decision-making processes are often equally contemptuous of or indifferent to their contribution. As a result, laws and policies designed by majorities with little regard to indigenous concerns frequently lead to land disputes and conflicts over natural resources that threaten the way of life and very survival of indigenous peoples.⁴

1 General Assembly resolution 48/134. Further information on the Paris Principles is available at www.asiapacificforum.net/members/international-standards.

2 APF, *Forum Councilor Meeting – Outcomes, 14th Annual Meeting, Amman, Jordan, 3-6 August 2009*; para. 13.

3 OHCHR, *Note on the outcome of the International Meeting on the Role of National Human Rights Institutions in Promoting the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, Bangkok, Thailand, 16-17 December 2009*.

4 Navanethem Pillay, United Nations High Commissioner for Human Rights, opinion piece for the International Day of the World's Indigenous Peoples, 9 August 2009.

In response to the ongoing obstacles hindering the full and effective realization of the rights of indigenous peoples, there have been significant advances in the development of international standards for the protection of indigenous peoples' rights at the international level. These advances culminated in the adoption of the Declaration by the General Assembly in September 2007.⁵

Although NHRIs have broad mandates which require that they protect and promote all human rights for all persons, there are strong arguments for NHRIs to devote special attention to the situation of indigenous peoples' human rights.

NHRIs are uniquely positioned to monitor implementation by States. The central role they can play in this regard has been noted by several United Nations bodies and mechanisms, including the Human Rights Council,⁶ the United Nations Permanent Forum on Indigenous Issues,⁷ the Expert Mechanism on the Rights of Indigenous Peoples⁸ and the Special Rapporteur on the rights of indigenous peoples.⁹ This role can be achieved through work regularly undertaken by most NHRIs, including advocacy, complaint handling, human rights education, review and formulation of laws in line with human rights standards and monitoring of their State's human rights performance.

CONTENT

This Manual is divided into three parts. The first part outlines the background and legal context of the rights of indigenous peoples, including an analysis of the content of the Declaration.

The second part outlines the practical steps that NHRIs can undertake to promote the realization of the rights of indigenous peoples, using the Declaration as the normative framework. Examples of good practice from different NHRIs have been included to illustrate effective ways of implementing the Declaration. These examples are not exhaustive but provide ideas to inspire NHRIs on how they can incorporate the Declaration into their regular work.

The third part outlines the actions that NHRIs can take at the international level to promote the Declaration and its domestic implementation. Again, a selection of examples have been included to illustrate the different ways in which NHRIs can utilize the international human rights system to promote the Declaration and advance indigenous peoples' rights

Each chapter includes key questions, the legal basis for the involvement of NHRIs, discussion of the major issues and a recap of the key points.

The companion DVD-Rom features interviews with representatives from NHRIs describing their work for the protection, promotion and realization of indigenous peoples' rights, as well as interviews with leading international experts.

5 The Declaration was adopted by the General Assembly on 13 September 2007 (resolution 61/295). An overwhelming majority of States (143) voted in favour, while four States (Australia, Canada, New Zealand and the United States of America) voted against it. Eleven States abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). By January 2012, the four countries that had opposed the Declaration had moved to indicate their support.

6 Human Rights Council resolution 15/7, para. 12.

7 E/2010/43-E/C.19/2010/15, paras. 53 and 93.

8 A/HRC/12/32, p. 5; A/HRC/15/36, pp. 3-4; and A/HRC/18/43, p. 6.

9 A/64/338, para. 7.

Part I

The United Nations Declaration on the Rights of Indigenous Peoples: Background, content and implementation



Chapter 1: Background to the Declaration

Chapter 2: The content of the Declaration: Equality and non-discrimination; cultural integrity; and collective rights

Chapter 3: The content of the Declaration: Self-determination; autonomy; and participation, consultation and consent

Chapter 4: The content of the Declaration: Lands, territories and resources; development with identity, and redress and compensation

Chapter 5: The implementation of the Declaration

Introduction to Part I

The first part of the Manual is divided into five chapters. Chapter 1 begins with a brief history of developments concerning indigenous peoples at the international level and addresses the question of the definition of indigenous peoples. Chapter 2 begins the discussion on the content of the Declaration and examines the right to equality and non-discrimination, culture and the significance of collective rights. Chapter 3 discusses indigenous peoples' rights to self-determination and autonomy and addresses the rights to participation and consultation. It also explores the concept of free, prior and informed consent. Chapter 4 examines the rights to lands, territories and resources, as well as the rights for redress and compensation.

The Manual is not intended to comprehensively address each of the rights affirmed in the Declaration. Instead it seeks to provide the foundational elements of rights and thematic issues, clustering them for ease of reference and with no hierarchy between them.

Finally, Chapter 5 discusses the significance of the Declaration and its legal status and introduces Part II of the Manual on the role of national human rights institutions.

Chapter 1:

Background to the Declaration

KEY QUESTIONS

- What are indigenous peoples' human rights issues?
- How have indigenous peoples historically been treated by the international community?
- What developments have changed this historical treatment?
What are the international developments concerning indigenous peoples?
- What United Nations mechanisms address the rights of indigenous peoples?
- Who are the world's indigenous peoples?
- What are the relevant characteristics of indigenous identity?
- What does the primacy of self-identification mean?



1. INTERNATIONAL DEVELOPMENTS CONCERNING INDIGENOUS PEOPLES

Indigenous peoples are recognized as being among the world's most vulnerable, disadvantaged and marginalized peoples. Spread across the world from the Arctic to the South Pacific, they number, at a rough estimate, more than 370 million in some 90 countries. While they constitute approximately five per cent of the world's population, indigenous peoples make up 15 per cent of the world's poor and one-third of the world's extremely poor.¹⁰

Indigenous peoples each have unique and distinctive cultures, languages, legal systems and histories. Most indigenous peoples have a strong connection to the environment and their traditional lands and territories. They also often share legacies of removal from traditional lands and territories, subjugation, destruction of their cultures, discrimination and widespread violations of their human rights. Through centuries, they have suffered from the non-recognition of their own political and cultural institutions and the integrity of their cultures has been undermined. Indigenous peoples are also harmfully impacted by development processes, which pose a grave threat to their continued existence.

In response to human rights violations, indigenous peoples and their organizations have lobbied domestically and internationally to have these violations addressed. After decades of obtaining little or no attention from the international community, indigenous peoples have increasingly gained visibility and made their voices heard at international forums.

The International Labour Organization (ILO) was the first international organization to address indigenous and tribal issues and signal the need for cooperation and international attention. It has been working to protect and promote the rights of indigenous and tribal peoples since the early 1920s. ILO developed two international instruments relating exclusively to indigenous and tribal peoples: the Indigenous and

10 International Fund for Agricultural Development, *Engagement with Indigenous Peoples Policy*, 2009.

Tribal Populations Convention, 1957 (No. 107) – now closed for ratification – and the Indigenous and Tribal Peoples Convention, 1989 (No. 169).¹¹

The modern indigenous rights movement gained momentum in the 1960s and the 1970s, when a large number of non-governmental organizations (NGOs), many of which were specifically indigenous peoples' organizations, were established nationally and internationally. These organizations have shed light on systemic discrimination and human rights violations faced by indigenous peoples all over the world. In 1971, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities appointed one of its members, Martinez Cobo, as Special Rapporteur, to conduct a comprehensive study on discrimination against indigenous populations and recommend national and international measures for eliminating such discrimination. The study is commonly known as the Martinez Cobo Study.¹²

This seminal piece of work laid the foundations for the modern indigenous international human rights system and led to the establishment, in 1982, of the first United Nations mechanism with a mandate to exclusively address issues related to indigenous peoples: the Working Group on Indigenous Populations. Its primary functions was to give special attention to the development of standards concerning the rights of indigenous populations. It completed the elaboration of a draft declaration on the rights of indigenous peoples in 1993,¹³ in collaboration with governmental, indigenous and other non-governmental participants. The draft declaration was adopted in 1994 by the Sub-Commission and submitted to the Commission on Human Rights, which set up its own working group¹⁴ in 1995 to review the draft. It was adopted by the Human Rights Council at its first session held in June 2006 by a vote of 30 in favour, 2 against and 12 abstentions.¹⁵

Simultaneously, throughout the United Nations system, a range of initiatives brought increasing attention to the rights of indigenous peoples, including the establishment of a United Nations Voluntary Fund for Indigenous Populations in 1985,¹⁶ the proclamation of the International Year of the World's Indigenous People in 1993 and the adoption of two consecutive International Decades of the World's Indigenous People, beginning in 1995.¹⁷

In the same vein, the United Nations system has established a number of mechanisms with specific mandates to address the rights of indigenous peoples:

- The United Nations Permanent Forum on Indigenous Issues¹⁸ held its first session in 2002. It is an advisory body to the Economic and Social Council and is mandated to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is also mandated to, inter alia, promote coordination of activities related to indigenous issues across the United Nations system.

11 While ILO Convention No. 107 broke new ground, it promoted an assimilationist approach. In the years following its adoption, and in light of the Martinez Cobo Study and the discussions that took place at the sessions of the United Nations mechanism devoted to indigenous peoples (the Working Group on Indigenous Populations, 1982), the limitations of ILO Convention No. 107 became evident and indigenous peoples called for new international standards. In 1988 and 1989, the ILO drafted a new convention – ILO Convention No. 169 – which establishes a framework for the protection of indigenous peoples under international law. It has since provided a basis for the development of policies and programmes involving indigenous peoples by several international organizations.

12 "Study of the problem of discrimination against indigenous populations" (E/1982/34).

13 E/CN.4/Sub.2/1993/26.

14 Working group to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, Commission on Human Rights resolution 1995/32.

15 Human Rights Council resolution 2006/2.

16 General Assembly resolution 40/131. The United Nations Voluntary Fund on Indigenous Populations was established to assist representatives of indigenous communities and organizations to participate in the deliberations of the Working Group on Indigenous Populations. The General Assembly has expanded the mandate of the Fund – in resolution 56/140, resolution 63/161 and resolution 65/198 – to assist representatives to participate in sessions of the Permanent Forum, the Expert Mechanism, the Human Rights Council and the human rights treaty bodies.

17 General Assembly resolution 48/163 established the first International Decade of the World's Indigenous People (1995-2004), under the coordination of the United Nations High Commissioner for Human Rights. A second Decade (2005-2014) was established by resolution 59/174, under the coordination of the Under-Secretary General for Economic and Social Affairs. A Trust Fund was established respectively in 1995 and 2004 to fund projects and programme during both Decades.

18 Economic and Social Council resolution 2000/22. More information is available at <http://social.un.org/index/IndigenousPeoples.aspx>.

- The Expert Mechanism on the Rights of Indigenous Peoples¹⁹ was established in 2007 to provide the Human Rights Council with thematic advice on the rights of indigenous peoples. The Expert Mechanism provides its expertise mainly in the form of studies and advice on specific issues pertaining to indigenous peoples' rights. To date, it has worked on studies relating to the rights of indigenous peoples to education; the right to participate in decision-making; the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples; and indigenous peoples' access to justice.²⁰
- The Special Rapporteur on the right of indigenous peoples²¹ was established by the Commission on Human Rights (now the Human Rights Council) in 2001. The Special Rapporteur has the mandate to, *inter alia*, examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights of indigenous peoples; to identify, exchange and promote best practice; and to gather, request, receive and exchange information and communications from all relevant sources on alleged violations of their human rights and fundamental freedoms and to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations.

The three mandates can be seen as complementary. They meet annually to coordinate their activities and share information.

In addition to mechanisms specific to indigenous peoples' rights, a number of treaty-monitoring bodies play an important role in advancing the rights of indigenous peoples. For example, the Human Rights Committee (which monitors implementation of the International Covenant on Civil and Political Rights), the Committee on the Elimination of Racial Discrimination (which monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination), the Committee on the Rights of the Child (which monitors implementation of the Convention on the Rights of the Child) and the Committee on Economic, Social and Cultural Rights (which monitors implementation of the International Covenant on Economic, Social and Cultural Rights) developed a body of jurisprudence on the rights of indigenous peoples before the adoption of the Declaration.

Finally, the universal periodic review (UPR), in which all United Nations Member States are reviewed by the Human Rights Council for the performance of their human rights obligations and commitments, is becoming increasingly concerned with indigenous issues.

Actions that NHRIs can undertake to advance the Declaration through interacting and leveraging off these mechanisms and procedures are considered in Part III of this Manual.

The adoption of the Declaration by the General Assembly on 13 September 2007 marks the culmination of more than two decades of negotiations involving States and indigenous peoples. It is the most comprehensive international instrument on the rights of indigenous peoples. It gives prominence to collective rights to a degree unprecedented in international human rights law; it establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world; and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.

The importance of the recognition of the rights of indigenous peoples by the General Assembly cannot be underestimated. Chief Willton Littlechild, current member and Chairperson-Rapporteur of the Expert Mechanism, captures this sentiment:

19 Human Rights Council resolution 6/36.

20 See www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx.

21 Commission on Human Rights resolution 2001/57. The mandate was continued by the Human Rights Council and, in its resolution 15/14, the title of "Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people" was modified to "Special Rapporteur on the rights of indigenous peoples".

The UN Declaration on the Rights of Indigenous Peoples clarifies how the Universal Declaration on Human Rights applies for our survival, dignity and well-being. As an Elder wanted me to tell you, “Now I am not an object, I am not a subject, I am a human being!”²²

The United Nations Secretary-General Ban Ki-moon has stressed that, with the adoption of the Declaration, it is now time to take action to address the rights of indigenous peoples:

The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated. I encourage Member States and indigenous peoples to come together in a spirit of mutual respect and make use of the Declaration as the living document it is, so that it has a real and positive effect throughout the world.²³

This Manual will articulate how NHRIs can play a constructive role in this ongoing process.

2. WHO ARE INDIGENOUS PEOPLES?

Considerable thinking has been dedicated to defining “indigenous peoples” in the international arena.²⁴ Indigenous peoples have argued against the adoption of a formal definition at the international level, stressing the need for flexibility and for respecting the desire and the right of each indigenous people to define themselves. Reflecting this position, the former Chairperson of the Working Group on Indigenous Populations, Erica Daes, noted that “indigenous peoples have suffered from definitions imposed on them by others”.²⁵

As a consequence, no formal definition has been adopted in international law. A strict definition is seen as unnecessary and undesirable.

The Martinez Cobo Study provided the most widely cited “working definition” of indigenous peoples:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.²⁶

It also notes that an indigenous person is:

... one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.²⁷

22 “When Indigenous Peoples Win, The Whole World Wins: Address to the United Nations Human Rights Council on the 60th Anniversary of the Universal Declaration on Human Rights” in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, C. Charters and R. Stavenhagen, eds. (2009), p. 374.

23 United Nations Secretary-General, “Protect, promote endangered languages, Secretary-General urges in message for International Day of World’s Indigenous People”, 23 July 2008; available at www.un.org/News/Press/docs/2008/sgsm11715.doc.htm.

24 Working paper by the Chairperson-Rapporteur, Erica-Irene A. Daes, on the concept of “indigenous people” (E/CN.4/Sub.2/AC.4/1996/2), para. 68. See also the background paper prepared by the Secretariat of the United Nations Permanent Forum on Indigenous Issues (PFI/2004/WS.1/3).

25 Note by the Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples (E/CN.4/Sub.2/AC.4/1995/3), p. 4.

26 E/CN.4/Sub.2/1986/7/Add.4, para. 379.

27 *Ibid.*, paras. 381-382.

According to ILO Convention No. 169, indigenous peoples are descendants of populations “which inhabited a country or geographical region during its conquest or colonization or the establishment of present state boundaries” and “retain some or all of their own social, economic, cultural and political institutions”.²⁸

While not providing a definition, the Chairperson-Rapporteur of the Working Group on Indigenous Populations has listed the following factors that have been considered relevant to the understanding of the concept of “indigenous”:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.²⁹

The Chairperson-Rapporteur stressed that these factors do not, and cannot, constitute a comprehensive definition and that it may not be desirable to derive a more precise definition of indigenous peoples but rather ensure that there is a room for the reasonable evolution and regional specificity of the concept of “indigenous” in practice.³⁰

Debate over a definition of indigenous peoples has often focused on African and Asian indigenous peoples. In the Asian context, the term “indigenous peoples” is generally understood to refer to distinct cultural groups, such as “Adivasis”, “tribal peoples”, “hill tribes” or “scheduled tribes”, while some indigenous peoples in Africa are referred to as “pastoralists”, “vulnerable groups” or “hunter-gatherers”. In Africa, it is often argued that all African peoples are indigenous to Africa. This debate was addressed by the Working Group of Experts on Indigenous Populations/Communities in Africa which noted that a modern approach should put “less emphasis on the early definitions focussing on aboriginality” and instead emphasize:

- (1) Self-definition as indigenous and distinctly different from other groups within a state;
- (2) A special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples.
- (3) An experience of subjugation, marginalization, dispossession, exclusion or discrimination because of their different cultures, ways of life or modes of production than the dominant model.³¹

The above demonstrates that there is no universally-agreed definition of indigenous peoples. Despite the ongoing debate, the key criterion of self-identification as the expression of the right to self-determination of indigenous peoples is widely recognized today.

*The African Commission on Human and Peoples’ Rights agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a “people”, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands.*³²

28 Article 1(1).

29 E/CN.4/Sub.2/AC.4/1996/2, para. 69.

30 Ibid., para. 70.

31 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples Rights at its 28th ordinary session (2005), pp. 92-93.

32 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and People’s Rights, 276/2003 (4 February 2010), para. 162.

This has been reaffirmed in the Declaration. Article 33 states that, “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” ILO Convention No. 169 also asserts that self-identification as indigenous is a “fundamental criterion for determining the groups”³³ which are indigenous.

It is important that an understanding of self-identification informs the practice of NHRIs. This is particularly important in States where Governments do not recognize the legitimate claims of a people as indigenous. Regardless of the controversy around issues of definition, human rights issues facing indigenous peoples should be addressed. Part II of this Manual provides examples of NHRIs’ engagement in situations where Governments do not embrace the rights of indigenous peoples or do not recognize the existence of indigenous peoples. The absence of a formal definition should not constitute an obstacle in addressing the human rights issues affecting indigenous peoples.

Bangladesh abstained from voting on the Declaration. Explaining its position after the vote, it stated that the Declaration contained some ambiguities, particularly that “indigenous people” had not been identified or explicitly defined in any way.

In 2009, the National Human Rights Commission of Bangladesh was established. Active lobbying on the human rights issues of Adivasis (indigenous peoples) is a core part of the Commission’s five-year strategic plan. The Commission is in a position to provide a strong voice and raise the profile of indigenous peoples’ human rights issues.³⁴



KEY POINTS: CHAPTER 1

- **Indigenous peoples have unique and distinctive cultures, languages, legal systems and histories. Most have a strong connection to the environment and their traditional lands and territories. They also often share legacies of removal from traditional lands and territories, subjugation, destruction of their cultures, discrimination and widespread violations of their human rights.**
- **After decades of obtaining little or no attention from the international community, indigenous peoples have increasingly gained visibility and successfully made their voices heard at international forums.**
- **The Martinez Cobo Study helped to build the foundations for the modern indigenous international human rights system.**
- **The Declaration is the most comprehensive instrument on the rights of indigenous peoples.**
- **The United Nations system has not developed a strict definition of “indigenous peoples”, as such a definition may not be workable in all contexts and may be over-inclusive or under-inclusive.**
- **Self-identification is a key criterion for determination of a group of peoples or an individual as indigenous.**



33 Article 1 (2).

34 National Human Rights Commission of Bangladesh, *Strategic Plan of the National Human Rights Commission 2010–2015*; available at www.nhrc.org.bd.

Chapter 2:

The content of the Declaration: Equality and non-discrimination; cultural integrity; and collective rights

KEY QUESTIONS

- What are formal and de facto forms of discrimination?
- Why is there a need to adopt special measures for indigenous peoples?
- What is indigenous culture?
- How do collective rights differ from individual rights?
- Why are collective rights important for indigenous peoples?



1. THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of civil, political, economic, social and cultural rights.

The Committee on the Elimination of Racial Discrimination has clarified that the term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in the situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment.³⁵ It is important that States take into consideration the special characteristics of indigenous peoples in applying the principle of non-discrimination in their law and practice.

The Declaration provides that indigenous peoples and individuals are free and equal to all other peoples and that indigenous individuals have the right to be free from any kind of discrimination in the exercise of their rights.³⁶ It specifically calls on States to take measures to combat prejudices and eliminate discrimination; promote good relations between indigenous and non-indigenous people; and provide effective mechanisms for the prevention of, and redress for, any form of propaganda designed to promote or incite racial or ethnic discrimination directed against indigenous peoples.³⁷

The right to equality and non-discrimination requires that States combat both formal and substantive or de facto forms of discrimination. The elimination of formal discrimination may require that a State’s constitution, legislation, regulations or policies do not discriminate against indigenous peoples. The elimination of de facto discrimination requires States to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights. The obligation to eliminate

³⁵ General recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

³⁶ Article 2.

³⁷ Article 15 (2).

discrimination and provide for equality requires States to regulate the conduct of both public and private actors, as well as implement policies that provide for substantive equality.³⁸

In the context of indigenous peoples, the right to equality and non-discrimination is viewed as offering a dual protection. On the one hand, it focuses on the conditions inherently required to maintain indigenous peoples' way of life and, on the other, it focuses on attitudes and behaviour that exclude or marginalize indigenous peoples from the wider society.³⁹

The Expert Mechanism has noted, however, that some States appear to perceive a conflict between the rights enshrined in the Declaration and the principle of equality. Some States are of the view that the principle of equality prohibits States from treating any one group differently from another group. In particular, some States interpret the right to equality as prohibiting specialized programmes that target indigenous peoples. However, the Expert Mechanism has stressed that, in order to achieve substantive equality, it may be necessary to treat indigenous peoples as a distinct group experiencing unique circumstances.⁴⁰ Similarly, the Inter-American Commission on Human Rights has held that it is a well-established principle in international law that unequal treatment towards persons in unequal situation does not amount to discrimination.⁴¹ In the same vein, the Committee on the Elimination of Racial Discrimination has held that:

*... to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.*⁴²

ILO Convention No. 169, the Inter-American Court of Human Rights and the United Nations treaty bodies have recognized the need for "special measures" for indigenous peoples. These are measures intended to remedy past discrimination or to correct contemporary inequalities.

It has been held that special measures are required for indigenous peoples owing to their greater vulnerability, their historical experiences of marginalization and discrimination and the disproportionate impact that continuing human rights violations have on them.⁴³ The Committee on Economic, Social and Cultural Rights has specifically held that, where discrimination of a particular group has been pervasive, States should take a systematic approach to eliminating such discrimination.⁴⁴

The Committee on the Elimination of Racial Discrimination has drawn attention to the distinction between special and temporary measures for the advancement of ethnic groups on the one hand, and the permanent rights of indigenous peoples on the other.⁴⁵ It has clarified that the rights of indigenous peoples, including rights to lands traditionally occupied by them, are permanent rights which should not be confused with temporary special measures. "States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures."⁴⁶

38 Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

39 E/CN.4/1989/, para. 5.

40 A/HRC/EMRIP/2012/4, para. 87.

41 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172, para. 103.

42 General recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

43 For example, see Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 10; Committee on the Elimination of Racial Discrimination, general comment No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, para. 15; Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (OEA/Ser.L/V/II. Doc. 56/09, 2009), para. 18. See also the *Preliminary Observations of the Inter-American Commission on Human Rights on its Visit to Honduras, 15-18 May 2010* (DOC OEA/Ser.L/V/II.,Doc.68), para. 26.

44 General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 12.

45 CERD/C/NZL/CO/17 (2007), para. 15.

46 General recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

Such an approach may often require States to devote greater resources to particularly vulnerable groups.⁴⁷ When adopting measures to provide for substantive equality, it is important that States also facilitate the right of indigenous peoples to participate in decision-making in matters that concern them. States should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of these communities.⁴⁸ At the same time, the adoption of special measures should not undermine recognition afforded to indigenous peoples' rights as distinct and permanent rights.⁴⁹

Examples of special measures can be seen in the recognition afforded by some States to the collectively-held land rights of indigenous peoples.⁵⁰ The African Commission on Human and Peoples' Rights held in the *Endorois* case that such special measures are necessary in order to address the discrimination experienced by indigenous peoples under a property system that did not give recognition to the communal property rights of the Endorois people.⁵¹ In the *Saramaka* case, the Inter-American Court held that:

*... the aim and purpose of special measures required on behalf of members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states.*⁵²

The Special Rapporteur on the rights of indigenous peoples has cautioned that a holistic approach must be adopted when developing special measures to address inequalities. In particular, policies that address substantive inequalities must not be limited to social and economic aspects of indigenous lives, but must also address the right to self-determination, the right to maintain distinct cultural identities and the right to maintain relationships with traditional lands.⁵³ Thus, efforts to address substantive inequality must be adopted in collaboration with indigenous peoples, allowing them to take control of their own affairs, in accordance with their cultures and beliefs.

The Declaration also draws special attention to the position of indigenous women and children and requires that they enjoy full protection against all forms of discrimination.⁵⁴ In particular, all rights in the Declaration must be equally enjoyed by indigenous men and women.⁵⁵ It is important to note that policies that discriminate against indigenous peoples may impact disproportionately on indigenous women owing to their gender.⁵⁶ The Expert Mechanism has commended national-level programmes which, as well as seeking to redress imbalances between non-indigenous and indigenous peoples, specifically seek to ensure equality among indigenous men and women.⁵⁷ In this regard, it is important that States empower indigenous women, ensure their participation in the design, delivery and monitoring of programmes, and build on indigenous women's own initiatives.

47 Committee on Economic Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural right, para. 39.

48 Expert Mechanism on the Rights of Indigenous Peoples, "Final study on indigenous peoples and the right to participate in decision-making" (A/HRC/EMRIP/2011/2).

49 Expert Mechanism on the Rights of Indigenous Peoples, "Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples" (A/HRC/EMRIP/2012/3), para. 87. See also Committee on the Elimination of Racial Discrimination, general comment No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, para. 15.

50 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172; *Yakye Axa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Judgement of 17 June 2005, Series C No. 125; the *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001, Series C No. 79.

51 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 196.

52 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172, para. 32.

53 Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, "The situation of indigenous peoples in Australia" (A/HRC/15/37/Add.4, 2010), para. 53.

54 Article 22 (2).

55 Article 44.

56 Committee on the Elimination of Racial Discrimination, general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, para. 2.

57 A/HRC/EMRIP/2012/4, para. 69.

At times, tensions have been perceived between the right to equality and indigenous peoples' right to culture. It has been argued that indigenous traditions and customs can be discriminatory, especially towards women. For example, some cultural practices may inhibit education of the girl-child or prevent women from inheriting land or participating in decision-making processes.⁵⁸ The Expert Mechanism has cautioned that such practices should not be assessed from a non-indigenous perspective. What may be perceived as discrimination should be understood within indigenous cultural practices and historical contexts. When assessing such practices, the perspective of the victim of the allegedly discriminatory practice should be prioritized. Indeed, the perspective of indigenous women is often unique and different from the perspectives of non-indigenous women. At the same time, discrimination against individuals should be eliminated.⁵⁹

Article 46 (2) of the Declaration states that any limitation must be “in accordance with international human rights obligations”. It must also be “non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society”.



Wayuu women, part of Colombia's largest indigenous group, support themselves with artisan work in the village of Pessuapa, near the border with Venezuela. UN Photo/Gill Fickling.

58 International Labour Organization, *Indigenous & Tribal Rights in Practice, A Guide to ILO Convention No. 169* (2009).

59 A/HRC/EMRIP/2012/3, paras. 86-87.

2. DISTINCT IDENTITY AND CULTURAL INTEGRITY

Indigenous peoples' culture is a defining part of their identity. In many cases, the impact of assimilationist policies on indigenous peoples' languages and cultures has been extremely harmful, threatening the continuing cultural existence of indigenous peoples.

The Declaration provides for the protection of the distinct identity and cultural integrity of indigenous peoples through:

- The right to maintain and strengthen their distinct cultural institutions⁶⁰
- The right to belong to an indigenous community or nation in accordance with the customs of the community or nation concerned⁶¹
- The right to practice, revitalize and transmit their cultural traditions and customs⁶²
- The right to control their education systems and institutions providing education in their own languages⁶³
- The right to promote, develop and maintain their institutional structures, customs, spirituality, traditions and juridical systems⁶⁴
- The right to maintain, control and develop their cultural heritage and traditional knowledge⁶⁵
- The right not to be subjected to forced assimilation or destruction of their culture.⁶⁶

In this context, it is worth noting that article 8 (j) of the Convention on Biological Biodiversity requires States to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”.

States are also under an obligation to take action to prevent and provide redress for any action that deprives indigenous peoples of their integrity as distinct peoples, their cultural values or ethnic identities and any form of forced assimilation or integration.⁶⁷

The Expert Mechanism has provided the following non-exhaustive definition of indigenous culture:

*Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous cultures is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering.*⁶⁸

60 Article 5.

61 Article 9.

62 Article 9.

63 Articles 14 and 15. See also A/HRC/EMRIP/2012/3.

64 Article 34.

65 Article 31.

66 Article 8 (1).

67 Article 8 (2).

68 A/HRC/EMRIP/2012/3, paras. 51-52. See also Human Rights Committee, general comment No. 23 (1993) on article 27 (the rights of minorities), para. 7; and Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right to culture, para. 10.

The Human Rights Committee has held that, for indigenous peoples, the right to culture can require that a range of other rights are also fulfilled. These can include the right to participate in customary activities;⁶⁹ the right to access lands, territories and resources;⁷⁰ the right to family;⁷¹ and the right to participate in decision-making processes that affect their cultural rights.⁷²

The Committee on the Elimination of Racial Discrimination has called upon States to “recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation”, to “provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics” and to “ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.”⁷³

Further, the concept of indigenous spirituality is inherently connected to culture. Adopting policies that promote certain religions or prohibit indigenous spiritual practices, or the failure of laws or other governmental institutions, such as the police and courts, to respect indigenous spiritual practices, can undermine the right to culture. The Expert Mechanism has drawn attention to the right of indigenous peoples to repatriation of their ceremonial objects and human remains, which may require the cooperation of individuals and organizations where such remains are kept, including museums.⁷⁴ The Special Rapporteur on the rights of indigenous peoples, while commending efforts to promote cultural diversity through policies and programmes that seek to support aesthetic aspects of cultural expression, has emphasized that States must similarly commit to recognizing cultural diversity in all its forms, including political and social structures, land use patterns and approaches to development.⁷⁵

The Expert Mechanism has further highlighted that indigenous women and children are often holders of significant cultural knowledge.⁷⁶ However, they can also be disproportionately affected by violations of the right to culture. In this regard, the Committee on the Rights of the Child has held that States may have to adopt special measures to facilitate the right to culture of indigenous children.⁷⁷ In adopting such measures, States must pay heed to the significance of the collective nature of indigenous children’s enjoyment of their cultures and the need to include indigenous peoples in decisions about the best interests of indigenous children, including the need for cultural sensitivity.⁷⁸ Language education is absolutely critical to the preservation of indigenous peoples’ cultures. It is important that effective measures are taken to preserve indigenous languages and that indigenous children be taught in their own language during the early school years and receive a multicultural education that does not devalue their indigenous cultural identity.

69 *Lansman v Finland*, Communication No. 511/1992, views adopted 26 October 1994.

70 *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984, views adopted 26 March 1990. See also Human Rights Committee, general comment No. 23 (1993) on article 27 (the rights of minorities), paras. 3.2 and 7.

71 *Hopu & Bessert v France*, Communication No. 549/1993, views adopted 29 July 1997.

72 *Mahuika v New Zealand*, Communication No. 547/1993, views adopted 15 November 2000. The Human Rights Committee has held that the right to self-determination is inherently connected to the right to culture. The Committee held that in order to facilitate articles 1 and 27 of the International Covenant on Civil and Political Rights, States are required to give indigenous peoples greater influence in decision-making in matters that affect their natural environment, their means of subsistence and their culture. See Human Rights Committee, “Concluding Observations on the United States of America” (15 September 2006), para. 37; and Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life, paras. 3, 7 and 36-37.

73 General recommendation No. 23 (1997) on indigenous peoples.

74 A/HRC/EMRIP/2012/3, paras. 56-61.

75 “The situation of indigenous peoples in Botswana” (A/HRC/15/37/Add.2), para. 30.

76 A/HRC/EMRIP/2012/3, para. 79.

77 Committee on the Rights of the Child, general comment No. 11 (2009) on indigenous children and their rights under the Convention.

78 *Ibid.*

3. SIGNIFICANCE OF COLLECTIVE RIGHTS

Articles 1 and 2 of the Declaration state that indigenous peoples have the right to enjoy all human rights and freedoms from discrimination, as individuals and collectively. The Declaration gives prominence to collective rights to a degree unprecedented in international human rights law.

Indigenous peoples often organize their societies as a group. The Expert Mechanism has explained the collective dimension to indigenous peoples' way of life:

Values of collective responsibility and respect for elders, ancestors, spirits and the community are often embodied in indigenous cultures, which can guide indigenous individuals' behaviour in everyday life ... Indigenous peoples have unique structures and institutions that have developed over time. These structures often have family as a primary unit, expanding to larger communal and social institutions, and are generally governed by indigenous law and sacred teachings.⁷⁹

Given the collective character inherent in indigenous cultures, individual rights are not always adequate to give full expression to indigenous peoples' rights. The rights contained in the Declaration seek to protect, in addition to individual rights, the collective rights of indigenous peoples because recognition of such rights is necessary to ensure the continuing existence, development and well-being of indigenous peoples as distinct peoples. Past experiences have shown that unless the collective rights of indigenous peoples are respected, there is a risk that such cultures may disappear through forced assimilation into the dominant society.



A Squamish father and daughter. Bella Bella, Heiltsuk Nation, Canada. UN Photo/John Isaac.

79 A/HRC/EMRIP/2012/3, paras. 53-54.

The notion that indigenous peoples can hold rights, such as the right to own property, as a collective is consistent with the principle of non-discrimination and the right to culture. For instance, the Committee on Economic, Social and Cultural Rights has required information from a State party regarding the protection of the collective rights of indigenous peoples related to their traditional knowledge and cultural heritage, including ancestral lands, as an integral part of their cultural identity.⁸⁰ The Inter-American Court and Commission on Human Rights have in a number of cases confirmed that indigenous peoples hold collective property rights to their lands and resources.

For example, in the case of the *Mayagna (Sumo) Awas Tingni vs Nicaragua*, the Court held that:

*... among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.*⁸¹

The African Commission on Human and Peoples' Rights has concurred with this conclusion and recognized the collective rights to lands in the *Endorois* case.⁸²

Both the United Nations treaty bodies and the Expert Mechanism have recognized the need to facilitate the collective rights of indigenous peoples. For example, the collective element in indigenous cultures is reflected in their traditional work ethic, communal values and societal structures based on the family unit. These values are, for example, expressed in indigenous communities through mechanisms such as councils of elders, which are traditionally given authority to address issues in the community.

The Expert Mechanism has noted that the imposition of governmental and other administrative bodies has undermined traditional mechanisms such as these that give expression to the underlying collective aspect of indigenous cultures.⁸³ Indeed, governmental requirements that indigenous peoples organize themselves in ways that are acceptable to Governments may not be consistent with indigenous forms of organization and can undermine their cultures.

Further, the Declaration seeks to protect and preserve indigenous peoples' traditional knowledge, including cultural expressions, as well as genetic resources. Many current legal frameworks protect the intellectual property of individuals only, rather than intellectual property interests of a community or group of people, thus failing to adequately protect the collective rights of indigenous peoples.⁸⁴ The Expert Mechanism has stressed the need for international legal mechanisms to address such gaps and to give full protection to the rights of the indigenous peoples under the Declaration.⁸⁵

Practical issues can arise as to who can represent the beneficiaries of collective rights. This can be especially important when attempting to fulfil obligations related to the acquisition of free, prior and informed consent, fair and equitable benefit-sharing and attempting to use legal remedies. The Expert Mechanism has emphasized that, where it is unclear who the legitimate representatives are, indigenous communities should be permitted to resolve such questions in accordance with their customs, culture and decision-making institutions.⁸⁶

80 "Concluding Observations on Argentina" (14 December 2011), paras. 12 and 25.

81 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Judgment of August 31, 2001, Series C No. 79, para. 149.

82 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and People's Rights, 276/2003, (4 February 2010).

83 A/HRC/EMRIP/2012/3, paras 52 and 55.

84 *Ibid.*, para. 62.

85 *Ibid.*

86 Expert Mechanism on the Rights of Indigenous Peoples, "Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries" (A/HRC/EMRIP/2012/2), paras. 15-16.

The Special Rapporteur on the rights of indigenous peoples has identified legal mechanisms that provide for comprehensive consultation with indigenous peoples on all matters that directly affect their interests, with a duty to provide full information at all stages of the decision-making process, as being best practices that can help secure the collective rights of indigenous peoples.⁸⁷ Another best practice approach highlighted by the Special Rapporteur is legal recognition of indigenous villages as administrative units.⁸⁸



A child plays with a poster at the observance of the International Day of the World's Indigenous People. UN Headquarters, New York. UN Photo/Stephenie Hollyman.

87 "The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland" (A/HRC/18/35/Add.2), para. 16.

88 "The situation of indigenous peoples in the Republic of the Congo" (A/HRC/18/35/Add.5), para. 42.

KEY POINTS: CHAPTER 2

- The elimination of formal discrimination may require that a State's constitution, legislation and/or policies do not discriminate against indigenous peoples.
- The elimination of de facto discrimination may require States to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights and to adopt special measures.
- The Expert Mechanism has commended national-level programmes which, in addition to seeking to redress imbalances between non-indigenous and indigenous peoples, specifically seek to ensure equality between indigenous men and women.
- The Declaration does not specifically define "culture". The Expert Mechanism has noted that it is not necessary, and may not even be appropriate, to define culture. A broad view of indigenous cultures should be adopted.
- Indigenous peoples often organize their societies as a group, which is why recognition of collective rights is essential for indigenous peoples.



Chapter 3:

The content of the Declaration: Self-determination; autonomy; and participation, consultation and consent

KEY QUESTIONS

- What is self-determination?
- Why is the right to self-determination important for indigenous peoples?
- What can indigenous peoples do to promote and exercise their right to self-determination?
- What procedures should be used for consultations with indigenous peoples? What does free, prior and informed consent mean?
- When does the right to consent apply?



1. THE RIGHT TO SELF-DETERMINATION, AUTONOMY, SELF-GOVERNMENT AND INDIGENOUS INSTITUTIONS

Indigenous peoples have long traditions of self-government, independent decision-making and institutional self-reliance. While particular circumstances vary, indigenous peoples throughout the world have exercised what is now described as the right to self-determination as an inherent right derived from their political, economic and social structures, as well as their cultures, spiritual traditions, histories and philosophies, throughout their histories.⁸⁹

Historical, and in many cases contemporary, patterns of discrimination have impaired the free exercise of the right to self-determination by indigenous peoples and interfered with their capacity to exercise control over those decisions which impact their daily lives. In many cases, the lack of meaningful involvement of indigenous peoples in decision-making processes has resulted in detrimental impacts, marginalization and a legacy of economic, social, cultural and physical challenges.

Indigenous peoples' rights to autonomy and self-government are reflected throughout the Declaration, but chiefly in articles 3 and 4. These provisions affirm that:

... indigenous peoples have the right to self-determination ...in exercising their right to self-determination, [indigenous peoples] have the right to autonomy and self-government in matters relating to their internal and local affairs.

Reflecting the state of contemporary international law, the affirmation of self-determination in the Declaration is deemed compatible with the principle of territorial integrity and political unity of sovereign

⁸⁹ United Nations Declaration on the Rights of Indigenous Peoples, seventh preambular paragraph.

and independent States.⁹⁰ In article 3, the Declaration affirms the right of indigenous peoples to self-determination, in terms that mirror the common provisions of article 1 of the two 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The Declaration articulates its application in relation to the particular circumstances of indigenous peoples.

Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination.⁹¹

It is worth noting that the Committees that oversee the implementation of common article 1 of the Covenants have confirmed that this right applies to indigenous peoples, among other peoples. For instance, the Committee on Economic, Social and Cultural Rights expressed its concern “about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant” and urged “the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence”.⁹²

The right to self-determination is a collective right held by all members of an indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.⁹³ As is the case with all rights in the Declaration, the right to self-determination is universal, inalienable and indivisible. It is also interdependent and interrelated with all of the other rights in the Declaration.⁹⁴ While all rights in the Declaration are understood to have equal status, the right to self-determination has been described as a “foundational” right, without which the other human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed”.⁹⁵ Accordingly, the right to self-determination should be an ever-present consideration in the effective implementation of the Declaration and is vital for the continuing existence of indigenous peoples as distinct peoples.⁹⁶

Autonomous political, economic and social structures of indigenous peoples support the effective exercise of their right to self-determination. The Declaration recognizes the right of indigenous peoples to autonomy or self-government in matters relating to their internal and local affairs (article 4), as well as the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (article 5). The Declaration also recognizes that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, judicial systems or customs, in accordance with international human rights standards (article 34).

The Declaration affirms that indigenous peoples have the right to ways and means for financing their autonomous functions (article 4) and that indigenous peoples have the right to access financial and technical assistance from States, and through international cooperation, for the enjoyment of the rights contained in the Declaration (article 39). The Special Rapporteur on the rights of indigenous peoples has recommended to a State that sufficient funding be provided for indigenous peoples to effectively exercise their self-governance functions.⁹⁷

90 Article 46 (1).

91 Expert Mechanism on the Rights of Indigenous Peoples, “Final report of the study on indigenous peoples and the right to participate in decision-making” (A/HRC/EMRIP/2011/2).

92 “Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation” (E/C.12/1/Add.94), paras. 11 and 39.

93 Article 46 (3).

94 Inter-Agency Support Group on Indigenous Issues, *United Nations Development Group Guidelines on Indigenous Peoples’ Issues* (22 October 2009), p. 27.

95 Special Rapporteur on the rights of indigenous people, “The situation of indigenous peoples in Brazil” (A/HRC/12/34/Add.2, 2009), para. 22.

96 Inter-Agency Support Group on Indigenous Issues, *United Nations Development Group Guidelines on Indigenous Peoples’ Issues* (22 October 2009), p. 17.

97 A/HRC/18/35/Add.2, para. 78.

It has been noted that indigenous peoples are “distinct from, yet joined to, larger units of social and political interaction”.⁹⁸ Self-determination serves as a basis for those interactions and the meaningful participation of indigenous peoples facilitates effective, good-faith dialogue:

*The fundamental condition to realizing the right of self-determination in practice is trust between peoples. Trust is impossible without cooperation, dialogue and respect. Governments have nothing to fear from indigenous peoples; they can learn to respect and trust ... to be able to live together peacefully, without exploitation or domination [indigenous peoples and Governments] must continually renegotiate the terms of their relationship.*⁹⁹

Consequently, the recognition and promotion of indigenous peoples’ right to self-determination buttresses the processes of forming and maintaining constructive relations between indigenous peoples and States and facilitates mutual efforts to overcome legacies of historical injustice:

*[T]he right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of “belated State-building”, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.*¹⁰⁰

There are many approaches to achieving effective implementation of the right to self-determination within the State context and the most effective are those that are developed in cooperation with indigenous peoples.



Young Salaseca Indians in Ambato, Ecuador. UN Photo/Milton Grant.

98 J. Anaya, “The right of indigenous peoples to self-determination in the post-Declaration era” in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, p. 193.

99 E. Daes, “Striving for self-determination for indigenous peoples” in *In pursuit of the right to self-determination*, Y. Kly and D. Kly, eds. (2000), p. 57.

100 E/CN.4/Sub.2/1993/26/Add.1, para. 26.

INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE (A/65/264, 2010)

Enhancing indigenous self-determination is a matter of basic human dignity as well as being conducive to successful practical outcomes. Among the objectives to be pursued in this regard are the following:

- (a) **Enhancing indigenous education and skills in relevant areas so that indigenous peoples themselves can engage and participate in the various components of development programmes and projects that affect them in the modern world, including natural resource extraction projects;**
- (b) **Strengthening indigenous peoples' own institutions and self-government structures to empower them to take control of their own affairs in all aspects of their lives and to ensure that development processes are aligned with their own cultural patterns, values, customs and world-views;**
- (c) **Providing indigenous peoples with the opportunity to participate as equal partners in the development process when both their particular interests and the interests of the larger societies of which they form a part are implicated, allowing them to genuinely influence decisions concerning development activities, fully participate in their design and implementation and directly benefit from any economic or other benefits that are derived from them;**
- (d) **Allowing indigenous peoples the opportunity to continue to progress and improve decision-making concerning development on their own terms, and to remedy any shortcomings through their own forms of internal regulation and accountability. In this regard, indigenous peoples should be allowed the opportunity to make mistakes, to learn from those mistakes and to build ever greater capacity and wisdom to advance in their own development objectives and choices about the future.**



Indigenous peoples may exercise self-determination through participating in, and influencing the law and decision-making processes of the State. An example may be found in Law No. 5-2011 on the promotion and protection of the rights of indigenous peoples from the Republic of the Congo, which the Special Rapporteur on the rights of indigenous peoples has described as being developed in a participatory manner and serves as “good practice in the region for the recognition and protection of the rights of indigenous peoples.”¹⁰¹

Indigenous peoples may also exercise control over the legislation and administrative functions of the State in areas which affect their nations or communities through the devolution of State governance powers. Examples of devolved decision-making power are present in the Sami parliaments of Norway, Sweden and Finland.¹⁰² A further option for implementing the right to self-determination is the effective recognition of indigenous peoples' political and legal institutions by the State and the exercise of direct decision-making power in accordance with their own laws, traditions and customs.

101 A/HRC/18/35/Add.5, para. 41.

102 A/HRC/18/35/Add.2.

In addition to these approaches, some States, in collaboration with indigenous peoples, have taken significant steps to enhance the legislative and administrative powers of indigenous peoples through guaranteed representation in legislative bodies, constitutionally-protected self-government agreements and legally-mandated consultation with indigenous peoples where administrative and legislative decisions would impact the interests of indigenous peoples.¹⁰³

For example, the New Zealand Parliament includes seats that have been specifically designated for indigenous Maori, with the number of “Maori seats” determined based on the level of the electoral population. Similarly, the Constitution of Burundi provides six reserved seats for the Batwa indigenous peoples in the National Assembly and the Senate. The Constitution of India also provides for the reservation of seats in the Parliament for indigenous scheduled tribes.

As noted previously, the right to self-determination is multi-faceted and is relevant to the meaningful exercise of all of the rights protected in the Declaration, including rights to maintain and develop institutional structures to support the exercise of the right to self-determination. The Declaration specifically recognizes the right of indigenous peoples to establish and control their educational systems and institutions (article 14) and to promote, develop and maintain judicial systems or customs (article 34). The exercise of the right to self-determination is often expressed through the development of treaties, agreements and constructive arrangements based on the mutual agreement of indigenous peoples and States.¹⁰⁴ It should also be noted that the Declaration makes clear that the exercise of the rights in the Declaration does not extend to activities or rights which would impair the territorial integrity or political unity of sovereign and independent States.¹⁰⁵

The jurisprudence of United Nations bodies and mechanisms provides important guidance on the implementation of the right to self-determination. For example, the Special Rapporteur on the rights of indigenous peoples has recommended to a State that it provide effective recognition of indigenous peoples’ institutions or authority and customary laws, to the extent compatible with universal human rights standards. He has also recommended the facilitation of greater decision-making power by indigenous peoples over the delivery of government services in their communities, enhancements in indigenous peoples’ representation in legislative, executive and judicial institutions at the local, state and federal levels and adequate consultations with indigenous peoples in regard to all legislative or administrative decisions affecting them.¹⁰⁶

The right to self-determination is also intrinsically tied to indigenous peoples’ rights over lands and natural resources, which has been identified by the Special Rapporteur as a prerequisite for the continued existence of indigenous peoples throughout the world as distinct peoples.¹⁰⁷

The promotion and exercise of the right to self-determination also requires the active efforts of indigenous peoples to develop and strengthen indigenous institutions and other facets of the right to self-determination. The Special Rapporteur has noted that “[i]ndigenous peoples themselves should endeavour to strengthen their capacities to control and manage their own affairs and to participate effectively in all decisions affecting them, in a spirit of cooperation and partnership with government authorities and NGOs with which they chose to work”.¹⁰⁸ Strengthening indigenous peoples’ institutions and self-governing structures is an important step towards empowering indigenous peoples to take control of their own affairs in all aspects of their lives and to ensure that development processes are aligned with their own cultural patterns, values, customs and worldviews.

103 Inter-Parliamentary Union, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples: A Handbook for Parliaments* (2012).

104 See article 37 of the Declaration, and Expert Mechanism on the Rights of Indigenous Peoples Advice No. 2 (2011) on indigenous peoples and the right to participate in decision-making, para. 34.

105 Article 46 (1).

106 A/HRC/12/34/Add.2, paras. 78-82.

107 A/HRC/18/35/Add.2, para. 79.

108 A/HRC/18/35/Add.5, para. 90.

2. PARTICIPATION AND CONSULTATION

International human rights law refers to the right to participate in both general and specific forms.¹⁰⁹ The Declaration contains more than 20 provisions affirming the right of indigenous peoples to participate in decision-making, articulated as, inter alia, (a) the right to self-determination; (b) the right to autonomy or self-government; (c) the “right to participate”; (d) the “right to be actively involved”; (e) the duty of States to “obtain their free, prior and informed consent”; (f) the duty to seek “free agreement” with indigenous peoples; (g) the duty to “consult and cooperate” with indigenous peoples; (h) the duty to undertake measures “in conjunction” with indigenous peoples; and (i) the duty to pay due “respect to the customs” of indigenous peoples.¹¹⁰

Article 18 of the Declaration establishes that “indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”.

The Declaration requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (article 19).

The right to participation is also present in those articles of the Declaration which affirm the rights of indigenous peoples to be consulted regarding, or to consent to, decisions which will affect their interests.

The Expert Mechanism has discussed the relationship between the right to self-determination and the participation of indigenous peoples in decision-making. It has noted that self-determination is an ongoing process which ensures that indigenous peoples continue to participate in decision-making and have control over their own destinies. It means that the institutions of decision-making should be devised to enable indigenous peoples to make decisions related to their internal and local affairs, as well as to participate collectively in external decision-making processes in accordance with relevant human rights standards.¹¹¹

Other United Nations bodies have addressed elements of the right of indigenous peoples to self-determination in the context of consultation and participation. The Committee on the Elimination of Racial Discrimination has emphasized the importance of participation by indigenous peoples’ freely chosen representatives in processes of constitutional negotiation and has recommended respect for the principle of free, prior and informed consent in those negotiations.¹¹² The Committee on Economic, Social and Cultural Rights has also issued a general comment on the right to culture, emphasizing the communal nature of indigenous people’s culture and the importance of indigenous peoples’ lands to those cultures. In its general comment No. 21, the Committee addresses the obligation to:

*... allow and encourage the participation of persons belonging to ... indigenous peoples ... in the design and implementation of laws and policies that affect them.*¹¹³

The Special Rapporteur on the rights of indigenous peoples has recommended to a State that it build greater opportunities for indigenous peoples to participate in decision-making processes and to recognize, strengthen and accommodate indigenous peoples’ own decision-making institutions and authority.¹¹⁴

109 For a summary of the international human rights framework relating to the right to participate in decision-making, see the progress report on the study on indigenous peoples and the right to participate in decision-making (A/HRC/15/35, 2010) prepared by the Expert Mechanism on the Rights of Indigenous Peoples.

110 Ibid., para. 8.

111 Ibid., para. 31.

112 For example, the Committee sent an “early warning” letter on this issue to the Government of Nepal, dated 13 March 2009 and available at www2.ohchr.org/english/bodies/cehd/docs/early_warning/Nepal130309.pdf.

113 Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life, para. 36.

114 A/HRC/18/35/Add.5, para. 83.

He has further noted that involving indigenous peoples in decision-making facilitates better outcomes for projects and programmes. He has expressed the view that without the consultation and buy-in of indigenous peoples at the earliest stages of the development of government initiatives, the effectiveness of those programmes, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. A lack of adequate consultation can lead to situations of conflict, as well as indigenous expressions of anger and mistrust, which, in some cases, have spiralled into violence.¹¹⁵

The Expert Mechanism has completed a study on the right of indigenous peoples to participate in decision-making and has issued advice on the subject to the Human Rights Council.¹¹⁶ It has noted the special opportunities for NHRIs to promote the participation of indigenous peoples in the discussions and decisions which concern them.

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES: FINAL STUDY ON INDIGENOUS PEOPLES AND THE RIGHT TO PARTICIPATE IN DECISION-MAKING¹¹⁷

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



The Expert Mechanism has also identified resource extraction as a thematic area requiring special attention in relation to the right of indigenous peoples to participate in decision-making. It has noted that while States retain the primary obligation to ensure indigenous peoples' right to participate is respected, nevertheless, to meet their own responsibility to respect human rights, extractive businesses should ensure, and make their own assessment as to, compliance with the right of indigenous peoples to participate in decision-making. Indeed, positive experience illustrates that extractive industries should work in partnership with States and indigenous peoples at all planning and implementation stages of extractive activities that might impact on indigenous peoples' interests.¹¹⁸

The right of indigenous peoples to participate in decision-making is a key component in achieving reconciliation between indigenous peoples and States and, when effectively implemented, affords an effective means of combating the legacy of exclusion and marginalization affecting indigenous peoples throughout the world.

115 A/HRC/12/34, para. 36.

116 Expert Mechanism on the Rights of Indigenous Peoples, "Progress report on the study on indigenous peoples and the right to participate in decision-making" (A/HRC/15/35, 2010), "Final report of the study on indigenous peoples and the right to participate in decision-making" (A/HRC/18/42, 2011), including Advice No. 2 on indigenous peoples and the right to participate in decision making, and "Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries" (A/HRC/EMRIP/2012/2), including Advice No. 4 on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries. The issue of indigenous peoples' participation in the United Nations system has also been examined in a report of the Secretary-General, "Ways and means of promoting participation at the United Nations of indigenous peoples' representatives on issues affecting them" (A/HRC/21/24, 2012).

117 A/HRC/EMRIP/2011/2, annex, para. 37.

118 A/HRC/EMRIP/2012/2, annex: Advice No. 4 on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, para. 40. See also the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/17/31) and Human Rights Council resolution 17/4.

Consultation with indigenous peoples is a process, rather than a single event, and the procedures by which consultations are undertaken will be dependent on the circumstances requiring the consultation. In all cases, consultations should be guided by the overarching requirement of good faith.¹¹⁹ They should be undertaken with the aim of achieving agreement or consent about the proposed measure. As noted by the Special Rapporteur, the principles guiding consultation are “designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement”.¹²⁰

Treaty bodies have also called upon numerous Governments to carry out consultations with indigenous peoples on matters affecting their rights and interests. In light of its general recommendation No. 23 (1997), the Committee on the Elimination of Racial Discrimination has urged States to establish practical mechanisms for implementing the right to consultation in a manner that respects the prior, free and informed consent of the affected peoples and communities and to ensure that such consultations are carried out systematically and in good faith.¹²¹ It has also recommended that effective consultations be carried out with communities likely to be affected by projects to develop and exploit natural resources, with the aim of obtaining their free, prior and informed consent at each stage of the process, particularly in the case of mining projects.¹²²

Similarly, the Committee on Economic, Social and Cultural Rights has recommended that, prior to the construction of hydro-electric projects, a State undertakes comprehensive impact assessments and extensive consultations with affected communities, providing them with genuine opportunities to present their views and influence decision-making.¹²³ The Committee on the Rights of the Child has also recommended that companies be required to undertake assessments, consultations and full public disclosure of the environmental, health-related and human rights impacts of their business activities and their plans to address such impacts.¹²⁴ While the obligation to consult is borne by States, corporations and other private actors are also required to respect the human rights of indigenous peoples. They can also play an important role in promoting and protecting the rights of indigenous peoples.¹²⁵

The objectives of these consultations can vary greatly. Accordingly, the Special Rapporteur on the rights of indigenous peoples has encouraged States and industry to look beyond compensation agreements and to encourage ownership interest and profit-sharing in extractive industries, when indigenous peoples are so inclined. The Special Rapporteur has also recommended diverse forms of interaction between indigenous peoples, States and business enterprises. For example, in relation to a major hydroelectric development project, he recommended establishing a group of independent experts to facilitate the consultation under the auspices of the United Nations.

3. FREE, PRIOR AND INFORMED CONSENT

Free, prior and informed consent is more than consultation. States have the obligation to have consent as the objective of consultation before any of the following actions are taken:

- The adoption of legislation or administrative policies that affect indigenous peoples (article 19)
- The undertaking of projects that affect indigenous peoples’ rights to land, territory and resources, including mining and other utilization or exploitation of resources (article 32).

119 See articles 19, 32 and 46 of the Declaration. See also A/HRC/12/34, paras. 46-53.

120 A/HRC/12/34, paras. 46 and 49.

121 See the Committee’s concluding observations on Bolivia (Plurinational State of) (CERD/C/BOL/CO/17-20) and Ecuador (CERD/EQU/CO/20-22).

122 Concluding observations on Mexico (CERD/C/MEX/Q/16-17).

123 Concluding observations on Ethiopia (E/C.12/ETH/CO/1-3).

124 Concluding observations on Namibia (CRC/C/NAM/CO/2-3).

125 See A/HRC/17/31 and Human Rights Council resolution 17/4. For an in-depth examination of corporate responsibility with respect to indigenous rights, see the report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/15/37).

In certain circumstances, there is an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. For example, the Declaration explicitly requires States to obtain consent of indigenous peoples in cases of:

- The relocation of indigenous peoples from their lands or territories (article 10)
- The storage or disposal of hazardous materials on indigenous peoples' lands or territories (article 29)

Furthermore, indigenous peoples who have unwillingly lost possession of their lands, when those lands have been “confiscated, taken, occupied or damaged without their free, prior and informed consent” are entitled to restitution or other appropriate redress that can include lands equal in size and quality or just, fair and equitable compensation (article 28). In addition, indigenous peoples are entitled to redress with respect to cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent (article 11).

Other circumstances may also require free, prior and informed consent depending on the nature of the proposed measure and the scope and depth of its impact on indigenous peoples. According to the Expert Mechanism, the right of free, prior and informed consent is an “integral element” of the right to self-determination and obtaining such a consent is required in matters of fundamental importance for the rights, survival, dignity and well-being of indigenous peoples.¹²⁶ Similarly, the Special Rapporteur on the rights of indigenous peoples has stressed that “a significant direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.”¹²⁷



A Mongolian herder milks her yaks in Must, Khovd Province, Mongolia. UN Photo/Eskinder Debebe.

126 Advice No. 2 (2011) on indigenous peoples and the right to participate in decision-making.

127 A/HRC/12/34, para. 47.

The Committee on the Elimination of Racial Discrimination also calls for both consultation and informed consent in its interpretation of the rights of indigenous peoples in applying the International Convention on the Elimination of All Forms of Racial Discrimination. In its general recommendation No. 23, the Committee requires States parties to ensure that indigenous peoples have equal rights to participate in public life and that no decisions relating directly to indigenous peoples are to be taken without their informed consent. With specific reference to land and resource rights, the Committee calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples. It has also highlighted the obligation of States to ensure that the right of indigenous peoples to free prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources.¹²⁸ More recently, the Committee on Economic, Social and Cultural Rights has further expanded on free, prior and informed consent in general comment No. 21. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the rights of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples. It also calls on States parties to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights” and to “obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.¹²⁹

In the same vein, the Inter-American Court of Human Rights held in the *Saramaka* case that the State has a duty to not only consult with indigenous peoples, but also to obtain their free, prior and informed consent, according to their customs and traditions, in cases of large-scale development or investment projects that would have a major impact within indigenous peoples’ territory.¹³⁰

In relation to the practical application of the principle of free, prior and informed consent, the following guidance has been provided:

*Free, should imply that there is no coercion, intimidation or manipulation, and **Prior** should imply consent being sought sufficiently in advance of any authorisation or commencement of activities and respective requirements of indigenous consultation/consensus processes. **Informed** should imply that information is provided that covers a range of aspects, [including, **inter alia**] ... the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project ...; the duration; locality or areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a **consent** process.*¹³¹

A number of intergovernmental development agencies and international financial institutions have incorporated free, prior and informed consent into their policies and programmes on indigenous peoples. The United Nations Development Programme policy on indigenous peoples “promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them”.¹³² The Operational Policy on Indigenous Peoples and Strategy for Indigenous Development adopted by the Inter-American Development Bank promotes “participation mechanisms and processes that must take into account the general principle of the free, informed and

128 See, for example, the Committee’s concluding observations on the Lao People’s Democratic Republic (CERD/LAO/CO/16-18) and Canada (CERD/CAN/CO/19-20).

129 Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life.

130 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172.

131 United Nations Permanent Forum on Indigenous Issues, “Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, New York, United States of America, 17-19 January 2005” (E/C.19/2005/3), paras. 46-49.

132 United Nations Development Programme, *UNDP and Indigenous Peoples: A Policy of Engagement* (2001).

prior consent of indigenous peoples”¹³³ and stipulates that “before approving operations with particularly significant potentially adverse impacts on indigenous peoples, the Bank will demand evidence that the project proponent has reached satisfactory and duly documented agreements with the peoples affected, or has obtained their consent”.¹³⁴ The European Bank for Reconstruction and Development also recognizes the need to obtain the free, prior and informed consent of indigenous peoples before starting any activity on traditional lands, the relocation of indigenous peoples or any project proposing to use the cultural resources, knowledge, innovations or practices of indigenous peoples for commercial purposes.¹³⁵

The issue of with whom the State can seek consent is critical. In this regard, several communities around the world are working on establishing their own protocols on how outsiders should communicate with them to obtain their free, prior and informed consent. The consent of indigenous peoples should be determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that the consent process will be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

In addition, mechanisms and procedures should be established to verify that free, prior and informed consent has been sought. In order for these mechanisms to function properly, indigenous peoples must be included in their development. States are to provide effective mechanisms for redress when the free, prior and informed consent of indigenous peoples has not been sought. This redress may include restitution or compensation. If it is determined that the elements of free, prior and informed consent have not been respected, it may lead to the revocation of consent given.

Many avenues are open to States to ensure that indigenous peoples benefit from the full protection of the principle of free, prior and informed consent, provided that indigenous peoples are meaningfully engaged in manner that is consistent with their culture and institutions.

133 Inter-American Development Bank, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development* (2006), p. 34.

134 *Ibid.*, p. 39.

135 European Bank for Reconstruction and Development, *Performance Requirement PR-7* (2008).

KEY POINTS: CHAPTER 3

- **The right to self-determination is a collective right held by all members of an indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.**
- **Autonomous political, economic and social structures of indigenous peoples support the effective exercise of the right to self-determination by indigenous peoples.**
- **Indigenous peoples have the right to participate in decision-making in matters that may affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.**
- **The Declaration requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.**
- **Consultation and participation are crucial components of a consent process.**



Chapter 4:

The content of the Declaration: Lands, territories and resources; development with identity; and redress and compensation

KEY QUESTIONS

- What are the lands, resources and territories of indigenous peoples?
- How do indigenous peoples relate to their lands, resources and territories?
- What protections exist in relation to the lands, resources and territories of indigenous peoples?
- What avenues of redress do indigenous peoples have in relation to their rights to lands, territories and resources?
- What is development with culture and identity?



1. CHALLENGES FACED BY INDIGENOUS PEOPLES IN RELATION TO LANDS AND NATURAL RESOURCES

From time immemorial, indigenous peoples have maintained a special relationship with the land, their source of livelihood and sustenance and the basis of their very existence as communities. The issues of land, territory and access to natural resources remain central to observing the human rights and fundamental freedoms of indigenous peoples.

The nature and importance of those relationships is fundamental for both the material subsistence and the cultural integrity of many indigenous peoples.¹³⁶ The Permanent Forum has commented on the significance of the relationship between indigenous peoples and their lands:

Land is the foundation of the lives and cultures of indigenous peoples all over the world. This is why the protection of their right to lands, territories and natural resources is a key demand of the international indigenous peoples' movement and of indigenous peoples and organizations everywhere. It is also clear that most local and national indigenous peoples' movements have emerged from struggles against policies and actions that have undermined and discriminated against their customary land tenure and resource management systems, expropriated their lands, extracted their resources without their consent and led to their displacement and dispossession from their territories. Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct cultures is threatened.

¹³⁶ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System* (OEA/Ser.L/V/II. Doc. 56/09, 2009), para. 56.

*Land rights, access to land and control over it and its resources are central to indigenous peoples throughout the world, and they depend on such rights and access for their material and cultural survival. In order to survive as distinct peoples, indigenous peoples and their communities need to be able to own, conserve and manage their territories, lands and resources.*¹³⁷

Indigenous peoples, if deprived of the natural resources pertaining to their lands and territories, may be deprived of meaningful economic and political self-determination and self-development. In many situations, indigenous peoples may also be effectively deprived of their cultures and the enjoyment of other human rights by reason of extreme poverty and lack of access to their means of subsistence.¹³⁸

Two of the primary constraints on the full and free enjoyment of indigenous peoples' rights to lands, territories and resources relate to either the failure of States to recognize the existence of indigenous use, occupancy and ownership or the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land.¹³⁹

Other indigenous groups face challenges relating to the abrogation of treaty rights and the failure to demarcate lands.

Issues of land tenure and indigenous peoples can generate a great deal of complexity and conflict where domestic law has developed without appropriation, recognition or protection for indigenous peoples' rights to lands, territories and natural resources. Many indigenous peoples experience the loss of lands due to expropriation for national interests and the associated removals and relocations have had many negative impacts on the well-being of indigenous communities and their enjoyment of their rights.¹⁴⁰

The social, environmental and cultural impacts of large-scale development projects and extractive industries are also an increasing concern for many indigenous peoples. The Special Rapporteur on the rights of indigenous peoples has identified extractive industries as a subject of special concern during his mandate.¹⁴¹



A Bakoya Pygmy woman outside her home in the village of Imbong in Gabon's northeastern Ogooué-Ivindo province. UN Photo/Gill Fickling.

137 E/2007/43 and E/C.19/2007/12, paras. 5-6.

138 E/CN.4/Sub.2/2004/30, para. 58.

139 E/CN.4/Sub.2/2001/21, para. 34.

140 Ibid., paras. 48-84.

141 A/HRC/18/35.

2. THE RIGHTS OF INDIGENOUS PEOPLES TO THEIR LANDS, RESOURCES AND TERRITORIES

What constitutes the lands, resources or territory of a particular indigenous people will depend on the specific circumstances of the community in question. The Declaration recognizes indigenous peoples' rights to their lands, territories and resources, including rights to those lands, territories and resources traditionally held by indigenous peoples but now controlled by others as a matter of fact and also law.

The Declaration provides broad recognition of the rights of indigenous peoples to land, territories and natural resources, including:

- The right to strengthen their distinctive spiritual relations with lands and resources (article 25)
- The right to own, use, develop and control the lands, territories and resources that indigenous peoples possess by reason of traditional ownership (article 26)
- The right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent (article 28)
- The right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (article 29)
- The right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources (article 32)

The Declaration requires States to take measures to uphold and promote the rights of indigenous peoples relating to lands, territories and resources, such as imposing restrictions on the storage or disposal of hazardous materials in the lands or territories of indigenous peoples (article 29) and placing restrictions on the use of lands and territories of indigenous peoples for military activities (article 30).

The Inter-American human rights system has a highly developed body of jurisprudence regarding indigenous peoples' rights to lands and resources. It has decided on indigenous land possession in a number of cases. For instance, the Court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.¹⁴²

The African Commission on Peoples' and Human Rights has confirmed that indigenous peoples hold property rights to the lands and natural resources they traditionally used. In the view of the African Commission in the *Endorois* case, the following conclusions can be drawn:

- (1) Traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title;
- (2) Traditional possession entitles indigenous people to demand official recognition and registration of property title;
- (3) The members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and
- (4) The members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.¹⁴³

142 *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001, Series C NO. 66, para. 151.

143 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 209.

In the *Endorois* case, the African Commission held the view that, in the pursuit of creating a game reserve, the State unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It also held that that the upheaval and displacement of the Endorois and the denial of their property rights over their ancestral land was disproportionate to any public need served by the game reserve.

The Special Rapporteur on the rights of indigenous peoples has actively promoted the resource and land rights of indigenous peoples through thematic and country visit reports.¹⁴⁴ Indigenous rights relating to the protection of lands, territories and resources have implications that extend beyond the protection of the lands themselves. The associated concerns have been examined by several special procedure mandate holders.

The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, has recommended that actions be taken to protect indigenous lands as part of the protection of the right to an adequate standard of living. The Special Rapporteur has also noted that “measures aiming at realization of indigenous peoples’ right to adequate housing should include respect for their traditional lands and elaboration of culturally sensitive land and housing policies”.¹⁴⁵

The Special Rapporteur on the right to food has on numerous occasions recommended to States that they take action to ensure the protection of indigenous peoples’ rights to lands in order to ensure their enjoyment of the right to food.¹⁴⁶

Indigenous peoples’ land and resource rights derive from their rights to cultural integrity, non-discrimination, self-determination and property, including the right to collective ownership or use. Consultation and the right to consent are also critical elements of indigenous peoples’ right to lands and natural resources. The interpretation of these rights by regional and international human rights bodies, as well as its application in relation to indigenous peoples’ rights to lands and natural resources, are examined in Chapters 2 and 3 of this Manual.

3. DEVELOPMENT WITH CULTURE AND IDENTITY

While indigenous peoples have the right to develop in common with the broader communities and societies in which they live, there are often particular concerns relating to indigenous peoples that must at all times be taken into account with regard to development initiatives that affect them.¹⁴⁷ The concept of development with culture and identity recognizes that indigenous peoples may assess the well-being of their communities and the appropriate use of their lands, territories and resources in a manner that is distinct from non-indigenous communities.

In many instances, development paradigms of modernization and industrialization have contributed to the destruction of natural resources and indigenous governance, economic, social, education, cultural, health, spiritual and knowledge systems. Indigenous peoples have also encountered challenges when trying to maintain their strategies and priorities for their lands, territories and resources because their cultures and identities are seen as “obstacles” to progress. Development with culture and identity is characterized by a holistic approach that seeks to build on collective rights, security and greater control and self-governance of lands, territories and resources.¹⁴⁸

144 See, for example, the Special Rapporteur’s reports to the Human Rights Council on extractive industries operating within or near indigenous territories (A/HRC/18/35 and A/HRC/21/47).

145 E/CN.4/2006/41/Add.3, p. 22.

146 A/HRC/13/33/Add.5.

147 A/65/264, para. 25.

148 United Nations Permanent Forum on Indigenous Issues, “Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, Report of the international expert group meeting, New York, United States of America, 19-30 April 2010” (E/C.19/2010/14), paras. 19-22.

The Declaration provides a comprehensive normative framework for advancing development with culture and identity, centred on articles 3 and 32. These articles recognize the right of indigenous peoples to determine and develop priorities and strategies regarding the development of their lands, territories and resources, based on their right to self-determination. Central to the exercise of self-determination is the right of indigenous peoples to maintain their own representative institutions and to have those institutions respected and consulted by both States and corporations. Traditional knowledge and language are key elements in development with culture and identity and indigenous peoples' interests, knowledge and experience must be at the centre of methodologies when constructing knowledge about indigenous peoples.¹⁴⁹

NHRIs are well positioned to promote development with culture and identity. Conflicts relating to lands, territories and resources may be brought to the attention of NHRIs and, through application of the Declaration, NHRIs may help to ensure that indigenous peoples' strategies and priorities are respected. NHRIs may also contribute to research and policy development to enhance knowledge of indigenous peoples' rights, including the right to self-determination, and to guide the establishment of institutional structures to support the implementation of these rights.

4. REDRESS AND COMPENSATION

NHRIs are also well positioned to promote and protect indigenous peoples' rights through applying and promoting the articles of the Declaration pertaining to lands, territories and resources. The Declaration recognizes various rights relating to redress and compensation for the violation of indigenous peoples' rights to lands, resources and territories.

Article 28 details the rights of indigenous peoples for redress and compensation where their lands, territories and resources have been taken, used or damaged without consent. This right provides a remedy for indigenous peoples who no longer possess their lands and territories so that:

- Where possible, lands, territories and resources that indigenous peoples no longer possess are returned
- Alternatively, fair compensation should be paid, which could include the provision of other lands, territories and resources, monetary compensation, development opportunities (i.e. employment opportunities) or any other benefits to which indigenous peoples agree.

Replicating the approach taken by the Committee on the Elimination of Racial Discrimination in its general recommendation No. 23, restitution of lands and territories is to be the primary means of redress. Only when restitution is not possible should other forms of redress and compensation be explored.¹⁵⁰

149 Ibid., paras. 40, 42 and 44.

150 See also J. Gilbert and C. Doyle, "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent" in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, S. Allen and A. Xanthaki, eds. (2011), p. 299.

KEY POINTS: CHAPTER 4

- **What constitutes the lands, territories and resources of a particular indigenous people will depend on the specific circumstances of the community in question.**
- **Key impediments to the full and free enjoyment of indigenous peoples' rights to lands, territories and resources include the failure of States to recognize the existence of indigenous use, occupancy and ownership and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land.**
- **States have an obligation to provide effective mechanisms for redress when the free, prior and informed consent of the indigenous peoples has not been sought.**



Chapter 5:

The implementation of the Declaration

KEY QUESTIONS

- What is the legal status of the Declaration?
- How does the Declaration relate to other international standards?
- What role can NHRIs play to advance the rights of indigenous peoples?



1. THE LEGAL STATUS OF THE DECLARATION

The Declaration was adopted through resolution 61/295 of the General Assembly. Unlike treaties or conventions, resolutions do not *per se* create legally binding obligations on States. However:

*... as a resolution adopted with the approval of an overwhelming majority of Member States, the Declaration represents a commitment on the part of the United Nations and Member States to its provisions, within the framework of the obligations established by the Charter of the United Nations.*¹⁵¹

The Declaration does not create new or special rights for indigenous peoples; rather, it elaborates on existing human rights standards and articulates them as they apply to the particular situation of indigenous peoples. Therefore, the Declaration illustrates the interdependent and indivisible nature of international human rights norms and standards:

The United Nations Declaration on the Rights of Indigenous Peoples represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No. 169 and other relevant instruments and processes.

*The Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.*¹⁵²

In a joint statement to celebrate the 2008 International Day of the World's Indigenous People, the Acting High Commissioner for Human Rights, Kyung-wha Kang, and the Special Rapporteur on the rights of indigenous peoples, James Anaya, made this call for a political commitment to the Declaration:

151 A/64/338, para. 48.

152 A/HRC/9/9, paras. 85-86.

*[T]he adoption of the Declaration [...] – important though it was – will not in itself change the everyday lives of men, women and children whose rights it champions. For this we need the political commitment of States, international cooperation, and the support and goodwill of the public at large, to create and implement a range of intensely political programmes, designed and undertaken in consultation with indigenous peoples themselves.*¹⁵³

The Declaration adopts language that imposes obligations and responsibilities on States.¹⁵⁴ Accordingly, the United Nations system is increasingly recommending that States take concrete and targeted actions in this regard. For example, the Special Rapporteur on the rights of indigenous peoples has made recommendations to States that they review their laws and policies that impact on indigenous peoples in light of the Declaration.¹⁵⁵

As noted previously, the rights of indigenous peoples are grounded in international human rights instruments. Provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination are particularly relevant to indigenous peoples' issues. The treaty bodies have, in their reports and recommendations, provided general interpretations of the rights set out in these treaties and their application to indigenous peoples:

- The Committee on the Elimination of Racial Discrimination issued general recommendation No. 23, which calls on States parties to ensure indigenous peoples' rights to culture, land and political participation are recognized. It has also clarified that indigenous peoples' rights, which are permanent rights, should not be confused with temporary "special measures" – which are measures intended to remedy past discrimination or to correct contemporary inequalities – in a general comment on special measures.
- The Committee on the Rights of the Child adopted an important and extensive general comment on the rights of the indigenous child and has made references to the Declaration in its examination of State party reports.
- The Human Rights Committee continues to invoke the right to self-determination in relation to indigenous peoples, particularly article 1 (2) (the right to freely dispose of natural wealth and the right to be secure in the means of subsistence). It has also highlighted the obligation on States to "ensure that indigenous peoples are able to exercise their right to free, prior and informed consent".¹⁵⁶ Further, the Committee has interpreted article 27 (the right to culture) as a valid basis for indigenous peoples' claims to land and resources.
- The Committee on Economic, Social and Cultural Rights has also made reference to article 1 in relation to the effective enjoyment by indigenous peoples of their rights to ancestral domains, lands and natural resources. It has adopted a general comment on non-discrimination in relation to economic, social and cultural rights that is very relevant to indigenous peoples. The Committee has also adopted an important general comment on the right to take part in cultural life that contains substantial text on indigenous peoples and affirms the rights recognized in the Declaration. It relates territorial rights to cultural identity, using language from the Declaration about indigenous peoples' right to own and control their lands, territories and resources, as well as stressing that States should respect the principle of free, prior and informed consent in all matters that affect the rights of indigenous peoples.

153 Joint statement by Acting United Nations High Commissioner for Human Rights and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (9 August 2008), available at www.un.org/events/indigenous/2008/hmessage.shtml.

154 See, for example, articles 38, 41 and 42 of the Declaration.

155 For example, the Special Rapporteur recommended that the Russian Federation should "engage in a comprehensive review of the laws and policies of the Russian Federation to ensure their compatibility with the Declaration, and take further coordinated action to implement the standards of the Declaration within the particular context of indigenous peoples in Russia" (A/HRC/15/37/Add.5), para. 82.

156 CCPR/C/TGO/CO/4, para. 21.



Wide-view of the 61st session of the General Assembly, 13 September 2007. UN Photo/Paulo Filgueiras.

A number of additional factors add weight to the importance of the Declaration and its potential to influence human rights norms:

- At the time of its adoption, the Declaration was supported by most States, with only four voting against it (Australia, Canada, New Zealand and the United States of America) and 11 abstentions.¹⁵⁷ The four States who voted against the Declaration have all since reversed their position. This worldwide support indicates an international consensus on the normative expression of the rights of indigenous peoples in a way that is coherent with existing international human rights standards. The consistent reference to the Declaration in the universal periodic review (UPR) process further highlights this international consensus.¹⁵⁸
- The drafting of the Declaration extended over a period of 20 years. During this time, both indigenous peoples and States were actively involved in what a number of States described as “negotiations”.¹⁵⁹ Consequently, the Declaration is evidence of the common ground between the indigenous peoples of the world and United Nations Member States.¹⁶⁰ As the Special Rapporteur on the rights of indigenous peoples has noted, the advocacy and participation of indigenous peoples over decades gives a high degree of legitimacy to the Declaration and the norms contained within it “substantially reflect indigenous peoples’ own aspiration”.¹⁶¹
- It is increasingly argued that aspects of the Declaration already form part of customary international law.¹⁶²

157 “General Assembly adopts Declaration on the Rights of Indigenous Peoples; ‘Major step forward’ towards human rights for all, says President, 61st session of the General Assembly, 107th and 108th Plenary Meeting” (GA/10612), 13 September 2007.

158 See, for example, A/HRC/12/8/Add.1, para. 6; and A/HRC/11/17, para. 86 and recommendations 45 and 52.

159 E. Voyiakis, “Voting in the General Assembly as Evidence of Customary International Law?” in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, 216.

160 E/C.19/2009/14, annex, para. 9.

161 A/65/264.

162 E/C.19/2009/14, annex, paras. 6-13; and J. Anaya and S. Wiessner, “OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment” in *Jurist*, 3 October 2007, available at <http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>.

2. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

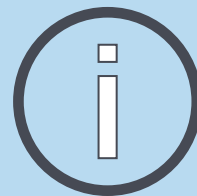
NHRIs are uniquely placed to operate as a bridge between the international human rights system and the on-the-ground reality experienced by indigenous peoples. NHRIs are a vital part of strong national human rights protection system and play a key role in linking international standards with domestic protection.

There are significant differences between the structure and functions of different NHRIs. This reflects the distinct domestic contexts in which NHRIs operate. However, the Paris Principles provide a broad normative framework from which NHRIs undertake their specific programmes of work. It is through this framework that NHRIs can work to advance the protection, promotion and realization of indigenous peoples' human rights.

PARIS PRINCIPLES

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
 - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures
 - (ii) Any situation of violation of human rights which it decides to take up
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government
 - (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation



- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation**
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence**
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights**
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles**
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.**

Additional principles concerning the status of commissions with quasi-judisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;**
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;**
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;**
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.**

This broad mandate enables NHRIs to engage with all relevant actors at the national level, as well as to interact with international mechanisms, in order to contribute and advance the promotion, protection and realization of indigenous peoples' human rights.

For example, NHRIs can utilize their technical expertise to monitor and advise Governments to ensure that their laws and policies are consistent with, and provide protection for, the rights contained in the Declaration. In addition, the education functions of NHRIs can help raise awareness of indigenous peoples' human rights and how they may be exercised.

NHRIs also generally have quasi-judicial powers which enable them to investigate and sometimes initiate complaints, as well as conduct public hearings and national inquiries into violations of indigenous peoples' human rights.

KEY POINTS: CHAPTER 5

- **The Declaration is a resolution of the General Assembly. Resolutions *per se* do not create legally binding obligations on States.**
- **The Declaration does not create new rights for indigenous peoples. It elaborates on existing human rights standards and articulates them as they apply to indigenous peoples.**
- **The Declaration adopts language that imposes obligations and responsibilities on States.**
- **Treaty bodies are using the Declaration in their work and recommendations to States.**
- **The Paris Principles establish a broad normative framework from which NHRIs can undertake distinct programmes of work to advance the protection, promotion and realization of the rights of indigenous peoples.**



Part II

National human rights institutions' domestic activities and functions



Chapter 6: Accessibility of NHRIs to indigenous peoples

Chapter 7: Awareness raising and education

Chapter 8: Promoting domestic compliance with the Declaration

Chapter 9: Investigations and complaints

Chapter 10: Public inquiries

Introduction to Part II

The primary responsibility for the promotion and protection of indigenous peoples' human rights resides with States.¹⁶³

By definition, NHRIs play a pivotal role in assisting their State to meet its human rights obligations. They can play a crucial role in advocating, lobbying and advising the State and others, such as corporations, to uphold their responsibilities.¹⁶⁴

NHRIs can play an important role in raising public awareness of human rights issues and have strategic opportunities to collaborate with indigenous peoples' organizations and other NGOs to address indigenous peoples' human rights issues.

NHRIs also monitor State compliance with national and international human rights standards and many have complaint handling and investigatory functions.

Finally, NHRIs are uniquely placed to engage with the international human rights system, both in contributing to international reporting processes and disseminating relevant information domestically.

Part II of this Manual describes the practical actions that NHRIs can take to advance the rights of indigenous peoples, as articulated in the Declaration.

163 It should be remembered that the role of corporations – particularly transnational corporations – is coming under increasing spotlight by the human rights sphere. See, for example, A/HRC/15/37, paras. 26-91.

164 APF, *Advisory Council of Jurists Reference on Human Rights, Corporate Accountability and Government Responsibility* (2008).

Chapter 6:

Accessibility of NHRIs to indigenous peoples

KEY QUESTIONS

- How can NHRIs promote and position themselves to be accessible to indigenous peoples?
- How can NHRIs effectively engage with indigenous peoples?
- How can NHRIs build an indigenous presence within their institution?



FOUNDING PRINCIPLES FOR NHRI INVOLVEMENT

Paris Principles

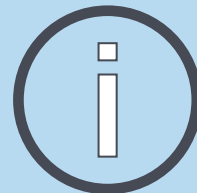
Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government
- (f) Publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
 - (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists.



Methods of operation

Within the framework of its operation, the national institution shall:

- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions.**
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions).**
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.**

For NHRIs to effectively contribute to the protection, promotion and realization of indigenous peoples' human rights, they must be structured and operate in a manner that is readily accessible to indigenous peoples and the broader public.

1. ACCESSIBILITY

1.1. PROMOTING AWARENESS OF THE INDEPENDENCE OF NHRIs

It is important that NHRIs promote themselves and their functions to the community.

This self-promotion becomes more important when targeting minority or marginalized groups, such as indigenous peoples. Unless indigenous peoples are aware of the existence and functions of the NHRI, they will not find it accessible.

Standard forms of communication may not be sufficient when undertaking outreach activities that seek to engage indigenous peoples. Consistent with human rights principles, it is the responsibility of the NHRI to adjust its promotional messaging to meet the needs of its diverse constituency, including the needs of indigenous peoples. Accordingly, NHRIs will need to develop flexible and culturally appropriate methods of outreach and to use indigenous languages when necessary.

One critical message that needs to be conveyed to indigenous peoples is that “A status” NHRIs – that is, those that comply with the Paris Principles – are independent bodies. Targeted promotional activities highlighting the independence of the NHRI from the State can build help awareness of that independence among indigenous peoples.

1.2. PROMOTING AWARENESS OF THE ACTIVITIES OF THE NHRI

NHRIs should also recognize that, while they are independent bodies, they are also organs of their States. This could negatively impact on the perception of the NHRI by indigenous peoples. Given the historical legacies of State-sanctioned discrimination, it is not uncommon for indigenous peoples to be wary of engaging with government bodies. This wariness may also extend to the NHRI. Consequently, it is important that NHRIs provide clear messaging about their role, particularly their independence from the Government, and actively work with indigenous peoples to promote trust.¹⁶⁵

¹⁶⁵ *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4/Rev.1 (United Nations publication, Sales No. E.09.XIV.4), p. 13.

The website of the *Defensoría del Pueblo de Perú* is available in both Spanish and an indigenous language (Quechua). Some awareness raising materials are also available in indigenous languages.¹⁶⁶



See Chapter 7 for a more detailed discussion of promotional strategies for NHRIs.

1.3. ACCESSIBILITY

NHRIs must also be physically accessible to their constituencies. Indigenous peoples often live in geographically isolated locations and the physical inaccessibility of NHRIs can pose significant challenges.

The *Kenya National Commission on Human Rights* has two regional offices located in marginalized areas of the country and both have a significant population of indigenous peoples. The Commission plans to establish more regional offices.¹⁶⁷



It is not uncommon for NHRIs to have one office located in the country's capital city or another central location with a large population. Funding constraints might make this situation an unavoidable reality.

Nevertheless, it is important that NHRIs do not unintentionally exclude people living in remote locations. Potential avenues to extend the reach of NHRIs include:

- Geographical decentralization
- Deployment of field officers
- Creation of “consultation hubs”
- Engagement with indigenous peoples' organizations, peak bodies and representative bodies
- Creative use of technology, including the internet and social networking media
- Road shows in rural areas.

It is particularly important that the ability of NHRIs to receive and adequately investigate complaints of human rights violations is not hindered by their geographic location. Where necessary, NHRIs can develop alternative procedures that facilitate effective investigation and resolution of complaints without the need for individuals to personally attend the NHRI's office.¹⁶⁸

¹⁶⁶ Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

¹⁶⁷ Ibid.

¹⁶⁸ *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, pp. 82-83.

The **Office of the Ombudsman in Namibia** has undertaken a range of actions to increase its accessibility to people living in isolated areas. In addition to establishing two regional offices, 152 “visiting points” have been set up throughout the country. Depending on budget, these locations are visited two or three times each year to collect complaints.

To complement the regional complaint intake clinic programmes, the Ombudsman also visits indigenous communities for “community meetings”. The purpose is to meet traditional chiefs and inform them and community members of the functions and duties of the Ombudsman and to attend to matters brought to the Office.

The Ombudsman also uses radio as a tool to reach the remote and largely illiterate indigenous communities in the country. The Namibia Broadcasting Corporation broadcasts in all indigenous languages. Radio spots are used to provide information on human rights and the role of the Ombudsman, which is presented by a staff member in an indigenous language.¹⁶⁹



In addition to physical accessibility, NHRIs need to be culturally accessible to indigenous peoples. NHRIs can take a range of actions to ensure that as an institution indigenous peoples feel culturally safe when they engage with it. Some of these actions are detailed in the following subsections.

2. BUILDING TRUST WITH INDIGENOUS PEOPLES' ORGANIZATIONS

In order to foster effective engagement with indigenous peoples, NHRIs must do more than ensure that their structures are accessible. Cooperative working relationships based on trust and mutual respect must be fostered between NHRIs and indigenous peoples and indigenous peoples' organizations. The duty to consult and the principle of free, prior and informed consent should guide the development of these relationships.

The **Canadian Human Rights Commission** participates at annual general meetings of First Nations and other indigenous peoples' stakeholder groups. At these meetings the Commission distributes education and awareness raising materials on human rights and on the Commission's functions. This participation helps build relationships of trust and confidence between the Commission and First Nations peoples.

The Commission's also hosts Discrimination Prevention Forums to help strengthen partnerships and networking connections. In 2010, the Commission's Circle of Awareness, Cycle of Growth Forum focused on the rights of indigenous peoples, particularly issues relating to the workplace.¹⁷⁰ The Forum enabled indigenous, corporate, Government and NGO participants to interact in an informal setting, which included practical workshops and plenary sessions.



169 Presentation to OHCHR workshop, *Toward an Operational Guide for National Human Rights Institutions: Possible good practices in addressing the rights of Indigenous Peoples*, Geneva, Switzerland, 11 July 2011.

170 Further information is available at www.chrc-ccdp.ca/preventing_discrimination/forum_2010_forum/archives-eng.aspx.

Indigenous peoples' organizations can provide expertise to the NHRI to ensure that its activities to engage indigenous peoples are properly targeted and are culturally and linguistically appropriate. Furthermore, cooperative relationships with indigenous peoples' organizations can help foster a perception of legitimacy of the NHRI and its work in the eyes of the relevant indigenous peoples. This can help break down a possible reluctance to engage with the NHRI.

The need for cooperative engagement with indigenous peoples' organizations is discussed in more detail in Chapter 7, in the context of the promotional activities of NHRIs.

3. CREATING AN INDIGENOUS PRESENCE WITHIN NHRIs

In addition to cooperative engagement with indigenous peoples' organizations, the staffing composition of NHRIs should reflect the diversity of their constituencies. It is particularly important that vulnerable groups, including indigenous peoples, are represented in the workforce of NHRIs and are consulted on activities and policies of NHRIs which impact on indigenous rights and indigenous communities. Workforce representation needs to occur throughout the organization, including at decision-making levels.¹⁷¹

As far as possible, NHRIs should advertise vacancies widely outside of capital cities so that indigenous candidates living in rural areas have the opportunity to apply for vacancies. Once appointed, indigenous staff can be a valuable source of knowledge for NHRIs regarding issues, customs and cultural sensitivities of indigenous peoples. Indigenous NHRI staff can also help indigenous communities to better understand the role and functions of the NHRI. However, the mere presence of indigenous staff in NHRIs may not be sufficient to gain the trust of indigenous communities. To better ensure that indigenous staff are seen as credible appointees, NHRIs should ensure that the recruitment of indigenous staff is carried out in an open, fair and consultative manner.

Within the *Procurador de los Derechos Humanos de Guatemala* is the Office for the Protection of Rights of Indigenous Peoples. The Office was created in 1998 with the aim of defining policies and general strategies for the Ombudsman to confront violations of indigenous peoples' human rights. This includes violations of collective rights.

The Ombudsman employs 51 indigenous staff who can speak their mother tongue, which assists the institution to receive complaints made by indigenous people in their own language.¹⁷²



Employment programmes and targeted hiring policies to attract indigenous peoples can be effective tools to enhance an indigenous “presence” within NHRIs.

171 See the *New Delhi Guidelines on the establishment of National Institutions on the Rights of Indigenous Peoples*, available at www.aitpn.org/NIRIPS/new_delhi_guidelines.pdf.

172 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

The **New Zealand Human Rights Commission**¹⁷³ has a specific mandate to “promote by research, education and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law”.

The Commission promotes the Declaration alongside its Treaty work. The team within the Commission tasked with leading this work is called “Ahi Kaa”, which in the Maori language means “to keep the home fires burning”.

In practice, its role is to:

- Facilitate relationships between the Commission and Maori communities
- Provide advocacy and leadership for the Commission’s role in promoting respect for, and an understanding of, indigenous rights
- Promote the Treaty of Waitangi to the public as the promise of two peoples to take the best possible care of each other
- Assist the Commission to include indigenous rights and the Treaty across all of the work of the Commission.



Creating an indigenous presence within NHRIs can also be advanced through specific programmes of work. NHRIs could seek to establish units or programmes specifically focused on advancing the protection, promotion and realization of the human rights of indigenous peoples.

NEW DELHI GUIDELINES ON THE ESTABLISHMENT OF NATIONAL INSTITUTIONS ON THE RIGHTS OF INDIGENOUS PEOPLES¹⁷⁴

In October 2008, representatives of indigenous peoples attended a regional conference organized by Asian Indigenous and Tribal Peoples Network. The conference adopted guidelines for the establishment of any National Institution on the Rights of Indigenous Peoples.

These guidelines focused on areas including:

- Constitution; mandate, staff composition and appointment and structure
- Functions and powers; quasi-judicial functions, investigatory powers
- Procedures; inquires and reporting
- Financial autonomy.

These guidelines can assist NHRIs in establishing indigenous-specific units within their institutions.



173 Information provided by the New Zealand Human Rights Commission.

174 Available at www.aitpn.org/NIRIPS/new_delhi_guidelines.pdf.

A programme of work could either be general in nature (i.e. focusing on the entire situation of the indigenous peoples within the specific State) or targeted to a particular thematic area (i.e. focusing on indigenous peoples rights to lands, territories and resources). Staff employed in these programmes should meet additional selection criteria, which ensure that they are suitably skilled and experienced to work sensitively and appropriately with indigenous peoples.¹⁷⁵

If suitable staff cannot be identified, NHRIs could engage appropriately qualified and experienced consultants to work on the relevant programmes or projects. Partnerships and collaborations with indigenous peoples' organizations will again be important in this regard.

The Aboriginal and Torres Islander Social Justice Commissioner of the Australian Human Rights Commission¹⁷⁶ has a mandate to promote, advocate and monitor the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples (the indigenous peoples of Australia). This work includes an annual report to the Parliament of Australia that makes recommendations regarding the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples and an annual report on the effect of the Native Title Act on the exercise and enjoyment of these rights.

The Special Rapporteur on the rights of indigenous peoples stated that:

... the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the Australian Human Rights Commission [is] an exceptional model for advancing the recognition and protection of rights of indigenous peoples.¹⁷⁷

The Commissioner is supported by a small team of policy staff in the Social Justice Unit of the Commission. All staff employed in the Social Justice Unit are required to meet two additional selection criteria:

- **A demonstrated knowledge and understanding of human rights issues facing Aboriginal and Torres Strait Islanders in contemporary Australian society and the diversity of circumstances of Aboriginal and Torres Strait Islander peoples**
- **A demonstrated ability to communicate sensitively and effectively with Aboriginal peoples and Torres Strait Islanders.**

These criteria help ensure that the staff of the Social Justice Unit can work effectively to assist the Commissioner's work and have the skills to engage appropriately with indigenous peoples and their organizations.



175 Ibid.

176 Information provided by the Australian Human Rights Commission.

177 A/HRC/15/37Add.4, para. 78.



Pressing of noses (Hongi), a form of greeting in Maori culture, signifies sharing of the life force and the breath of life. UN Photo/Evan Schneider.

4. ENGAGING WITH INDIGENOUS PEOPLES

It is critical that NHRIs engage effectively with indigenous peoples and their organizations when undertaking work to advance the protection, promotion and realization of indigenous peoples' human rights. Without meaningful engagement of indigenous peoples and their organizations, it will not be possible for NHRIs to adequately address the human rights issues that confront indigenous peoples.

The Norwegian Centre for Human Rights has established an advisory committee to help guide and inform its activities. The advisory committee consists of a broad spectrum of ombudsmen, interest groups and participants from civil society. The advisory committee nominates two representatives from civil society to the Centre's board. A representative of the Sami Parliament sits on the advisory committee.¹⁷⁸



4.1. HUMAN RIGHTS-BASED APPROACH

To be effective, programmes must account for and strengthen human rights standards, as well as indigenous peoples' cultures and aspirations.¹⁷⁹ In essence, NHRIs should adopt a human rights-based approach to programme development. The Vienna Declaration and Programme of Action¹⁸⁰ affirms the interdependent nature of human rights and development. United Nations agencies subsequently adopted a common understanding of a human rights-based approach to development. This common understanding can provide NHRIs with a useful frame of reference in developing human rights-based approaches to guide their own work.

178 Further information is available at www.jus.uio.no/smr/english/about/national-institution/about/advisory-committee.html.

179 United Nations Development Group, *Guidelines on Indigenous Peoples' Issues* (2009), p. 26.

180 General Assembly resolution 48/121.

THE HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION: TOWARDS A COMMON UNDERSTANDING¹⁸¹

Common understanding

1. All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.

Elements necessary, specific and unique to a human rights-based approach

- (a) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights.
- (b) Programmes assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities.
- (c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- (d) Programming is informed by the recommendations of international human rights bodies and mechanisms.



Other elements that are also essential under a human rights-based approach to development, include:

1. People are recognized as key actors in their own development, rather than passive recipients of commodities and services.
2. Participation is both a means and a goal.
3. Strategies are empowering, not disempowering.
4. Both outcomes and processes are monitored and evaluated.
5. Analysis includes all stakeholders.
6. Programmes focus on marginalized, disadvantaged, and excluded groups.
7. The development process is locally owned.
8. Programmes aim to reduce disparity.
9. Both top-down and bottom-up approaches are used in synergy.
10. Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
11. Measurable goals and targets are important in programming.
12. Strategic partnerships are developed and sustained.
13. Programmes support accountability to all stakeholders.

¹⁸¹ United Nations Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (2003).

Engaging with indigenous peoples requires recognition and respect for the collective nature of indigenous communities. Therefore, it is important that in advocating for indigenous peoples' human rights, NHRIs should:

- Recognize and have regard for the collective nature of indigenous peoples' human rights
- Show respect for indigenous cultures and differences, particularly decision-making processes
- Comply with the principle of free, prior and informed consent (see Chapter 3 for more information). Free, prior and informed consent is rooted in the right to self-determination and requires the active engagement of indigenous peoples in actions which may impact their lives.

The vulnerability of indigenous peoples to human rights abuses was the catalyst for a bilateral project between the Commission on Human Rights of the Philippines and the New Zealand Human Rights Commission, which ran from 2008 to 2010. A central aim of the project was to build the capacities of indigenous communities in the Philippines to identify, investigate, verify, document and monitor human rights violations affecting their own communities. It also sought to equip them with the skills and knowledge to more effectively advocate for their rights.

The project used a human rights community development approach to address priorities for indigenous communities, by focusing on developing the skills and knowledge of indigenous peoples to enable them to act as agents of change for their own communities. The Declaration and ILO Convention No. 169 provided the human rights framework.

After engaging with indigenous communities and adopting a process based on free, prior and informed consent, three indigenous groups were identified to participate in the project. These indigenous groups led the identification of human rights issues of concern affecting their own communities and played a central role in developing and implementing action plans aimed at addressing those issues of concern. The Commission on Human Rights of the Philippines, with the support of the New Zealand Human Rights Commission, assisted the three indigenous communities and provided ongoing support to help ensure the operationalization and sustainability of the project.¹⁸²



In addition to adopting a human rights-based approach, NHRI engagement with indigenous peoples should be consistent with the following principles that coincide with key themes in the Declaration:

- Non-discrimination
- Equality
- Gender equality
- Self-determination
- Collective rights
- The right to define and decide development priorities.¹⁸³

182 Philippines Commission on Human Rights and the New Zealand Human Rights Commission, *Building Human Rights Communities: The experience of three indigenous peoples in the Philippines* (2011).

183 United Nations Development Group, *Guidelines on Indigenous Peoples' Issues* (2009), pp. 12-16.



A Cakchiquel family in the hamlet of Patzutzun, Guatemala. UN Photo/F Charton.

4.2. EFFECTIVE ENGAGEMENT WITH INDIGENOUS PEOPLES

Implementing the right to consultation for indigenous peoples has been a priority for the **Defensoría del Pueblo de Perú** (Ombudsman's Office). In 2009, it issued a report on indigenous peoples' rights to consultation.¹⁸⁴

Following the release of this report, the Ombudsman's Office undertook work to develop a draft law on consultation with indigenous peoples. This included strategies for dissemination and engagement with indigenous peoples and other stakeholders. The Office also participated in a working group, comprising government officials and representatives from national indigenous peoples' organizations, which prepared a matrix to facilitate input for the development of the draft law.

In July 2009, the draft law on the right to consultation was submitted by the Ombudsman's Office to the Congress. It was approved in August 2011.



The steps below offer practical assistance to NHRIs to engage effectively with indigenous peoples.

4.2.1. Build a community profile

Knowing the community will greatly assist effective engagement. Consultation and engagement does not occur in a vacuum and indigenous communities will not simply drop everything to facilitate a visit, consultation or programme by the NHRI.

The following strategies should be considered before engaging with an indigenous community:

- Develop a basic snapshot of the community, including history, culture, language, current events, major human rights challenges and impacts of Government laws and policies on the community
- Develop an understanding of the politics of the community
- Identify key community organizations and individuals, as regular contact with these organizations and individuals will provide invaluable assistance and knowledge for working with the community.

184 Defensoría del Pueblo de Perú, *Department Report No. 011-2009-DP/AMASPPI-PPI* (2009).

4.2.2. Visiting the community

Consultation and engagement should occur, as much as is possible, at the convenience of the community. The buy-in of key organizations and individuals is essential to ensure that this is achieved.

The following strategies should be considered:

- Ensure consultations are appropriately timed, preferably coinciding with other community-wide events but not with cultural activities or ceremonies
- Identify cultural protocols, including relevant gender issues, that must be respected
- Identify appropriate codes of attire that should be worn in the community
- Develop an understanding of the communication conventions adopted by the community (i.e. is eye contact appropriate?)
- Develop a language profile of the community; do not assume the official language of the state is spoken and use interpreters where necessary
- Use plain language and avoid bureaucratic language
- Encourage the participation of all people in the community; where appropriate, work with groups based on gender and age
- Identify if there are any locations within the community where permission must or should be sought before entering
- Develop trust and seek permission for any activities in advance; do not assume that the indigenous community wants you there
- Be realistic about what will be achieved from the visit, consultation or programme.

4.2.3. After the visit

To establish trust and good working relationships, it is important that NHRIs follow up with the indigenous communities after a visit.

KEY POINTS: CHAPTER 6

- **NHRIs must be accessible to indigenous peoples in order to effectively advance the protection, promotion and realization of their human rights.**
- **It is important that NHRIs promote awareness among indigenous peoples of who they are and what they do. This may require targeted promotional campaigns.**
- **NHRIs should recognize that indigenous peoples may be reluctant to engage with them.**
- **NHRIs should take actions to engage indigenous peoples in remote locations.**
- **Collaborations and partnerships with indigenous peoples' organizations can foster greater engagement by NHRIs with indigenous peoples.**
- **NHRIs are encouraged to have an indigenous presence within their organization. It is important to engage with indigenous peoples and their organizations in the recruitment process of indigenous staff.**
- **Indigenous-specific programmes of work will foster an indigenous presence within NHRIs. Staff working in these units should meet additional selection criteria to ensure that they have the necessary skills and experience to work sensitively and appropriately with indigenous peoples.**
- **NHRIs should be guided by a human rights-based approach when working with indigenous peoples.**



Chapter 7:

Awareness raising and education

KEY QUESTIONS

- What can NHRIs do to raise public awareness of the Declaration and the rights of indigenous peoples?
- What educational and training activities can NHRIs undertake on the Declaration?



INTERNATIONAL STANDARDS RELEVANT FOR NHRI INVOLVEMENT

United Nations Declaration on the Rights of Indigenous Peoples

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

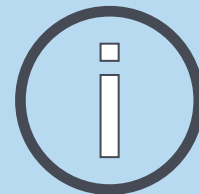
1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 42

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.



International Covenant on Economic, Social and Cultural Rights

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:
 - (f) Assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles
 - (g) Publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Methods of operation

Within the framework of its operation, the national institution shall:

- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations.

General comment No. 17, Committee on the Elimination of Racial Discrimination

1. Recommends that States parties establish national commissions or other appropriate bodies, taking into account, *mutatis mutandis*, the principles relating to the status of national institutions annexed to Commission on Human Rights resolution 1992/54 of 3 March 1992, to serve, inter alia, the following purposes:
 - (a) To promote respect for the enjoyment of human rights without any discrimination, as expressly set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁸⁵

In order to enjoy their rights, people need to be aware of them and understand how to exercise them. Public awareness and education programmes are essential in this regard. In recognition of this, the international human rights system places obligations on States to promote awareness of, and education on, human rights standards.¹⁸⁶ These obligations extend directly to promotional and education activities on the Declaration and in relation to indigenous peoples' human rights issues.

For example, the Special Rapporteur on the rights of indigenous peoples made the following recommendation to the Government of Brazil:

In partnership with indigenous peoples, and with the support of the United Nations ... develop and implement a national campaign of education on indigenous issues and respect for diversity, highlighting ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples and the Government's commitment to these instruments. This campaign

¹⁸⁵ Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993) on the establishment of national institutions to facilitate implementation of the Convention.

¹⁸⁶ See, for example, article 13 of the International Covenant on Economic, Social and Cultural Rights.

*should target and seek to involve policymakers at all levels, the general public, educational institutions and the news media.*¹⁸⁷

Promoting awareness of, and respect for, human rights is a core function of all NHRIs. This mandate uniquely positions NHRIs to assist their State to meet these obligations.

NHRIs have three key goals in awareness raising and education:

- To increase awareness of the existence and nature of rights
- To foster values and attitudes which uphold and respect human rights
- To encourage the public to assert their human rights and state institutions to support their enforcement.¹⁸⁸

1. RAISING PUBLIC AWARENESS

Raising public awareness of a human rights issue can foster community-wide attitudinal change. In turn, this can positively influence decision-making and law reform.

1.1. THE BROADER POPULATION

In many instances, indigenous peoples form a minority of a State's population and are often geographically isolated. As a result, it is not uncommon for the human rights issues confronting indigenous peoples to remain hidden from the broader population, including:

- Discrimination
- Dispossession from land and territory
- Denial of culture
- Poverty
- Substance abuse
- Violence.

Furthermore, the broader population that lives in indigenous areas or close to indigenous communities can at times express opposition to indigenous peoples' claims and rights. It is important that awareness raising activities be specifically targeted when these situations exist.

Compounding possible ignorance, public perceptions of indigenous peoples are often influenced by negative stereotypes, particularly in the media. These stereotypes and images can serve to legitimize public opinions about indigenous peoples that are racially discriminatory. Articles 15 and 16 of the Declaration directly target this issue.

The protection, promotion and realization of indigenous peoples' human rights cannot be achieved without confronting negative stereotypes and public ignorance. NHRIs can play a pivotal role in raising awareness and providing the historical context to the contemporary human rights challenges facing indigenous peoples. A public awareness campaign is an effective mechanism to engage the broader community on these issues.

¹⁸⁷ A/HRC/12/34/Add.2, para. 77.

¹⁸⁸ *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; p. 57.

The New Zealand Human Rights Commission undertakes an annual survey on the attitudes of New Zealanders to indigenous peoples' rights.¹⁸⁹



1.2. INDIGENOUS PEOPLES

Being aware of human rights standards, understanding how to exercise them and knowing how to seek redress for violations are fundamental preconditions for indigenous peoples to realize their human rights. Given indigenous peoples have been historically marginalized from mainstream society, it is not surprising that, in many instances, they are marginalized from public information networks and mechanisms promoting human rights. NHRIs can develop and run targeted awareness raising campaigns for indigenous peoples. However, it is important that awareness raising activities are not confined to urban areas; they must also reach indigenous communities in rural and remote locations. As noted in Chapter 6, it is also important that indigenous peoples are aware of the existence and functions of the NHRI.

The Canadian Human Rights Commission has developed a plain language guide to federal human rights legislation for people who work for First Nations governing bodies. The purpose of the guide is to help First Nations managers understand and address human rights issues in their organizations and communities.

The guide provides information on the following areas of human rights law:

- **Understanding discrimination and discriminatory practices**
- **Preventing discrimination and respecting human rights, including developing human rights protection policies and providing human rights training**
- **The Commission's dispute resolution process**
- **Preparing responses to a discrimination complaint, including using First Nations legal traditions and aboriginal treaty rights**
- **Community-based dispute resolution processes to enable First Nations communities to develop their own dispute resolution processes.¹⁹⁰**



1.3. PUBLIC OFFICIALS

NHRIs can play a critical role in raising awareness of the Declaration and its content among public officials. Activities such as disseminating the Declaration to public officials should be broad and not confined to those working in indigenous affairs departments. For example, public officials who are employed in environmental or land demarcation agencies need to be aware of indigenous peoples' human rights.

¹⁸⁹ Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

¹⁹⁰ Canadian Human Rights Commission, *Human Rights Handbook for First Nations: Rights, Responsibility and Respect* (2011), available at http://doyouknowyourrights.ca/nai-ina/pdf/fn_handbook.pdf.

2. EDUCATION AND TRAINING

The mandate of NHRIs extends beyond promotional activities to include developing and delivering human rights education and training programmes for different groups in the community.

2.1. THE BROADER POPULATION

Educational activities on indigenous peoples' human rights that target the broader population can help counter ignorance and empower the community to address difficult challenges from an informed perspective.

The Commissioner on Human Rights in the Russian Federation organized a competition for students to write about the human rights situation of indigenous peoples now and into the future.¹⁹¹



2.2. INDIGENOUS PEOPLES

NHRIs are uniquely placed to assist States in meeting their obligations under article 39 of the Declaration by providing technical assistance to indigenous peoples about the exercise of the rights contained in the Declaration.

Education campaigns can build off promotional activities. Amnesty International has noted that “a population which is educated in their human rights is an asset to assist NHRIs carry out their task”.¹⁹² Human rights education that is delivered through adapted training methods can empower indigenous peoples to exercise their rights and bring about social change.

The Australian Human Rights Commission has produced a suite of community education and awareness raising materials on the Declaration. These materials include:

- **A colourful plain language guide that includes case studies of how the rights to the Declaration can be used**
- **A short overview of the Declaration**
- **A double-sided poster with the text of the Declaration on one side and an artistic interpretation of it on the other**
- **A short video documentary on the Declaration.**

These materials were produced with feedback from indigenous peoples.¹⁹³



191 Presentation to OHCHR workshop, *Towards an Operational Guide for National Human Rights Institutions: Possible good practices in addressing the rights of Indigenous Peoples*.

192 Amnesty International, *National Human Rights Institutions: Recommendations for Effective Protection and Promotion of Human Rights* (2001).

193 Information provided by the Australian Human Rights Commission.

2.3. PUBLIC OFFICIALS

Public officials are pivotal players in ensuring that a State complies with its international human rights obligations, such as the Declaration. For this reason, providing training and professional development programmes for public officials on indigenous peoples and their human rights is a necessary element to achieving the ends of the Declaration.

All public officials with roles that impact either directly or indirectly on the realization of indigenous peoples' human rights should receive training and professional development. This includes officials working in government departments with specific mandates concerning indigenous peoples' issues, as well as officials working in other government departments which inevitably impact on the land and cultural rights of indigenous peoples, such as officers in environmental and forestry departments, territorial and land management departments and cultural affairs departments.

All public officials whose work impacts on the realization of indigenous peoples' human rights should undertake:

- General human rights training
- Targeted training specifically related to indigenous peoples' human rights.

NHRIs can undertake a number of strategies in this regard. This work should be done in cooperation with the relevant authorities.

Since its establishment in 2009, the National Human Rights Commission of Bangladesh has worked to create a culture of human rights within the bureaucracy and the broader public. The rights of Adivasi (indigenous peoples) have been identified by the Commission as a priority area. One key area of activity has been to work with Government officials around human rights-based responses to Adivasi when developing and implementing government policies.¹⁹⁴



In the first instance, NHRIs can advocate, develop and implement training programmes for public officials whose works impacts on indigenous peoples. This advocacy should seek the integration of human rights principles and standards into any indigenous-related training programmes that are currently being provided to public officials.

Where there is an absence of training materials for public officials focused on working with indigenous peoples, NHRIs can seek to develop materials that incorporate a human rights-based approach and the standards contained in the Declaration.

The Procuraduría para la Defensa de los Derechos Humanos de Nicaragua has developed and published 14 training modules on various human rights issues, including one specifically focused on the human rights of indigenous peoples. A basic human rights training module has also been developed for public officials and employers, which has a particular emphasis on non-discrimination and equality. The Office has conducted over 1000 training workshops with public officials.¹⁹⁵



¹⁹⁴ Presentation to subregional consultation organized by OHCHR, *The Operationalization of the United Nations Declaration on the Rights of Indigenous Peoples by National Human Rights Institutions*, Auckland, New Zealand, 1-3 December 2010.

¹⁹⁵ Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

NHRIs should be aware that their training programmes may be perceived by public officials as an outside interference in their work and provided without the necessary context or background. To combat potential resistance, NHRIs will benefit from engaging with the leadership of State institutions. Receiving endorsement and support for training programmes from an organization's hierarchy will provide the necessary legitimacy to encourage behavioural change within the organization. This high-level buy-in is also necessary because if the leadership of the State institution is not genuine about protecting, promoting and realizing indigenous peoples' human rights, it is unlikely that training will be supported or effective.

It is important that NHRIs are strategic in the design and delivery of training programmes. In developing, revising or delivering training products, NHRIs should ensure that their materials are focused on practical, operational issues.

In instances where a training programme is likely to receive a high level of resistance, it might be preferable for the NHRI to develop the content for the training programme and allow it to be internally delivered.¹⁹⁶ Alternatively, it might be preferable for the NHRI to develop train-the-trainer materials and programmes, which can also be effective in stretching limited financial and human resources.

3. UNDERTAKING PROMOTIONAL AND EDUCATIVE ACTIVITIES

3.1. HOW CAN NHRIs ACHIEVE THEIR AWARENESS RAISING AND EDUCATIVE MANDATES?

An effective campaign should have an agreed communication strategy, a specific objective and a clear message.

NHRIs should have a broad range of research and education materials on human rights available for dissemination. These materials can contain information on:

- The role, function and activities of the NHRI
- International human rights standards and instruments
- The State's relationship with human rights standards and instruments
- State reports to treaty bodies
- Domestic human rights legislation
- Judicial decisions relating to human rights
- Domestic and international mechanisms for human rights protection
- Research undertaken by the NHRI on specific human rights issues
- Information regarding complaints mechanisms and avenues for redress for violations of human rights, including those contained in the Declaration.

NHRIs should have a human rights education plan, which should link to the strategic plan and annual activity plan of the NHRI. There is a range of public education activities that NHRIs can undertake. This includes seminars, workshops and professional training sessions, either for the general population or specific groups. Education initiatives targeted at a wider audience can include the development of school and university curricula for human rights, national media campaigns and human rights publications.

¹⁹⁶ APF, Association for the Prevention of Torture and OHCHR, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (2010), p. 56.



A Masai indigenous woman (Kenya) attending the *In Celebration of Indigenous Peoples Exhibit* at the United Nations. UN Photo/Stephenie Hollyman.

Awareness raising and educational activities around the Declaration can include:

- Conducting workshops and training for indigenous peoples and their organizations
- Conducting workshops and training for State officials and bureaucrats
- Translating the Declaration into indigenous languages
- Developing plain language toolkits and education materials
- Producing materials using a range of media, including websites, documentaries, audio programmes and social media
- Distributing media releases when activities occur within the country that might be related to, or impact on, the rights contained in the Declaration
- Referring to the Declaration and its impact in speeches, submissions and publications.

The **New Zealand Human Rights Commission** has produced a bilingual version of the Declaration. It contains the text of the Declaration in English and in Maori.¹⁹⁷



¹⁹⁷ More information is available at www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/united-nations-declaration-on-the-rights-of-indigenous-peoples.

3.2. DISSEMINATION

A dissemination strategy is crucial for the effective and efficient use of information produced by the NHRI. Dissemination can be targeted to a wide variety of audiences – including government departments, NGOs, the general public and indigenous peoples – so it is important that the strategy is audience-specific.

Once the target audience has been established, the NHRI must identify appropriate opportunities for dissemination. Both general and specialized media are useful vehicles for dissemination. However, widespread distribution should also utilize existing services and networks, such as schools, universities, libraries, government offices, community organizations, peak and representative bodies and indigenous peoples' organizations.

DoCip

In 1978, a document information centre known as doCip was created at the request of the indigenous delegations participating in the first international conference of NGOs on indigenous issues held at the United Nations.

As an information centre, doCip:

... publishes a quarterly Update on the main international processes on Indigenous issues. The Update includes summaries of statements, agendas, report presentations, statements by Indigenous Peoples and announcements. It is published in four languages and allows everyone to be equally informed, which is essential for reaching a consensus. Sends collective messages to 2,500 indigenous addresses when urgent news cannot await publication in the Update. DoCip also keeps its website up-to-date and answers all other requests for information.¹⁹⁸



The doCip website contains an extensive collection of historically important international documents for indigenous organizations and documentation from relevant international forums.

NHRIs can utilize the resources published on the website and promote its use by indigenous peoples and their organizations within their jurisdiction.

Promotional events play an important role in raising public awareness of human rights and giving NHRIs a community presence. NHRIs should not limit themselves to one type of event and should consider what events best suit their target audiences. There may also be opportunities to collaborate with existing community initiatives or programmes. Promotional events may include:

- Human rights-themed events aimed at school-age children, such as drawing or photography competitions
- University lectures and other higher education events
- Public events to celebrate significant dates, such as the anniversary of the adoption of the Declaration (13 September) and International Day of the World's Indigenous Peoples (9 August)
- Human rights awards and prizes
- The launch of key publications
- Human rights-themed art or music competitions.

Indigenous peoples' organizations and peak bodies will be essential conduits to disseminate products and information produced by NHRIs to indigenous peoples and communities.

198 More information is available at www.docip.org/About-doCip.4.0.html.

3.3. PARTNERSHIPS

The work of NHRIs benefits greatly from partnerships and collaboration on public awareness raising and educational activities. These partnerships help to ensure that the efforts of NHRIs have maximum impact.

The National Alliance of Indigenous Peoples in Indonesia engaged in a partnership agreement with the Indonesian National Commission on Human Rights to address the human rights of indigenous peoples in Indonesia.¹⁹⁹



3.3.1. The State

Where possible, NHRIs should seek to develop cooperative working relationships with the State. As noted previously, State buy-in of education programmes for public officials will enhance their uptake and their effectiveness.

In addition, NHRIs can seek additional funding from the State to support the development and delivery of awareness raising and education materials targeting the broader community and indigenous peoples.

3.3.2 Indigenous peoples' organizations

It is particularly important for NHRIs to collaborate with indigenous peoples' organizations for awareness raising and educational activities around the Declaration and indigenous peoples' human rights.

Consistent with human rights standards, indigenous peoples' organizations should be involved at every stage of the process, from design and development through to implementation and monitoring.

Indigenous peoples' organizations can provide necessary expertise on content, ensure cultural appropriateness and provide advice on language and communication methods. The active involvement of indigenous peoples' organizations will also help to legitimize the activities of the NHRI in the eyes of indigenous peoples. Further, indigenous peoples' organizations can act as key networking and dissemination hubs.

A number of NHRIs in Latin America have established a Permanent Bureau on Indigenous Issues. These bureaus bring together indigenous leaders and organizations and NHRI staff to agree on priorities. The initiative has helped build trust between indigenous peoples and NHRIs and have also helped facilitate joint work and strategies to advance the human rights of indigenous peoples.²⁰⁰



The involvement of indigenous peoples' organizations is not necessarily confined to activities targeting indigenous peoples. These organizations can provide context, case studies, advice on specific areas of concern and other valuable information for population-wide education and awareness raising activities to ensure that the promotion of human rights generally is relevant to indigenous peoples.

199 OHCHR, *Note on the outcome of the subregional consultation, The Operationalization of the United Nations Declaration on the Rights of Indigenous Peoples by National Human Rights Institutions*.

200 Responses to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

3.4. MEDIA

The media is a dominant force in the formation and expression of ideas and opinions. The extent to which traditional forms of media can be leveraged as partners in advocating for indigenous peoples' human rights will depend greatly on the social and political structures operating within the jurisdiction of each NHRI.

Nevertheless, where possible, NHRIs should seek to work constructively with the media. The media can play an important role to educate the public about human rights standards, raise public conscience about human rights issues and violations and draw attention to the activities of the NHRI.

The Jordan National Centre for Human Rights has an active social media presence. It has Twitter, Facebook and YouTube accounts, as well as an online newsletter. It uses these various forms of media as a mechanism to distribute reports, press releases and other news and information about the institution to a broad audience.²⁰¹



Marking the International Day of the World's Indigenous Peoples 2012, is a panel discussion with representatives of indigenous media organizations from across the world, following the theme "Indigenous Media, Empowering Indigenous Voices." On the screen are Secretary-General Ban Ki-moon (left) and Grand Chief Edward John, Chairperson of the UN Permanent Forum on Indigenous Issues. UN Photo/Devra Berkowitz.

201 More information is available at www.nchr.org.jo/english/home.aspx.

New technology has created new ways of communicating, including through social media networks such as Facebook, Twitter and YouTube. This technology provides a cost- and time-effective way for NHRIs to communicate with different groups of people. It can also be an effective way to engage with geographically isolated populations. However, it must be remembered that access to these forms of communication is not always possible in some isolated locations.

WITNESS is an international human rights organization that partners with local human rights organizations to provide training and support to use video in their human rights advocacy campaigns.

These videos can raise awareness of human issues and make the case for reform of State laws, policies and programmes. For example, videos from these collaborations have helped shed light on the human rights situation in Myanmar, been used to prosecute recruiters of child soldiers in the Democratic Republic of the Congo and helped facilitate the passage of the first law protecting elders from abuse in the United States of America.²⁰²



To engage effectively with the media, NHRIs should develop a communication strategy. This strategy should identify the initiatives that could benefit from media involvement and may involve actions such as employing public relations or press officers, providing communications training for staff and/or developing relationships with key media figures.

KEY POINTS: CHAPTER 7

- Promoting awareness of, and respect for, human rights is a core function of NHRIs.
- Raising awareness of indigenous peoples' human rights is of fundamental importance for their protection, promotion and realization.
- There are a range of educational and training activities that NHRIs can undertake on the Declaration and indigenous peoples' human rights. This includes both formal and informal human rights education activities, as well as working with the media and using social media to raise awareness and understanding of human rights issues affecting indigenous communities.



202 More information is available at www.witness.org.

Chapter 8:

Promoting compliance with the Declaration

KEY QUESTIONS

- How can NHRIs promote reform of laws, policies and practices that affect the enjoyment of human rights by indigenous peoples?
- How can NHRIs use the Declaration to advocate for changes to laws, policies and practices affecting the rights of indigenous peoples?



FOUNDING PRINCIPLES AND INTERNATIONAL STANDARDS FOR NHRI INVOLVEMENT

United Nations Declaration on the Rights of Indigenous Peoples

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States... for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 42

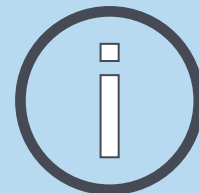
... States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis ... opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights... [in relation] to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures



- (ii) Any situation of violation of human rights which it decides to take up
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government.
- (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
 - (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation.

General recommendation No. 17, Committee on the Elimination of Racial Discrimination

1. Recommends that States parties establish national commissions or other appropriate bodies, taking into account, *mutatis mutandis*, the principles relating to the status of national institutions annexed to Commission on Human Rights resolution 1992/54 of 3 March 1992, to serve, inter alia, the following purposes:
 - (b) To review government policy towards protection against racial discrimination
 - (c) To monitor legislative compliance with the provisions of the Convention.
2. Also recommends that, where such commissions have been established, they should be associated with the preparation of reports and possibly included in government delegations in order to intensify the dialogue between the Committee and the State party concerned.²⁰³

Most NHRIs have a monitoring function and will regularly report on and update the Government on the situation of human rights in the country.

The founding legislation of the NHRI will usually determine the scope of its monitoring role. For example, NHRIs with narrowly constructed mandates may have little independent authority to advise their Government, whereas NHRIs with broader mandates may be able to develop sophisticated opinions that have a greater capacity to influence their Government in policy and law reform.²⁰⁴

1. ENGAGING WITH THE STATE

NHRIs are encouraged to foster dialogue in a spirit of cooperation with all branches and levels of their Government, including the legislative and executive branches and the judiciary. Information and data collected by NHRIs about human rights is an essential resource for Governments in formulating policy as it provides periodic data, details of progress made and identifies priority areas for action.²⁰⁵

203 Committee on the Elimination of Racial Discrimination, general recommendation No. 17 (1993) on the establishment of national institutions to facilitate implementation of the Convention.

204 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, p. 105.

205 *Manual on Human Rights Monitoring*, Professional Training Series No. 7/Rev.1 (United Nations publication, forthcoming).



1.1. TOOLS FOR ENGAGEMENT

The most common ways that NHRIs will engage with their State include:

- Bringing human rights issues to the attention of the relevant ministry
- Submitting annual reports and making recommendations to the Government
- Reviewing existing and proposed legislation for human rights compliance
- Advocating for the ratification and implementation of international human rights instruments and assisting the Government to fulfil its reporting obligations under international treaties
- Undertaking public inquiries into human rights violations and submitting subsequent recommendations to the Government
- Encouraging the development of mechanisms and procedures for receiving and implementing international recommendations and advice on the domestic human rights situation.²⁰⁶

The **Defensoria del Pueblo de Perú** produced a report – ***A challenge for the State: Contributions to a national policy on bilingual and intercultural education for indigenous peoples of Peru*** – which collated monitoring observations by the Office on the implementation of education policy.²⁰⁷



206 United Nations Development Programme and Office of the United Nations High Commissioner for Human Rights, *Toolkit for Collaborating with National Human Rights Institutions* (2010), pp. 34-35.

207 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

1.2. CONSTRUCTIVE RELATIONSHIPS

The way in which NHRIs engage and communicate with their State will influence their ability to influence real change. It is important that NHRIs undertake their programmes of work firmly upholding their independence, in accordance with the Paris Principles:

*NHRIs should be mindful of their official position within state structures and communicate their recommendations confidently and with the expectation that the executive part of government, or the prosecuting authorities, should implement them. NHRIs should open strong and effective methods of communication with all agencies of government, the prosecuting authorities and the judiciary in order to promote their recommendations, and... should not accept recommendations being ignored.*²⁰⁸

The precise nature of this engagement will be heavily influenced by the contemporary domestic political climate. Cooperative engagement with the State and its organs can facilitate greater uptake of recommendations made by the NHRI.

While the relationship between NHRIs and their parliament is significant, NHRIs should also engage with other State organs. These may include:

- Law enforcement and security bodies, such as the police, army and correctional and detention facilities
- Heritage and environmental agencies
- Land tenure and development agencies
- Specialized and sectorial government departments.

NHRIs can utilize this engagement to raise the profile of indigenous peoples' human rights issues within the State apparatus, which in turn can influence Government decision-making that impacts on indigenous peoples' human rights.



Participants during the fifth session of the United Nations Permanent Forum on Indigenous Issues. UN Photo/Paulo Filgueiras.

²⁰⁸ *National Human Rights Institutions: Recommendations for Effective Protection and Promotion of Human Rights*, recommendation 3.7.

THE ABUJA GUIDELINES²⁰⁹

The Abuja Guidelines provide an example of how NHRIs might navigate their relationship with their State. These guidelines were developed to encourage constructive relationships between the parliaments of Commonwealth States and their respective NHRIs.²¹⁰ The guidelines specify actions that parliaments and NHRIs can take to support a constructive relationship that advances the protection and promotion of human rights.

Actions that parliamentarians can take to support NHRIs include:

- Ensuring that adequate resources and facilities are provided to NHRIs to enable them to perform their functions effectively
- Promptly debating the annual report and other reports of NHRIs in parliament and promptly tabling the Government's response to the report in parliament
- Inviting Commissioners/Ombudsmen to meet with them regularly to discuss matters of mutual interest
- Ensuring that their constituents are made aware of the work of NHRIs
- Ensuring that part of the mandate of NHRIs is to advise parliament on the conformity or otherwise of any legislation that may affect the enjoyment of human rights in the country
- Considering revising their standing orders in order to enable them to develop a more effective relationship with NHRIs
- Ensuring that recommendations for action from NHRIs are followed up and implemented.



Actions that NHRIs can take to support parliaments include:

- Establishing mechanisms to liaise with parliamentarians
- Commissioners/Ombudsmen should obtain a thorough knowledge of the role, functions and constraints of parliament and parliamentarians
- Commissioners/Ombudsmen should provide parliamentarians with regular expert, independent advice on national, regional and international human rights issues, instruments and mechanisms
- Submitting annual reports both on its work and on the state of human rights in the country
- Advising parliaments on the creation of human rights committees in parliament and cooperating with such committees.

2. PROMOTING ADOPTION OF INTERNATIONAL STANDARDS

A State's legal framework and the existence of a human rights culture within the State's organs are foundations for the protection, promotion and realization of indigenous peoples' human rights. This legal framework includes adopting or becoming a party to international instruments containing human rights norms and standards, as well as the subsequent domestic implementation of these standards.

²⁰⁹ *Abuja Guidelines on the Relationship Between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions* (2004), available at www.agora-parl.org/node/1514.

²¹⁰ *Ibid.*

2.1. THE DECLARATION

First and foremost, NHRIs should assess whether their State has formally indicated support for the Declaration, either at the time of its adoption in the General Assembly or through a subsequent announcement.

At the time of its adoption, Canada voted against the Declaration. Through a number of submissions and other processes, the [Canadian Human Rights Commission](#) advocated for the Government to reverse its position and endorse the Declaration. In 2010, the Canadian Government undertook this step and formally supported the Declaration.²¹¹



NHRIs can develop a strategy to pursue formal support for the Declaration where their State has not already indicated it. A variety of approaches can be used, including:

- Raising public awareness through campaigns, media release and speeches
- Lobbying the Government, both at the parliamentary and the executive levels
- Making formal recommendations to the Government
- Advocating to international human rights mechanisms, such as the treaty bodies, and making recommendations through parallel reporting processes.

Consistent with the Declaration, NHRIs should work in conjunction with indigenous peoples' organizations in undertaking these strategies.

The [Human Rights Commission of Malaysia](#) has translated the Declaration into the national language to raise public awareness of the rights of indigenous peoples under the Declaration.²¹²



2.2. OTHER INTERNATIONAL INSTRUMENTS

Given the status of the Declaration as an instrument that collates existing international human rights standards and interprets them as they apply to indigenous peoples, it is crucial that NHRIs review whether their State is a party to the core international human rights treaties.

NHRIs should also assess whether their State has entered any reservations²¹³ to these human rights treaties. NHRIs can lobby their State if it is not a party to the core human rights treaties or for the removal of any reservations it may have entered.

211 Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (12 November 2010) is available at www.aadnc-aandc.gc.ca/eng/1309374239861.

212 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

213 A reservation is defined as "a unilateral statement... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"; Vienna Convention on the Law of Treaties, article 2 (1) (d). Note also that article 19 of the Vienna Convention provides that a State may make a reservation unless it is prohibited by the treaty or it is incompatible with the object and purpose of that treaty.

NHRIs should also consider reviewing their State's position on relevant regional instruments.

The **National Human Rights Commission of Bangladesh** helped promote the ratification of ILO Convention No. 169 by organizing a seminar focusing on the Convention and its relevance to the rights of indigenous peoples. A statement made by the Chairperson of the Commission, Professor Mizanur Rahman, affirmed the link between respecting the rights of indigenous peoples and a truly inclusive democracy: "True democracy demands self identity and equal rights ensured to everyone. This is inclusive democracy."²¹⁴



3. IMPLEMENTATION OF INTERNATIONAL TREATIES

The domestic protection afforded by international human rights treaties is determined by the legal and political landscape of each State. States are generally divided into two categories:

- Monist (or self-executing), where treaties are directly incorporated into domestic law upon the State becoming a party
- Dualist (or non self-executing), where the passage of implementing legislation is required to incorporate international treaty obligations into domestic law.²¹⁵

NHRIs that operate in dualist States should advocate for enabling legislation to incorporate international obligations domestically. The lobbying strategy can be similar to that outlined in relation to becoming a party to human rights treaties. Technical advice could also be offered by NHRIs in drafting, or in reviewing drafts, of such legislation.

In 2007, the **National Human Rights Commission of Nepal** organized a workshop on indigenous peoples' rights and international treaties. Workshop participants, including representatives from indigenous peoples' organizations, urged the Government to ratify ILO Convention No. 169.²¹⁶

Nepal ratified ILO Convention No. 169 in September 2007. Since that time, the Commission has promoted the implementation of the Convention, including reviewing the State party report on ILO Convention No. 169.²¹⁷



The domestic incorporation of human rights treaties will have a disproportionately positive effect for indigenous peoples because of their vulnerability to human rights violations. It should be noted that legislative incorporation of ILO Convention No. 169 will particularly benefit indigenous peoples because of its specific focus on indigenous peoples.

214 National Human Rights Commission of Bangladesh, *National seminar on ILO convention 169 and human rights of indigenous peoples in Bangladesh, Dhaka, Bangladesh, 8 June 2011*. Further information is available at www.nhrc.org.bd/PDF/seminar%20on%20169.pdf.

215 A State's legal and political system will determine whether it is a monist or a dualist State. See *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed.); S. Joseph, J. Schultz and M. Castan, eds. (2004); p. 14.

216 National Human Rights Commission of Nepal, *NHRC e-bulletin*, Vol. 5, No. 3 (13 June 2007), p. 4, available at http://nhrcnepal.org/nhrc_new/doc/newsletter/Ebulletin-Vol5-5.pdf.

217 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

In addition to general lobbying, NHRIs should encourage their State to specifically consider how domestic implementation of international standards can positively advance the promotion, protection and realization of indigenous peoples' human rights. Consultation and effective engagement with indigenous peoples will be very important in this regard.

DOMESTIC IMPLEMENTATION OF HUMAN RIGHTS

International human rights law imposes obligations on States to domestically implement the standards contained in the treaties to which they are a party. However, the manner and form in which these standards are implemented is for the State to determine. This can be achieved through a variety of mechanisms, including:

- **Constitutional protection of human rights**
- **A human rights act**
- **The requirement to have statements of human rights compliance with the introduction of new legislation**
- **National human rights action plans.**



Even if not domestically implemented, international standards can have an indirect impact on domestic law, as the norms and standards can be used by the judiciary in construing ambiguous provisions of legislation.²¹⁸ If their mandate allows, NHRIs can play a key strategic role to advise courts (i.e. as *amicus curiae* or “friend of the court”) on relevant and applicable human rights standards.

In 2007, the Supreme Court of Belize used the Declaration for guidance in interpreting the Constitution of Belize to uphold the rights of the Maya indigenous peoples to their traditional lands.²¹⁹



Legal reforms alone are rarely enough to achieve the effective implementation of international standards.²²⁰ A range of legislative instruments, policies, practices and programmes will have an influence on whether effective implementation is achieved. Advocacy by NHRIs should emphasize that legislation is the start of a process of domestic implementation, rather than an end point.²²¹

NHRIs can also advocate for a national action plan for human rights, which may include specific reference to the State's international obligations. Such a plan could outline the strategic steps necessary to ensure the protection, promotion and realization of human rights standards. NHRIs can provide technical assistance to the State in developing a national action plan for human rights.

218 See *R v Secretary of State for the Home Department ex parte Brind* (1991) AC 696, p. 747; *Attorney General of Botswana v Dow* (1994) (6) BCLR 1, paras. 29-30; and *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, p. 16.

219 *Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No. 171 and 172 (2007). See also A/HRC/9/9, para. 54.

220 Human Rights Committee, general comment No. 3 (1981) on implementation at the national level (article 2).

221 *Toolkit for Collaborating with National Human Rights Institutions*, p. 38.

4. IMPLEMENTATION OF THE DECLARATION

NHRIs are uniquely positioned to play an important role in advancing the domestic implementation of the Declaration.

In the first instance, undertaking actions consistent with this Manual will support NHRIs to significantly advance the domestic implementation of the Declaration. Additional specific actions that NHRIs can take are outlined below.

4.1. USING THE DECLARATION AS A STANDARD OF REFERENCE

One of the most effective ways that NHRIs can advance the domestic implementation of the Declaration is by using it as a common standard of reference.

The Kenya National Commission on Human Rights convenes national forums to carry out advocacy on the rights of indigenous peoples. The Declaration is used to guide this advocacy work.²²²



The more the standards in the Declaration are used to monitor the human rights performance of a State in relation to indigenous peoples, the more these standards will become the norm.

The Human Rights Commission of Malaysia uses the Declaration as an important framework and reference point in developing and implementing the programmes of its internal Indigenous Peoples Rights' Committee.²²³



4.2. COMPLAINTS

Article 40 of the Declaration places obligations on States to develop “just and fair procedures” and “effective remedies” for infringements of indigenous peoples’ human rights. The Paris Principles also provide for NHRIs to hear and resolve human rights complaints. It is noted in Chapter 9 that NHRIs should, according to their mandate, hear and resolve as many human rights complaints as possible from indigenous peoples. This includes complaints directly related to the Declaration.

Where NHRIs do not have a sufficiently broad mandate to hear and resolve complaints by indigenous peoples in relation to violations of their human rights, particularly those outlined in the Declaration, they could actively lobby their State in relation to this issue.

²²² Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

²²³ Ibid.

4.3. NATIONAL PLAN FOR THE IMPLEMENTATION OF THE DECLARATION

Considering that the Declaration is a collation of existing human rights standards, “effective implementation” will require a holistic, rather than an ad hoc, approach. In this regard, it is important that implementation occurs across all State agencies and departments. A common challenge for indigenous peoples’ representatives is engaging with different government departments.

An integrated approach is necessary to reflect the interrelated nature of human rights. It also reflects the lived reality for indigenous peoples; for example, rights to lands, territories and resources are integrally linked to rights to health, education and culture. NHRIs can provide strategic impetus for a holistic approach to implementation through advocacy and lobbying for the development of a national implementation plan.

Furthermore, it is important that NHRIs advocate that the development of a national implementation plan is undertaken in conjunction with indigenous peoples. This reflects article 38 of the Declaration which requires States to work in “consultation and cooperation with indigenous peoples” to “take appropriate measures, including legislative measures, to achieve the ends of the Declaration”. Accordingly, an aim of the strategy could include the introduction of legislation to give domestic legal effect to the provisions of the Declaration.

In November 2007, the Plurinational State of Bolivia passed legislation to implement the Declaration into domestic laws. The Declaration has also been used by the Plurinational State of Bolivia, Ecuador and Nepal to provide normative guidance in constitutional revision processes.²²⁴



As with the implementation of treaties, legislation alone is generally not sufficient for the protection, promotion and realization of indigenous peoples’ human rights. Therefore, an effective national plan should include the following elements:

- Active involvement of indigenous peoples in every stage of the design, development, implementation, monitoring and evaluation processes
- Some form of legislative protection
- A mechanism to review existing laws and policies (see below)
- An effective complaints mechanism
- Education for lawmakers, policymakers and policy implementers on indigenous peoples’ human rights
- A mechanism to review the national plan to facilitate amendments where needed.

4.4. REVIEW OF EXISTING LAWS, POLICIES AND PROGRAMMES

To ensure implementation is effective, existing laws, policies and programmes that impact on indigenous peoples’ human rights will need to be reviewed for consistency with the Declaration. As noted in Chapter 13, the Special Rapporteur on the rights of indigenous peoples has made recommendations that States undertake such reviews. For example, following his mission to Australia in 2009, the Special Rapporteur recommended that:

²²⁴ A/HRC/9/9, paras. 52-53.

*The Commonwealth and state governments should review all legislation, policies and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration.*²²⁵

Review work could be undertaken in a variety of forms, including:

- Systematic review of legislation and policies through an inquiry/commission
- Reviewing existing legislation that is currently before parliament to be amended
- Departmental reviews of policies and programmes that impact on indigenous peoples
- Thematically targeted reviews (i.e. re-examining laws and policies that impact on lands, territories and resources).

Through these actions NHRIs can provide their State with important technical assistance. In addition to working with their State, NHRIs can initiate their own reviews of State laws, policies and programmes through their regular monitoring work.

The Norwegian Centre for Human Rights publishes an annual yearbook which reviews the human rights situation in Norway.²²⁶



Indigenous Saami delegates at the opening of the twelfth session of the UN Permanent Forum on Indigenous Issues. UN Photo/Rick Bajornas.

225 A/HRC/15/37/Add.4, para. 74.

226 More information is available at www.jus.uio.no/smr/english/about/national-institution/.

KEY POINTS: CHAPTER 8

- **NHRIs have a mandate to provide advice and issue recommendations to their Government, as well as to other stakeholders.**
- **NHRIs can use their mandates to promote change to laws, polices and State practices which violate or restrict the rights of indigenous peoples.**
- **NHRIs are encouraged to use the Declaration as a common standard of reference in their work to advocate for the rights of indigenous peoples.**



Chapter 9:

Investigations and complaints

KEY QUESTIONS

- Are NHRIs able to investigate individual and collective complaints of violations of indigenous peoples' human rights?
- What can NHRIs do to encourage the provision of remedies for indigenous peoples whose human rights have been violated?



FOUNDING PRINCIPLES AND INTERNATIONAL STANDARDS FOR NHRI INVOLVEMENT

United Nations Declaration on the Rights of Indigenous Peoples

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 42

... States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration

Paris Principles

Methods of operation

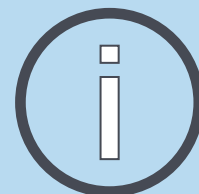
Within the framework of its operation, the national institution shall:

- Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner

Additional principles concerning the status of commissions with quasi-judicial competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality
- Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them



(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Investigating and resolving allegations of human rights violations is a pivotal function of NHRIs. The ways in which they undertake their complaint handling function will differ according to their particular mandate. NHRIs may be empowered to:

- Consider individual complaints and make recommendations for redress and remedies to appropriate authorities
- Consider complaints by groups or communities, in recognition of the collective rights held by indigenous peoples
- Refer cases to relevant authorities, including government agencies, parliament, the judiciary and prosecuting authorities
- Seek redress or remedies on behalf of complainants through courts and tribunals
- Advise courts and tribunals as *amicus curiae*
- Issue legally enforceable orders and binding decisions
- Order that violating authorities pay compensation to victims
- For NHRIs outside the Asia Pacific region, appear before regional bodies such as human rights courts.²²⁷



Indigenous performer from the Philippines at the opening launch of the International Year of the World's Indigenous People. UN Photo/John Isaac

227 *Toolkit for Collaborating with National Human Rights Institutions*, p. 32.

In 2011, the Chairperson of the **Commission on Human Rights of the Philippines**, Loretta Ann Rosales, conducted a press conference to announce the Commission's findings into its investigations into complaints of violations of indigenous peoples' human rights allegedly perpetrated by Oceana Gold, a foreign-owned mining company operating in the Philippines.²²⁸



Chairperson Rosales stated: “The history of development in the Philippines has been marred by serious environmental degradation caused by economic activities accompanied by and related to violations of civil and political rights. Indeed, those who stand up against development aggression expose themselves to harassment by government or project authorities. Nothing compares however to the sufferings endured by the indigenous peoples in whose community lands these projects are made to be located. They lose their homes, livelihood and property, but more grievously their connection to the land and their very identity. When this happens the Commission on Human Rights should not stand idly by. Neither should the government.”

In June 2008, reports and complaints were filed with the Commission alleging that Oceana Gold had “illegally and violently demolished some 187 houses belonging to indigenous peoples in Didipio”. According to Chairperson Rosales, the demolitions were “allegedly done despite failing to secure writs or special orders of demolition from the court, unaccompanied by the Sheriff, without payment of just compensation, and without providing alternative options for relocation and resettlement. These demolitions were reported to have been accompanied by unnecessary violence and destruction: residents who resisted and tried to save their homes were beaten, including their neighbours who helped them; houses had been bulldozed off cliffs and set on fire. It was further alleged that Oceana Gold fenced off large sections of the roads and pathways which community residents have relied upon for the past 30 years to transport produce from their farms to the market. It was also reported that (Oceana Gold) has set up checkpoints around the Barangay, causing them difficulty in moving about, resulting in the unjust restriction of their social and economic activities. Moreover, it was alleged that the Philippines National Police's Regional Mobile Group serves as a private security force of (Oceana Gold), with their officers being stationed inside the facilities of (Oceana Gold).”

Based on the exercise of its investigative powers and mandate, the Commission found sufficient evidence to make a finding that Oceana Gold had “violated the right to residence, the right to adequate housing and property rights; violated the right to freedom of movement and the right to be free from arbitrary interference; violated the right to security of the person of the affected residents; and violated the indigenous community's right to manifest its culture and identity”. The Commission further found that the Philippines National Police's Regional Mobile Group had violated its internal operational procedures by “carrying high-powered firearms and applying unnecessary and unreasonable force”.

In light of the findings from its investigations, the Commission issued a unanimous resolution which recommended that the Government “consider the probable withdrawal of the Financial and Technical Assistance Agreement granted to the foreign company in view of the gross violations of human rights it has committed”. The Commission also requested all concerned government agencies to submit reports to the Commission, within 30 days of the date of the Commission's resolution, “regarding concrete actions they have taken to respect, protect and fulfil the rights of the affected indigenous peoples in Didipio” and to “continue monitoring the human rights situation in Didipio”. The Commission also advised the Oceana Gold mining company to “consider the Commission's findings and conduct a policy reorientation on the conduct of mining operation taking into conscious account the observance of human rights of the community involved”. Furthermore, the Commission's own regional office was directed to “actively advocate for the human rights of the affected community and to take every step possible to avoid the occurrence of further violence and oppression”.

228 Commission on Human Rights of the Philippines, “Statement on the human rights situation in Barangay Dipidio, Kasibu, Nueva Vizcaya” (17 January 2011), available at www.chr.gov.ph/MAIN%20PAGES/news/PS_17Jan2011_didipio.htm.

Key features of an effective complaints investigatory mechanism have been identified as:

- Adequate legal capacity
- A defined and appropriate set of priorities
- Organizational competence
- The political will to pursue its work.

HEARING COLLECTIVE COMPLAINTS²²⁹

In 2008, the Canadian Human Rights Act was amended to include the following provision:

*In a complaint made under the Canadian Human Rights Act ... this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.*²³⁰

The Canadian Human Rights Commission has developed operational guidance on how it will apply the amendment. This guidance is based on research commissioned by experts in dialogues with Elders and legal practitioners, facilitated by the Indigenous Bar Association.



AMICUS CURIAE OR INTERVENER IN COURT PROCEEDINGS

The Nigerian Human Rights Commission intervened in a court case to seek an injunction to prevent the demolition of indigenous peoples' land.

The Defensor del Pueblo de la República de Ecuador has raised concerns with the courts in a number of criminal proceedings instituted against indigenous leaders or activists who have been charged with terrorism or other offences as a result of social protest. This has led to behaviour change in instances where violations of due process have been detected.

1. HEARING AND INVESTIGATING COMPLAINTS

It is always preferable that the powers of NHRIs in relation to complaints investigation are entrenched in law, with clearly defined procedural responsibilities. From this basis, NHRIs can define the scope and role of a complaints investigatory mechanism and identify priority issues to be considered.

NHRIs should also specify the criterion for admissible complaints. Human rights issues arise in almost every area of human activity. In order to avoid a misallocation of resources, NHRIs should prioritize complaints and be careful not to deal with matters that are outside their mandate. Generally, complaints should relate to human rights conferred in the constitution, legislation or other instruments considered part of national law.

Considering its relative youth and “non-binding”²³¹ nature, NHRIs may not have a specific and delineated mandate to investigate complaints for violations of the Declaration. However, it is important to remember that the Declaration elaborates upon existing human rights standards as they apply to indigenous peoples. As such, if a complaint is admissible under another instrument, the NHRI could still consider the complaint and use the Declaration as an interpretative tool.

229 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

230 Bill C-21 2008 (Canada), s. 1.22

231 For further discussion of this issue, see Chapter 5.

During 2010, the Office for the Protection of the Rights of Indigenous People in Guatemala received 4155 complaints by indigenous peoples of probable violations of human rights. During this period, 91 cases of human rights violations against indigenous peoples were recorded.²³²



Considering its relative youth and “non-binding”²³³ nature, NHRIs may not have a specific and delineated mandate to investigate complaints for violations of the Declaration. However, it is important to remember that the Declaration elaborates upon existing human rights standards as they apply to indigenous peoples. As such, if a complaint is admissible under another instrument, the NHRI could still consider the complaint and use the Declaration as an interpretative tool.

In order to maximize the ability of NHRIs to hear indigenous peoples' human rights complaints, and to maximise the effectiveness of the Declaration as a lever for addressing these complaints, it is important that NHRI officers are adequately trained. In this regard, this Manual and accompanying training materials will be of practical benefit for policy officers working within NHRIs and for staff with responsibility for complaint handling and investigations.

Where NHRIs have the mandate to conduct alternative dispute resolution, it is advisable that complaints officers be provided with professional development training. A specific focus of this training could include indigenous models of alternative dispute resolution.

In addition, NHRIs can play a valuable role in situations of conflict or escalating conflict between indigenous communities and the State or other groups, including private enterprises. Potential conflict situations could include the threat of or actual:

- Use of indigenous lands and territories by extractive industries
- Use of force against peaceful demonstrations by indigenous communities
- Illegal or arbitrary arrest of indigenous leaders.

NHRIs may undertake a range of activities to attempt to promote peaceful resolution of these issues, including efforts to:

- Promote dialogue between the parties
- Promote the establishment and growth of peace building mechanisms
- Encourage acceptable and necessary accommodations to deal with underlying human rights issues that may be at the root of the conflict.²³⁴

NHRIs can also play an important role in helping address disadvantage or inequality in negotiations or dialogue with the State or private enterprise.

²³² Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

²³³ For further discussion of this issue, see Chapter 5.

²³⁴ *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, pp. 93-95.

2. CREATING AN EFFECTIVE AND ACCESSIBLE COMPLAINTS PROCESS

An effective complaints mechanism requires organizational competence. This is achieved through an efficient management system. In some instances, United Nations Country Teams²³⁵ can offer assistance to NHRIs in building their internal capacity to undertake complaints investigations.

The National Human Rights Commission of India was established in 1993. During 1993–94, the Commission received 498 complaints. By 1999–2000 the Commission received approximately 50,000 complaints.

In order to accommodate the increasing number of complaints, and to enhance the speed, efficiency and effectiveness of its complaint process, the Commission introduced an online complaints process.²³⁵



A robust system of complaints management can be broken down into three basic stages:

- Early resolution
 - Screening
 - Counselling
 - Alternative dispute resolution/mediation (if within the mandate of the NHRI)
- Complaints investigation
 - Case management strategies
 - Investigation
 - Reporting findings
 - Discussing options for domestic and international recourse
- Recommendations and remedies
 - Disseminating case reports, results and recommendations
 - Seeking to enforce a remedy, including settlements, judicial decisions or confidential interventions
 - Communicating with treaty bodies and regional bodies when internal and national remedies have been exhausted.²³⁷

It is particularly important that NHRIs ensure that their complaints processes are accessible to indigenous peoples. As outlined in Chapters 6 and 7, NHRIs should undertake awareness raising activities targeting indigenous peoples to ensure their functions and complaints handling mandate are well understood. In addition, processes must be flexible to ensure maximum engagement with indigenous peoples. This could include ensuring that:

- Lodging a complaint is free of charge
- There is capacity to receive both oral and written complaints

235 The United Nations Country Team (UNCT) exists in 136 countries, covering all of the 180 countries where there are United Nations programmes, predominantly in the developing world. The UNCT ensures inter-agency coordination and decision-making at the country level. Their main purpose is for individual agencies to plan and work together to ensure the delivery of tangible results in support of the development agenda of the Government. More information is available at www.undg.org/index.cfm?P=1257.

236 More information is available at www.nhrc.nic.in/nhrc.htm.

237 *Toolkit for Collaborating with National Human Rights Institutions*, p. 33.

- Interpreters and/or indigenous liaison officers are used
- Processes are not unnecessarily formal
- Processes do not violate the cultural traditions of the relevant indigenous peoples (i.e. That a woman officer hears a complaint that involves cultural issues that are not to be discussed in the presence of men)
- If a complaint is rejected, complainants are clearly informed of the reasons in a detailed and understandable manner, and they are informed of alternative avenues of redress where appropriate.²³⁸

Furthermore, it is important that NHRIs keep the victim at the centre of any complaints process. Victims need access to necessary information and resources. They must be consulted appropriately and given detailed explanations of decisions.²³⁹

The National Human Rights Commission of Korea translates all its complaint forms into the main languages of migrant worker communities in the Republic of Korea. Staff members also distribute information brochures in multiple languages on the Commission, its complaint handling function and the rights of migrant workers in the suburbs and communities where migrant workers live. The Commission undertakes its awareness raising work in partnership with migrant associations and migrant communities. It has also established partnerships with translation agencies so that professional translators can be available to provide interpretation services when migrant workers seek to make a complaint.²³⁹



A woman cooking rice in the village of Melsanakuppam in Tamil Nadu, South India. UN Photo/P Sudhakaran.

238 Ibid., pp. 30-31.

239 *National Human Rights Institutions: Recommendations for Effective Protection and Promotion of Human Rights.*

240 APF, *Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions* (2012), p. 89.

3. CONDUCTING INVESTIGATIONS

A number of practical steps can be taken to facilitate an effective investigation into an allegation of a human rights violation against an indigenous person/people.²⁴¹

When a complaint is made, it is important to collect all possible information that might help support the allegation. However, the collection of this information should not be done in a way that violates any cultural protocols of the relevant indigenous people.

3.1. INTERVIEW

The first step is to promptly interview the complainant, preferably in person, and with an interpreter if required. The next step is to test the information from the interview. It is important to consider if:

- The testimony is consistent with other independent sources (e.g. indigenous peoples' organizations or relevant NGOs)
- The testimony corresponds with known policies and patterns of behaviour that impact indigenous peoples
- Other testimonies and evidence corroborate the complainant's statement
- The testimony is understood by the NHRI officer in light of language and cultural differences.

Where possible, the **Nigerian Human Rights Commission** provides interpreters during the complaints process for indigenous peoples.²⁴¹



3.2. KEEPING RECORDS

Recording information for use is a necessary part of any investigation. All information gathered in relation to an allegation of a human rights violation against an indigenous person/people should be properly recorded in a file, including:

- Testimonies
- Statements or complaints
- Relevant records
- Photographs
- Affidavits
- Information and responses from authorities
- Other relevant information (i.e. information supplied by indigenous peoples' organizations).

241 Information in this section is primarily drawn from *Preventing Torture: An Operational Guide for National Human Rights Institutions*, pp 36-42.

242 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

In addition, relevant reports on human rights violations faced by indigenous peoples should be kept, including:

- Data on the number of complaints received and resolved relating to indigenous peoples
- Decisions in relevant court cases (i.e. domestic, in other jurisdictions and by intergovernmental bodies)
- Reports prepared by NGOs and indigenous peoples' organizations
- Reports of international and regional bodies (i.e. by the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum or the Expert Mechanism) and by other NHRIs
- Media reports of indigenous peoples' human rights violations.

This additional information can be used to help cross-check allegations and identify consistent patterns of human rights violations.

All information should be systemically collated in a formal recording format that allows others within the NHRI to analyse and use the information appropriately. Records with confidential information should be kept in a secure location and possibly be de-identified.

In recording and storing this information, NHRIs must be cognizant that indigenous peoples have suffered from a legacy of misappropriation of their identity, culture and decision-making powers. This appropriation has frequently been in the form of State records. Ownership and control of these records resides in the creator, in this case the State. However, these records might contain images of important forms of cultural expression and indigenous knowledges (i.e. dance or ceremony).²⁴³

This legacy has two main impacts on the ability of NHRIs to create an effective record from investigating a complaint made by an indigenous person/people. First, there may be a reluctance to provide information for the NHRI to record. Second, there may be a need to develop, in conjunction with indigenous peoples, a protocol for the recording and archiving of records pertaining to indigenous peoples. Principles from the Declaration can guide the development of such a protocol, including:

- Self-determination
- Participation in decision-making
- Free, prior and informed consent
- Rights to culture.²⁴⁴

If a protocol is developed and is subsequently promoted to indigenous communities, it is likely to reduce the reluctance to provide information for the NHRI to record.

4. RECOMMENDATIONS AND REMEDIES/REDRESS

Depending on the mandate of the NHRI, it may be empowered to issue “findings” or recommendations following the investigation of a complaint of human rights violation. In some situations, NHRIs can call for the payment of compensation to victims. Some NHRIs have used this aspect of their mandate after investigating complaints of violations of economic, social and cultural rights, including matters specifically pertaining to indigenous peoples.

243 L. Iacovino, “Rethinking archival, ethical and legal frameworks for records of Indigenous Australian communities: a participant relationship model of rights and responsibilities in *Archival Science*, Vol. 10 (4) (30 June 2010).

244 M. Gooda, “The practical power of human rights: how international human rights standards can inform archival and record keeping practices” in *Archival Science*, Vol. 12 (2) (1 June 2012), p. 141.

The **National Human Rights Commission of India** has a mandate to inquire into complaints of human rights violations, either in response to complaints or on its own motion (i.e. *suo moto*).

It also has the power to instruct the police and other law enforcement authorities to provide it with post-mortem video tapes and autopsy reports conducted by state medical officers in response to deaths in custody and other violations of rights occurring in custody.

The Commission's investigative mandate is not confined to violations of civil and political rights; it can use its powers to inquire into violations of economic, social and cultural rights.

The Commission regularly uses its powers to recommend the payment of financial compensation to victims of human rights violations, following a determination by the Commission that the relevant government authorities have violated the rights of victims.

In one such case, the Commission recommended the payment of financial compensation to 125 tribal families from Orissa state, whose children had died due to the effects of malnutrition arising from the State's denial of the right to food of the affected population. Reports indicate an almost universal rate of compliance by State authorities in response to the Commission's recommendations for the payment of financial compensation to victims of violations.²⁴⁴



KEY POINTS: CHAPTER 9

- Depending on their mandate, NHRIs can consider individual and collective complaints regarding violations of indigenous peoples' human rights and make recommendations for redress and remedies to the appropriate authorities.
- Some NHRIs have mandates that allow them to refer human rights complaints to the relevant authorities, including government agencies, the parliament, the judiciary and prosecuting authorities, and also to seek redress or remedies on behalf of complainants.



²⁴⁴ This case was cited in material prepared by Mario Gomez on "National Human Rights Commissions and ESC Rights" for *Circle of Rights, Economic, Social and Cultural Rights Activism: A Training Resource*, available at www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module23.htm#_edn13.

Chapter 10:

Public inquiries

KEY QUESTIONS

- What are the advantages and disadvantages of NHRIs conducting a public inquiry into indigenous peoples' human rights?
- What are the steps involved in establishing and conducting an effective public inquiry?



FOUNDING PRINCIPLES FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas



Conducting a public inquiry – also known as a national inquiry – on systemic or extremely serious human rights violations can be an effective strategy for NHRIs. A public inquiry enables NHRIs to investigate beyond an individual complaint and identify structural issues or underlying causes of human rights violations. Effective data collection from individual complaints can provide the necessary evidence to justify a public inquiry.

If NHRIs fail to engage with serious or systemic human rights violations it may undermine their credibility. For indigenous peoples, this could foster mistrust and result in disengagement from the NHRI.

A public inquiry is especially important where it becomes apparent to the NHRI that it cannot adequately address a human rights issue through its regular monitoring programme or its complaints processes.

Public inquiries are also useful because they often attract significant media attention, which helps raise public awareness and support and can culminate in law or policy reform.

Detailed information on preparing for and undertaking a public inquiry is provided in the *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, published by the APF and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.²⁴⁵

245 The Manual was published in 2012 and is available at www.asiapacificforum.net/support/resources.

In 1995, the **Australian Human Rights Commission**²⁴⁶ was requested by the Australian Government to conduct the **National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families**. In 1997, the inquiry released the ***Bringing them home*** report.²⁴⁷

The inquiry included hearings and consultations in all parts of the country. It included an examination of a large number of complaints and an analysis of the past laws and policies relating to the forcible removal of Aboriginal and Torres Strait Islander children from their families.

The ***Bringing them home*** report greatly improved the Australian public's awareness of forcible removals and its continuing effects on Aboriginal and Torres Strait Islander peoples. A suite of education materials was subsequently developed for use in schools and for the general community.²⁴⁸

The Commission's report included a range of recommendations to the Australian Government, including that public apologies be made by the Parliaments of Australia. In 2007, the Australian Government issued a formal apology.



1. ADVANTAGES OF A PUBLIC INQUIRY

A public inquiry is a comprehensive process that allows NHRIs to perform several functions at the same time.

1.1. HANDLE LARGE NUMBER OF COMPLAINTS

A public inquiry into indigenous peoples' human rights, or a thematic aspect of indigenous peoples' rights (i.e. their rights to lands, territories and resources), enables the NHRI to deal with a large number of individual complaints in a cost-effective manner. Furthermore, the proactive nature of a public inquiry can elicit complaints or information on human rights violations from individuals who otherwise might not have approached the NHRI. Again, this is of particular relevance for indigenous peoples who often live in geographically isolated areas, can be marginalized from public information and may distrust State bodies.

1.2. INVESTIGATE SYSTEMIC CAUSES OF HUMAN RIGHTS VIOLATIONS

Human rights violations faced by indigenous peoples are frequently caused by underlying and systemic issues, such as marginalization from decision-making. A public inquiry can be an effective way to examine the underlying causes of indigenous disadvantage and human rights violations.

1.3. ANALYSE NATIONAL LAWS AND POLICIES

Public inquiries provide an opportunity for NHRIs to analyse existing laws and policies and assess whether they are consistent with the Declaration.

1.4. EDUCATE AND RAISE AWARENESS

A public inquiry can be a powerful education tool to raise awareness about indigenous peoples' human rights issues among the general public and indigenous peoples. Public inquiries are likely to

²⁴⁶ Information provided by the Australian Human Rights Commission.

²⁴⁷ The report is available at www.humanrights.gov.au/social_justice/bth_report/index.html.

²⁴⁸ More information is available at www.humanrights.gov.au/education/bringing_them_home/index.html.

generate significant media attention and produce resources that can be used for subsequent education programmes. Consequently, a public inquiry can be a useful vehicle for building community understanding of indigenous peoples' human rights challenges.

1.5. DEVELOP EFFECTIVE REMEDIES

The recommendations from a public inquiry, which draw on evidence, analysis and research, will be credible and provide clear and practical steps to develop appropriate strategies that address the systemic human rights issues faced by indigenous peoples.

2. DISADVANTAGES OF A PUBLIC INQUIRY

While conducting a public inquiry can be a very effective mechanism, it does present a series of challenges that NHRIs should closely consider before making the decision to proceed.

2.1. RESOURCES

An effective public inquiry requires a significant investment of time, expertise and human and financial resources. The scale of the resources will depend on the scope of the inquiry (e.g. is it focusing on indigenous peoples' human rights generally or a specific thematic area?). Commission members and policy, media and administrative staff of the NHRI will need to be assigned to undertake the inquiry. Where the NHRI does not have the necessary expertise, external consultants will need to be engaged.

2.2. COOPERATION OF WITNESSES AND ACCESS TO NECESSARY EVIDENCE

As noted in Chapter 6, indigenous peoples might be reluctant to engage with the inquiry as the NHRI may be perceived to be an organ of the State. Certain human rights issues that could be investigated are sensitive and indigenous witnesses may be reluctant to speak publicly about them. Furthermore, the fear of reprisal could inhibit people from sharing information or providing evidence. Language may also be a barrier to accessing necessary information about the inquiry.

In some instances, State bodies and officials may seek to block access to relevant information and evidence that is necessary for the NHRI to conduct a thorough investigation.

2.3. A ONE-OFF ACTIVITY RATHER THAN A PROCESS

A public inquiry will put indigenous peoples' human rights into the public spotlight for a specific period of time. However, the entrenched and systemic nature of many human rights challenges facing indigenous peoples will require a long-term strategy and a continuing monitoring process to ensure lasting change.

3. STEPS TO UNDERTAKE A PUBLIC INQUIRY

3.1. DEFINING TERMS OF REFERENCE

The first step of a public inquiry is to define the aim, scope and timeframe of the public inquiry. As far as possible, it is important to involve indigenous peoples in this planning phase. This is probably best achieved through working with indigenous peoples' organizations and peak bodies.

Although this can be a detailed process, clearly defined terms of reference that have the buy-in of indigenous peoples are critical for a legitimate, focused and effective inquiry.

Since its establishment, the **Human Rights Commission of Malaysia (SUHAKAM)** has received a number of complaints alleging violations of the rights of indigenous peoples. In response to these complaints, SUHAKAM conducted several investigations and research studies, leading the institution to detect indications of a systemic pattern of concerns relating to the native customary land rights of indigenous peoples. In 2010, SUHAKAM decided to hold a National Inquiry into the Land Rights of Indigenous Peoples in Malaysia.



Prior to conducting the national inquiry, SUHAKAM received technical advice and training from the APF and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

Early in the inquiry process, SUHAKAM developed a background paper, which provided contextual information regarding indigenous peoples in Malaysia and outlined the legal basis for SUHAKAM to conduct a national inquiry.²⁴⁹ The paper also outlined the terms of reference of the national inquiry as being:

- (i) To determine the constitutional, legal, administrative and political recognition of the Indigenous Peoples' right to land and their effectiveness in protecting and promoting the Indigenous Peoples' right to land.
- (ii) To inquire into the land rights situation of the Indigenous Peoples and the impact of the recognition or non-recognition of the Indigenous Peoples' right to land on their social, economic, cultural and political rights, taking into consideration relevant international and domestic laws.
- (iii) To identify the constraints which impede the full enjoyment of the Indigenous Peoples' right to land in accordance with their needs and requirements.
- (iv) To create and promote more awareness, knowledge and understanding of the Indigenous Peoples' right to land and their way of life.
- (v) On the basis of the facts and determinations arising from the National Inquiry, to develop recommendations to the Federal and State Government relating but not limited to the following:-
 - (a) the review of domestic land laws and other related laws and policies, with a view to incorporating a human rights focus therein, addressing, in particular, the problems faced by Indigenous Peoples in their land claims; and
 - (b) the formulation of strategies and a plan of action with the aim of protecting and promoting the Indigenous Peoples' right to land as an indivisible and integral part of the protection and promotion of their other human rights.

SUHAKAM organized a number of public consultations, fact-finding visits and discussion sessions as part of the national inquiry process, which commenced in December 2010 and continued into 2012. SUHAKAM also set up a process to receive written submissions from members of the public and concerned stakeholders. Additionally, SUHAKAM appointed researchers to support the inquiry process by conducting targeted research studies on specific topics, such as cases of land conflicts and on the compliance of local laws and policies affecting indigenous land with international human rights standards. In its press statement announcing the commencement of the national inquiry, SUHAKAM said that it intended to conduct "GIS mapping" of claimed indigenous boundaries/territories.²⁵⁰

A core component of the national inquiry process was the process of gathering evidence through public hearings. SUHAKAM used its quasi-judicial powers to conduct public hearings in several venues across Malaysia, hearing testimonies from key witnesses who had been invited or subpoenaed to attend the hearings. The hearings were led by a Panel of Inquiry, headed by the SUHAKAM Chairperson, Tan Sri Hasmy Agam. The hearings were conducted in open venues, with media and members of the public free to attend.

249 More information is available at www.suhakam.org.my/web/682315/1.

250 Human Rights Commission of Malaysia, "SUHAKAM to conduct a national inquiry into the land rights of indigenous peoples in Malaysia", available at www.suhakam.org.my/web/682315/13.



An indigenous man speaks at a public hearing for the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia.
Photo by the Human Rights Commission of Malaysia.

3.2. LAUNCHING THE INQUIRY

To maximise public exposure and effective participation, a public inquiry should be officially launched. Detailed information about the terms of reference, aims, objectives and conduct of the inquiry should be provided to relevant stakeholders.

A public launch should communicate information to indigenous peoples in a culturally appropriate and accessible format and in language that is easily understood, particularly among those individuals and communities affected by the inquiry.

3.3. RESEARCH AND ANALYSIS

All relevant national laws and regulations should be compiled, as well as international and regional human rights standards and accompanying jurisprudence. This research will allow an analysis of the State's compliance with international standards.

3.4. INDIVIDUAL COMPLAINTS

All relevant complaints received through the inquiry process should be analysed for systemic factors that contribute to or perpetuate the denial of indigenous peoples' human rights.

3.5. PUBLIC HEARINGS

As far as fiscally possible, the public inquiry should go to indigenous peoples in their communities, rather than requiring indigenous peoples to attend the inquiry. In this regard, public hearings will probably need to be conducted outside of central locations.

It will also be important to engage with public officials, indigenous peoples' organizations, relevant NGOs, human rights lawyers and academics.

To enhance public engagement with the inquiry, innovative methods to receive information and submissions should be explored. This may include the use of social media, email and video interviews.



Yaku indigenous women, Lakipia, Kenya. OHCHR Photo/Samia Slimane.

3.6. INTERVIEWING INDIGENOUS PEOPLES

Consistent with a human rights-based approach, it is important that indigenous voices emanate through the report. Consequently, a central component of a public inquiry will involve interviews with indigenous peoples.

Indigenous peoples' organizations will be essential in facilitating these interviews. The interviews will need to be conducted in a culturally sensitive manner.

3.7. PREPARATION OF A REPORT AND RECOMMENDATIONS

Preparing the final report is an important outcome for a public inquiry. It is important to consider the structure of the report during the early stages of the inquiry as it may impact the nature of the inquiry.

An effective and successful report will consider the following elements:

- **Style and language:** The report should be written for a target audience (in most instances politicians and public officials). However it should also be accessible to a broad audience, including indigenous peoples. Plain language should be utilized. NHRIs should also consider producing a “community” version of the report, in local language, that is more succinct and easy to understand. Recommendations should be written so that they are clearly directed, implementable and can be readily translated into laws or policies.
- **Content:** The report should address the issues outlined in the terms of reference. It should include details of factual scenarios and subsequent human rights-based analysis. Findings and conclusions should be evidence-based.
- **Format and timing:** The format of a report will influence its impact and ability to create publicity. NHRIs should consider using the content of the report to create associated resources, including education materials. The report should be publicly released to maximize its public exposure.

3.8. FOLLOW-UP

NHRIs should establish a dialogue with the relevant authorities to discuss the steps involved in implementing the report's recommendations. These steps should be subsequently monitored.

NHRIs should also seek to follow up with, and report back to, indigenous peoples and communities that participated in the public inquiry.

In 2004, following numerous complaints of human rights violations in the Khomani San (indigenous) community, the South African Human Rights Commission launched an inquiry.

The inquiry had three key phases:

The initial phase of the inquiry was *research* conducted by Commission staff, as well as commissioned researchers where specific expertise was required. The research was holistic, utilizing a variety of sources and disciplines.

The second phase was *consultations* conducted by Commission staff with the Khomani San community. Cultural sensitivity and ensuring community confidence were central elements of this phase.

The third phase was a three-day *public hearing* with the Khomani San community. The hearing was conducted within the community to facilitate their participation. Individuals, community organizations, NGOs, other stakeholders and government agencies all participated in the public hearing.²⁵¹

One important outcome of the inquiry was that community members expressed to the Commission that this was the:

... the first real opportunity they had to articulate the matters that affect them, which threaten their survival, their culture, their language, their economic prosperity and their future as a people.²⁵²

The inquiry sought to identify systemic and underlying causes of human rights violations

The inquiry report made a number of recommendations targeted at various stakeholders and levels of government. Since the inquiry, the recommendations have become the cornerstone of the Commission's work to promote the rights of indigenous peoples in South Africa. Accordingly, the Commission has taken on a monitoring role, following up progress on the recommendations and requesting information and update reports from various government departments.



251 South African Human Rights Commission, *Report on the Inquiry into Human Rights Violations in the Khomani San Community* (2004), pp. 9-10, available at: www.sahrc.org.za/home/21/files/Reports/KHOMANI_SAN_ENGLISH_FINAL.pdf.

252 *Ibid.*, p. 4.

KEY POINTS: CHAPTER 10

- **Conducting a public inquiry on indigenous peoples' human rights allows NHRIs to perform several functions simultaneously. It can be very effective mechanism for law and policy reform. However, public inquiries also pose challenges that should be considered before a decision is made to proceed.**
- **Undertaking an effective public inquiry on indigenous peoples' human rights involves a number of steps, including defining the inquiry's terms of reference, research and analysis, collecting complaints, holding public hearings, interviewing indigenous peoples, preparing a report and follow-up after the report is launched.**



Part III

National human rights institutions' international engagement



Chapter 11: The Human Rights Council

Chapter 12: Treaty bodies

Chapter 13: Mechanisms specific to indigenous peoples' rights

Introduction to Part III

A critical function of NHRIs is to act as a conduit between the international human rights system and the domestic reality within their State. A necessary part of this work includes monitoring their State's implementation of its international human rights obligations. In this way, international engagement reinforces the domestic work of NHRIs.

NHRIs are uniquely positioned to provide international bodies and mechanisms with authoritative and objective evidence and analysis of the human rights situation of indigenous peoples within their jurisdiction.

They are also well positioned to raise public awareness of the findings and recommendations of these international bodies and to promote domestic implementation of their recommendations.

Chapter 11 examines the Human Rights Council and its mechanisms, particularly the universal periodic review and the special procedures. Chapter 12 examines the human rights treaty bodies and Chapter 13 looks at three United Nations mechanisms that exclusively work in the area of indigenous peoples' human rights.

Chapter 11:

The Human Rights Council

KEY QUESTIONS

- How can NHRIs use the mechanisms of the Human Rights Council to advance the rights of indigenous peoples?
- What opportunities exist to establish links between the international human rights mechanisms and the domestic work of NHRIs in protecting and promoting the rights of indigenous peoples?

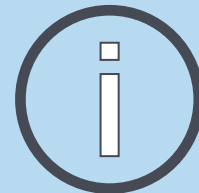


FOUNDING PRINCIPLES FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:
 - (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence
 - (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights



General Assembly resolution 60/251: The Human Rights Council

5. Decides that the Council shall, inter alia:
 - (h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society
11. Decides that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

The Human Rights Council is a permanent United Nations body which aims to strengthen the promotion and protection of human rights around the world. It was established in 2006 by General Assembly resolution 60/251 to replace the former Commission on Human Rights. It has a mandate to undertake its work based on the principles of equality, universality, objectivity and non-selectivity.

The Human Rights Council is based in Geneva. It is composed of 47 member States elected by the General Assembly through a secret ballot. A State's human rights record and any human rights voluntary pledges it has made are taken into account when members are elected to the Council.

The former Commission on Human Rights was a subsidiary organ of the Economic and Social Council, while the Human Rights Council is a subsidiary organ of the General Assembly. This has elevated the status of the Human Rights Council within the United Nations system.

NHRIs that have been accredited as complying with the Paris Principles ("A status") have been recognized with the following participation rights in the Human Rights Council:

- Separate accreditation status (different from States and NGOs)
- The right to speak under all items on the agenda
- The right to speak immediately after the State during the interactive dialogue
- The right to make written statements for inclusion in the official record of meetings
- The use of video conference to address the interactive dialogue
- Dedicated seating.

The Human Rights Council provides a number of mechanisms with which NHRIs can engage, including:

- The universal periodic review
- The special procedures, including the Special Rapporteur on the rights of indigenous peoples (discussed in Chapter 13)
- The complaints procedure
- The Expert Mechanism on the Rights of Indigenous Peoples (discussed in Chapter 13)
- The Social Forum.



Opening of the 21st session of the Human Rights Council. UN Photo/Jean-Marc Ferré.

1. UNIVERSAL PERIODIC REVIEW

The UPR is a mechanism which allows the Human Rights Council to examine the human rights records of all United Nations Member States every four and a half years. It was established by General Assembly resolution 60/251 and the principles, processes and modalities to guide its operation were established by Human Rights Council resolution 5/1 of 18 June 2007. Resolution 5/1 also provides for the active engagement of NHRIs in the UPR process.²⁵³

The review provides an opportunity for all States to highlight the steps they have taken to improve the human rights situation in their countries and to overcome challenges to the enjoyment of human rights.

Between late 2007 and 2011, the Human Rights Council reviewed the human rights performance of all 192 Member States. In 2010 and 2011, towards the end of the first cycle of State reviews, the Human Rights Council reviewed the modes and modalities of the UPR process and, with minor amendments, decided to commence the second cycle in June 2012.²⁵⁴

The second cycle of the UPR, which will involve 193 Member States,²⁵⁵ will be four and a half years in length and conclude at the end of 2016. Subsequent cycles will also be four and a half years in length.

1.1. PRINCIPLES

- **Universality:** All 193 United Nations Member States are examined and all human rights issues are reviewed.
- **Periodic:** The reviews happen on a regular basis and are not one-off events.
- **Equal:** The review process follows an agreed framework that ensures the equal treatment of all States.
- **Cooperative:** The review is based on objective and reliable information and on interactive dialogue. The full involvement of the State under review is essential.
- **Peer review:** The UPR is an intergovernmental-State review process.
- **Action-oriented:** The recommendations provided to States are focused on promoting positive action.

1.2. PERIODICITY²⁵⁶

- The first UPR cycle ran over four years; the second and subsequent UPR cycles will run over four and a half years.
- Three UPR sessions are held annually; each session runs for two weeks.
- 14 States are reviewed in each session; 42 States are reviewed annually.

1.3. OBJECTIVES AND PROCEDURES

The objectives of the UPR are:

- The improvement of the human rights situation on the ground
- The fulfilment of the State's human rights obligations and commitments, as well as assessment of positive developments and challenges faced by the State
- The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned
- The sharing of best practice among States and other stakeholders

²⁵³ Human Rights Council resolution 5/1, para. 3 (m).

²⁵⁴ Human Rights Council resolution 16/21, as supplemented by Human Rights Council resolution 17/119.

²⁵⁵ On 14 July 2011, the General Assembly admitted South Sudan as the 193rd Member of the United Nations.

²⁵⁶ Human Rights Council resolution 5/1 and Human Rights Council resolution 16/21.

- Support for cooperation in the promotion and protection of human rights
- The encouragement of full cooperation and engagement with the Human Rights Council, other human rights bodies and OHCHR.²⁵⁷

While not targeted specifically towards indigenous peoples, the UPR usually involves an examination of the human rights situation of indigenous peoples when the State under review has groups identified as indigenous within its borders or jurisdiction. The Special Rapporteur on the rights of indigenous peoples argues:

*The recently inaugurated mechanism of the Universal Periodic Review (UPR) of the Human Rights Council is an important tool in promoting the rights affirmed in the Declaration. Given the complementary and interrelated character of international human rights law, as well as the existing and developing jurisprudence on various human rights treaties by international bodies and mechanisms, it is clear that the provisions of the Declaration should factor into the interpretation of States' international human rights obligations and the evaluation of the positive developments and challenges faced when implementing them. It is foreseeable that, as the Declaration is gradually mainstreamed and operationalized in the practice of both States and human rights bodies and mechanisms, it will become entrenched in the UPR process, contributing to defining the human rights obligations of the States under review and guiding the recommendations of the Human Rights Council's Working Group on the Universal Periodic Review with regard to indigenous peoples.*²⁵⁸

In practice, the Declaration is increasingly operating as a benchmark in the review of a State's human rights performance in relation to indigenous peoples.²⁵⁹

To follow up the UPR process involving its Government, the South African Human Rights Commission²⁶⁰ is comprehensively integrating UPR recommendations into its work. Recommendations made through the UPR are one of the sources that guide the Commission in developing its strategic plan and setting its priorities.

The Commission links discrete areas of its work with the UPR recommendations made to South Africa. All 22 recommendations have been allocated as the responsibility of either a Commission Committee, programme or topic coordinator. The Commission's work is either specifically aligned to each recommendation or the relevant committee or staff member is tasked with monitoring issues related to their allocated recommendations. The Commission's strategic plan provides that all UPR recommendations and related work will be tracked.



For example, South Africa received recommendations that it should continue to promote and facilitate the right to education, particularly among economically disadvantaged children, and to continue disseminating a culture of human rights in its education institutions. In its strategic plan, the Commission will continue to prioritize work in this area, carrying out inquiries and providing input to the Government officials responsible for education. The Commission will also engage with a parliamentary analysis of the country's education challenges and will set up a committee on education-related issues.

257 Human Rights Council resolution 5/1, para. 4.

258 A/HRC/9/9, para. 63.

259 J. Anaya, *International Human Rights and Indigenous Peoples* (2009), p. 106.

260 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *National Human Rights Institutions and Universal Periodic Review Follow-up*, pp. 1-2, available at <http://nhri.ohchr.org/EN/IHRS/UPR/Pages/default.aspx>.

1.4. DOCUMENTATION FOR THE REVIEW PROCESS

The review of a State is based on three documents:

- Information prepared by the State concerned, not exceeding 20 pages
- A compilation prepared by OHCHR of information contained in the reports and official documents of relevant United Nations bodies and agencies, not exceeding ten pages
- A summary prepared by OHCHR of “[a]dditional, credible and reliable information provided by other relevant stakeholders”, not exceeding ten pages.²⁶¹

The preparation of the State report is the Government’s responsibility and NHRIs should not undertake this task on behalf of their Government. The Government is encouraged, however, to prepare the State report through a broad consultation process at the national level with all relevant stakeholders.²⁶² NHRIs can encourage their Government to organize national consultations and “can take steps to ensure that such consultation captures the diversity of experiences in the country”,²⁶³ particularly in relation to marginalized groups, such as indigenous peoples.

NHRIs can also encourage their Government to disseminate a draft of the State report for public comment, including comment by the NHRI.

In addition, NHRIs should develop their own report based on “[a]dditional, credible and reliable information”. In the first UPR cycle, information provided by NHRIs was usually integrated with information provided by NGOs and “other relevant stakeholders”.

In the second and subsequent cycles, however, the “summary of the information provided by other relevant stakeholders should contain, where appropriate, a separate section for contributions by the national human rights institution of the State under review that is accredited in full compliance with the Paris Principles”.²⁶⁴

1.5. REVIEW OF THE STATE

Based on the documentation provided, the human rights situation of the State is reviewed during a three and a half hour session of the Working Group on the Universal Periodic Review of the Human Rights Council, consisting of all 47 member States.

The review takes the form of an “interactive dialogue” with the State delegation and is only open to member and observer States of the Human Rights Council. The review is facilitated by a group of three rapporteurs, known as “the troika”.

The State can anticipate recommendations by offering voluntary commitments in its opening statement. These are promises of actions it will take to increase its compliance with international human rights law. NHRIs can encourage their State to develop and make good voluntary commitments in the opening statement. “A status” NHRIs can attend the interactive dialogue but they are not permitted to speak.

Following the interactive dialogue, a report is prepared by the troika and discussed in a half-hour session of the Working Group on the Universal Periodic Review.

The Working Group’s report on each State under review includes a summary of the proceedings; conclusions; recommendations made by individual States in the dialogue; and voluntary commitments made by the State under review.²⁶⁵

261 Human Rights Council resolution 5/1, part I.D, para. 15.

262 Human Rights Council resolution 5/1, part I.D, para. 15 (a).

263 APF, *UPR Good Practice Compilation* (2010), para. 3, available at www.asiapacificforum.net/working-with-others/un/human-rights-council/upr.

264 Human Rights Council resolution 16/21, part I.C.1, para. 9.

265 Human Rights Council resolution 5/1, part I.E, para. 26.

The Working Group does not debate the recommendations made by individual States and it does not adopt its own recommendations. Accordingly, the report simply includes all the recommendations put forward by individual States.

1.6. PLENARY DEBATE AND ADOPTION OF THE REPORT

The Working Group's report on each State under review is considered and adopted at a regular session of the Human Rights Council soon after the completion of the Working Group's session.

The State under review speaks first during the one-hour plenary meeting. It is expected to respond to the recommendations in the Working Group's report, either before or during the plenary debate.²⁶⁶

The "A status" NHRI of the State under review has special status. It is "entitled to intervene immediately after the State under review during the adoption of the outcome of the review by the Council plenary".²⁶⁷

Other "A status" NHRIs are also permitted to make oral statements during the discussion, if time allows. However, statements must be directed towards the draft report and not the interactive dialogue with the State under review.

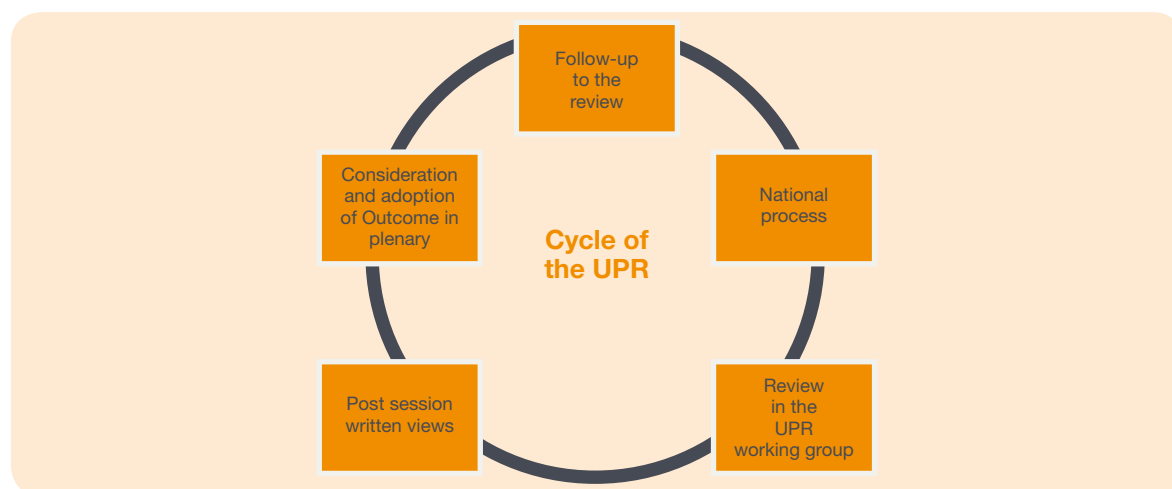
1.7. IMPLEMENTATION AND FOLLOW-UP

Implementation of recommendations is the principal objective of the UPR process. States are expected to act on the recommendations they accept and to consider further those that they have not accepted.

In the second cycle of the UPR, States are required to report on their follow-up and implementation of recommendations accepted from the first cycle.²⁶⁸ In subsequent cycles, they will be required to report on follow-up and implementation of recommendations in all past review reports.

The international community can assist States to implement recommendations through capacity building and technical assistance. NHRIs can also provide technical assistance. In addition, NHRIs can:

- Lobby their State to ensure that action is taken on the UPR recommendations
- Undertake their own implementation initiatives
- Raise public awareness of the UPR process and recommendations
- Monitor the progress made in implementing UPR recommendations.



²⁶⁶ A compiled list of recommendations that each State has accepted or rejected is available at www.upr-info.org.

²⁶⁷ Human Rights Council resolution 16/21, part I.C.2, para. 13.

²⁶⁸ Human Rights Council resolution 16/21, part I.C.1, para. 6.

1.8. THE ROLE OF NHRIs IN THE UPR

The specific role of NHRIs in the UPR process has been recognized and acknowledged. NHRIs provide an important source of independent information on the country's human rights situation, including the rights of indigenous peoples. It is therefore very important that NHRIs make use of their opportunity to contribute to the UPR process.

In March 2010, the **APF** hosted a two-day workshop on the UPR in partnership with the **Australian Human Rights Commission**. The workshop, held in Sydney, Australia, brought together representatives from a number of APF member institutions that had already participated in the UPR process.

The workshop provided a platform for APF member institutions to exchange their UPR experiences with a view to developing good practices, as well as to explore ways to improve the contribution of NHRIs to the UPR process.

A substantial outcome was the development of a *UPR Good Practice Compilation*, which can be used to inform how NHRIs participate at various stages of the UPR process. This document was tabled at the Human Rights Council.²⁶⁹



The 19th session of the Human Rights Council. During the session, Members considered the Universal Periodic Review reports of Ireland, Swaziland, Syria and Thailand, among others, as part of the Council's process to periodically review the human rights records of all 193 UN Member States. UN Photo/Jean-Marc Ferré.

269 A/HRC/14/NI/10.

THE INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (ICC)²⁷⁰

The Paris Principles give NHRIs a mandate, powers and functions that make them ideal contributors to the UPR process ... The roles of NHRIs in the UPR process include:

- Acting as a bridge between the national and international human rights systems
- Providing independent and authoritative information on national situations
- Sharing best practice examples and lessons learned
- Providing advice to Government on the implementation of UPR recommendations, and monitoring follow-up
- Raising UPR awareness at the national level and encouraging domestic actors
- When consistent with their functions, ensuring the implementation of the recommendations.

In relation to the UPR, the Human Rights Council in resolution 5/1 confirmed that stakeholders, including NHRIs, had opportunities to contribute in the UPR by:

- Submitting information for inclusion in the summary of information provided by relevant stakeholders prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR)
- Attending the examination of their country by the Working Group on the Universal Periodic Review in Geneva
- Making general comments at the Human Rights Council before adoption of the Working Group's report on their country by the Plenary, and
- Working to implement UPR recommendations, although the primary responsibility for this lies with the State.

Most recently, as a result of the Council's review and related ICC advocacy, the Council has broadened NHRI contribution opportunities in the UPR. In resolution 16/21, the Council confirmed:

- That Paris Principles compliant NHRIs will be allocated a separate section of future summaries of stakeholders' information prepared by OHCHR, and
- That Paris Principles compliant NHRIs will be entitled to intervene immediately after their State during the Council's adoption of the UPR report on that State, either in person or through video conference.



270 National Human Rights Institutions and Universal Period Review Follow-Up, pp. 1-2.

1.8.1 Preparation of the report

Given their mandate, NHRIs are able to collect and compile independent, reliable and well-documented information on the human rights situation in their country. This information will form the basis of their report to the UPR.

The Human Rights Council has issued detailed guidelines regarding the structure and length of reports, along with deadlines for submissions.²⁷¹ In their submissions, NHRIs can propose questions and issues that might be raised during the review of the State, as well as suggest concrete recommendations that the UPR process could make to the State.

The documents submitted by NHRIs and other national stakeholders are available in full on the website of the Human Rights Council. The NHRI can also print and publicly distribute its report at the domestic level in preparation for the review. This can serve to raise awareness of the UPR process.

The document compiled by OHCHR containing information provided by national stakeholders, including NHRIs, is ten pages in length. It is practice that NHRIs are generally afforded five pages of information and the other groups are similarly afforded five pages.

In 2010, Australia appeared before the Human Rights Council as part of the UPR process. In preparation, the Australian Human Rights Commission²⁷² worked with a broad range of NGOs, including indigenous peoples' organizations, to develop a strategic approach to the submission of documents. While individual NGOs were still encouraged to submit their own reports, a coalition was formed between NGOs and the Commission to coordinate a single "master" NGO report of five pages. The Commission also agreed to limit its report to five pages and drafted it in consultation with the NGO coalition. As a result of this collaboration, the two reports were complementary, avoided overlap and complied with the UPR page limits.

The Commission printed copies of its report and distributed it nationally to raise public awareness of the UPR process. Issues related to the human rights of Aboriginal and Torres Strait Islander peoples were included in both reports.



1.8.2 Review of the State

As noted previously, the human rights situation is reviewed by the Working Group on the Universal Periodic Review of the Human Rights Council, which takes the form of an interactive dialogue with the State delegation. This dialogue is only open to member and observer States of the Human Rights Council. NHRIs are not able to participate in the dialogue, although they are able to attend as observers. Attendance at the session provides an invaluable opportunity for NHRIs to lobby member States, raise awareness of indigenous peoples' human rights issues and propose questions and recommendations.

NHRIs can also lobby their State to make voluntary pledges during the UPR process.

1.8.3 Adoption of the report

NHRIs can participate in the general debate on the Working Group's report. This occurs during the following session of the Human Rights Council. As NHRIs cannot contribute to the dialogue during the review of the State, it is important that they make use of the opportunity to contribute to the discussion at this plenary.

²⁷¹ This information is available at www.ohchr.org/EN/HRBodies/UPR/Pages/NoteNHRIS.aspx.

²⁷² Information provided by the Australian Human Rights Commission.

1.8.4 Follow-up on recommendations and voluntary pledges

The role of NHRIs goes beyond participation in the UPR reporting and review process. As a key national stakeholder, NHRIs are uniquely placed to follow up on the implementation of recommendations made by the Human Rights Council. They can engage with the State and with civil society on the most appropriate and effective ways to monitor implementation and follow up the UPR procedure.

NHRIs are also well placed to disseminate the outcomes of the UPR process at the national level by developing relevant education and awareness-raising programmes.

Other actions that NHRIs can take include:

- Translating and disseminating broadly the UPR report and recommendations
- Identifying priority issues for follow-up in a holistic manner by linking UPR recommendations with those from other United Nations human rights mechanisms, national mechanisms and regional human rights bodies, when applicable
- Developing specific follow-up initiatives for the identified priority issues
- Actively contributing to consultation processes by the State and other stakeholders on the UPR outcome
- Cooperating with **State entities** and other stakeholders in the implementation of UPR recommendations at the national and local level
- Encouraging or facilitating the implementation of UPR recommendations by other relevant stakeholders, including civil society organizations
- Defining benchmarks and monitoring/reporting on the State's implementation of the UPR outcome
- Liaising and exchange good practices with other regional and international networks of NHRIs on UPR follow-up
- Including the implementation of the UPR outcome as an integral part of their own submissions to subsequent reviews.

In addition, stakeholders could maintain a consultative mechanism created when the national report is being prepared for the purposes of monitoring and reporting on the follow-up of the UPR outcome.

THE INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (ICC)²⁷³

NHRI contributions in the UPR follow-up process may take a variety of forms:

- **Publicizing and disseminating UPR outcomes**
- **Using UPR recommendations to inform and drive national activities, including NHRIs' strategic and operational plans**
- **Organizing post-UPR discussions with government and civil society as an impetus to implementation**
- **Monitoring and reporting on the implementation of UPR outcomes**
- **If a Paris Principles compliant institution, periodically reporting back on the implementation of UPR recommendations at Council sessions, and**
- **Incorporating UPR recommendations into reports to other United Nations human rights mechanisms.**



273 National Human Rights Institutions and Universal Periodic Review Follow-up, p. 3.

Following the Human Rights Council's adoption of Kenya's UPR report in 2010, the **Kenya National Commission on Human Rights**,²⁷⁴ together with the Kenya Stakeholder Coalition on the Universal Periodic Review (KSC-UPR), prepared an advocacy tool highlighting the recommendations that Kenya had accepted as commitments and which it should fulfil during the four-year period leading to its next UPR review in 2014.

The "Outcomes Charter" guides State and non-state actors to implement UPR recommendations and subsequent commitments made by Kenya during the UPR process. It sets out the key expectations, indicators, actions and actors whose interventions are necessary to ensure successful implementation.

The Outcomes Charter:

- Records the understandings of the Commission and the KSC-UPR on the commitments which the State made before the Human Rights Council
- Proposes a four-year roadmap on how the UPR recommendations accepted by Kenya can be turned into actions to improve the human rights situation in Kenya
- Converts Kenya's UPR recommendations and commitments into indicator-driven actions that the Government and other actors in the country should undertake during the current UPR cycle (2010–2014)
- Establishes a framework for the Commission and the KSC-UPR to use to monitor implementation of Kenya's UPR commitments.

This advocacy tool was used in March 2011 to guide government departments while they were preparing their UPR plan of action.



2. SPECIAL PROCEDURES

The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.

The system of special procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of 1 January 2013, there are 36 thematic and 12 country mandates.²⁷⁵

2.1. FUNCTIONS OF SPECIAL PROCEDURES

Although the mandates given to the special procedures vary, there is some uniformity in their methods of work.

Most special procedures:

- Undertake studies, through which they contribute to the development of international human rights law
- Investigate situations of human rights arising under the mandate
- Conduct country visits

²⁷⁴ Ibid., p. 6.

²⁷⁵ A compiled list of the special procedures is available at www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx.

- Receive and consider complaints from victims of human rights violations and intervene with States on their behalf through urgent appeals and letters of allegation
- Report to the Human Rights Council and to other intergovernmental bodies, such as the General Assembly, on their findings, conclusions and recommendations.

2.2. SPECIAL PROCEDURES AND INDIGENOUS PEOPLES

Most of the thematic special procedure mandate holders have examined the situation of indigenous peoples with regards to the promotion and protection of their human rights. For example, to cite but a few, Special Rapporteurs have reported on the situation of indigenous peoples in connection with their mandates on adequate housing, education, food and the disposal of hazardous substances and wastes.

Highlighting the unique nature of indigenous peoples' human rights, the Commission on Human Rights established a Special Rapporteur on the rights of indigenous peoples in 2001 (see Chapter 13 for detailed discussion).

2.3. CONTRIBUTION OF NHRIs TO SPECIAL PROCEDURES

NHRIs can contribute to each facet of a special procedure's mandate. In particular, NHRIs can draw attention to indigenous peoples' human rights issues as they relate to the mandates of the different special procedures.

Cooperative engagement can enhance the functioning of NHRIs and the special procedures in undertaking their mutually reinforcing roles. Deep cooperation is beneficial to protecting and promoting the realization of human rights at the national level.²⁷⁶

2.4. COUNTRY VISITS²⁷⁷

Conducting country visits is one of the most important functions of the special procedures. Country visits cannot be undertaken without the approval of the relevant State.

The terms of reference for country visits, adopted in 1998, provide that the special procedures and the staff assisting them should have:

- Freedom of movement in the whole country, in particular to restricted areas
- Freedom of inquiry, in particular as regards:
 - Access to all prisons, detention centres and places of interrogation
 - Contacts with central and local authorities of all branches of government
 - Contacts with representatives of NGOs, other private institutions and the media
 - Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty
 - Full access to all relevant documentary material
- Assurance by the Government that persons who have been in contact with the special procedures will not be penalized or suffer retribution of any kind
- Appropriate security arrangements without, however, restricting the special procedures' freedom of movement and inquiry.²⁷⁸

276 APF, *Position Paper: Engagement of National Human Rights Institutions with Special Procedures* (2007), para. 24.

277 APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions* (2012), p. 52.

278 E/CN.4/1998/45.

During a country visit, the special procedure will meet with government officials, the NHRI, local NGOs and local experts, including victims and others affected most by the situation, to hear their views on the issue. Where relevant, the special procedure should meet with indigenous peoples' organizations to seek their views and input.

A country visit by a special procedure is one of the most effective means of bringing a human rights situation to international attention. It can therefore be an important means by which the NHRI can build international support for its work and, in this way, increase its effectiveness. A special procedure making a country visit generally has limited knowledge of the country and needs access to local expertise. The NHRI can provide its knowledge and experience to support and advise the special procedure.

After the visit, the special procedure finalizes and releases the report of the visit and participates in an interactive dialogue during a regular session of the Human Rights Council. The "A status" NHRI of the country visited can address, in person or by video, the Human Rights Council immediately after the State concerned when the report is presented.²⁷⁹

NHRIs have an important role in following up on the report issued by the special procedure. They should widely disseminate the report, particularly to indigenous peoples. In addition, they can monitor the steps taken by the State to implement the recommendations from the report. NHRIs could also organize follow-up seminars or roundtable discussions on the report and its recommendations with key indigenous peoples' organizations and public officials.

The report is an authoritative source of information that NHRIs can draw on in their role to make recommendations to the Government and others on the human rights situation of indigenous peoples. It can also provide significant guidance to inform the work plans of NHRIs, as well as the development of national action plans on human rights.



An indigenous leader from the Western Amazon in Brazil, delivers an invocation to mark World Interfaith Harmony Week. UN Photo/Devra Berkowitz.

279 Human Rights Council resolution 16/21, part II.B, para. 28.

Finally, NHRIs can regularly communicate with the special procedure and provide information on progress that has occurred in the implementation of the report's recommendations.

SUPPORTING COUNTRY VISITS BY SPECIAL PROCEDURES²⁸⁰

To support country visits by the special procedures, the NHRI can:

- Encourage its Government to issue a standing invitation to all special procedures to visit the country
- Propose that its Government invite and encourage a visit by a particular special procedure whose mandate is relevant to the country situation
- Brief government officials, NGOs, other experts, legal authorities and victims about the purpose, nature and arrangements for the visit
- Advise the special procedure on the programme for the visit, including who should be met during the visit
- Brief the special procedure and her or his staff, both before the visit and during it
- Widely publicize any press release or public statement made by the special procedure at the conclusion of the visit
- Participate in the interactive dialogue in the Human Rights Council plenary session on the special procedure's report, responding to the report's findings and recommendations
- Ensure that the report of the visit, including its findings and recommendations, receives wide circulation in the country, including with selected government officials, parliamentarians and NGOs and civil society groups
- Take relevant special procedures' recommendations into account when submitting opinions, recommendations, proposals and reports to the Government, parliament or other bodies
- Monitor and report on the safety and well-being of those human rights defenders, victims of violation and others who cooperated with the special procedure during the visit
- Promote, monitor and report publicly, including to the special procedure and the Human Rights Council, on the implementation of the report's recommendations.



3. HUMAN RIGHTS COUNCIL COMPLAINTS PROCEDURE

A complaints procedure has been established under the Human Rights Council to address consistent patterns of gross and reliably attested violations of all human rights, which occur in any part of the world and under any circumstances. Its modalities and procedures are established in Human Rights Council resolution 5/1.

²⁸⁰ *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, pp. 53-54.

Economic and Social Council resolution 1503 from 1970 provides the basis for the establishment of this confidential procedure. However, it requires a complainant to exhaust all domestic remedies before lodging a complaint with the Human Rights Council. The complaints procedure aims to address systemic “patterns” of human rights violation. However, it does not result in an individual judgement or an individual remedy.

The complaints procedure establishes two distinct working groups: the Working Group on Communications and the Working Group on Situations.

The Working Group on Communications, composed of five independent experts, assesses the admissibility and the merits of the communications it receives. All admissible communications and recommendations are transmitted to the Working Group on Situations.

The Working Group on Situations is composed of five members appointed by regional groups from the member States of the Human Rights Council. It presents the Human Rights Council with a report on consistent patterns of gross and reliably attested violations of human rights and makes recommendations on the course of action to take. The Human Rights Council then makes a decision concerning each situation brought to its attention.

3.1. THE CONTRIBUTION OF NHRIs TO THE COMPLAINTS PROCEDURE

NHRIs can raise awareness at the national level about the complaints procedure, how it works, possible outcomes and the fact that it is a confidential process. NHRIs may also be able to submit complaints/communications on behalf of victims when they have evidence of consistent patterns of human rights violations involving indigenous peoples.²⁸¹



Participants during the plenary meeting of the fifth session of the UN Permanent Forum on Indigenous Issues. UN Photo/Paulo Filgueiras.

281 *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, pp. 50-54.

KEY POINTS: CHAPTER 11

- **NHRIs can use the universal periodic review as an opportunity to encourage their Government to respect, protect, promote and advance the rights of indigenous peoples.**
- **NHRIs can interact with relevant special procedures to submit information regarding violations of indigenous peoples' human rights, to assist in country visits and to contribute towards studies.**
- **NHRIs can consider using the Human Rights Council's complaints procedure to submit a complaint on behalf of indigenous peoples.**



Chapter 12:

Treaty bodies

KEY QUESTIONS

- How can the treaty bodies contribute to the promotion and protection of the human rights of indigenous peoples?
- In what ways can NHRIs interact with the treaty bodies to draw attention to the human rights situation of indigenous peoples?



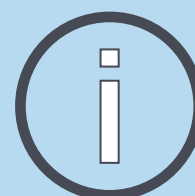
FOUNDING PRINCIPLES FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights



Human rights treaty bodies are committees of independent experts that monitor the implementation of international treaties. They are created by the treaty that they monitor²⁸² and their main function is to consider the reports of States parties.

In addition to their obligation to implement the substantive provisions of the treaty, each State party undertakes to submit periodic reports to the relevant treaty body on how the rights are being implemented. For example, States parties to the International Convention on the Elimination of All Forms of Racial Discrimination are required to submit regular reports to the Committee on the Elimination of Racial Discrimination.

For more detailed information on the interaction of NHRIs with the treaty body system, see the OHCHR Information Note²⁸³ and the APF training manual on NHRIs and the international human rights system.²⁸⁴

282 The Committee on Economic, Social and Cultural Rights was established by Economic and Social Council resolution 1985/17.

283 Office of the United Nations High Commissioner for Human Rights, *Information Note: National Human Rights Institutions (NHRIs) interaction with the UN Treaty Body System* (2011), available at <http://nhri.ohchr.org/EN/ICC/AnnualMeeting/24/4NHRI%20Treaty%20Bodies%20Engagement/NHRIs%20and%20the%20Treaty%20Bodies.Infonote.11.4.2011.doc>.

284 *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, chaps. 10-11 and 12.

Treaty body	Treaty	Examination of reports	Individual complaints
Human Rights Committee	International Covenant on Civil and Political Rights (1966)	Yes	First Optional Protocol (1966)
Committee on Economic, Social and Cultural Rights	International Covenant on Economic, Social and Cultural Rights (1966)	Yes	Optional Protocol (2008)
Committee on the Elimination of Racial Discrimination	International Convention on the Elimination of All Forms of Racial Discrimination (1965)	Yes	Article 14
Committee on the Elimination of Discrimination against Women	Convention on the Elimination of All Forms of Discrimination against Women (1979)	Yes	Optional Protocol (1999)
Committee against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984)	Yes	Article 22
Committee on the Rights of the Child	Convention on the Rights of the Child (1989)	Yes	Optional Protocol (2011) – not yet in force ²⁸⁵
Committee on Migrant Workers	International Convention on the Rights of All Migrant Workers and Members of Their Families (1990)	Yes	Article 77– not yet in force
Subcommittee on Prevention of Torture	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (2002)	No	No
Committee on the Rights of Persons with Disabilities	Convention on the Rights of Persons with Disabilities (2006)	Yes	Optional Protocol
Committee on Enforced Disappearances	International Convention for the Protection of All Persons from Enforced Disappearances (2006)	Yes	Article 31

285 The third optional protocol on a Communications Procedure opened for signature in 2012.

The work of the human rights treaty bodies is conducted through a number of functions, in accordance with their specific treaty. This work includes:

- The State party reporting system
- Receiving individual complaints/communications
- Developing general comments or general recommendations
- Conducting inquiries.

The findings and recommendations of treaty bodies provide authoritative interpretations and statements on the content and implementation of the relevant treaty. Consequently, this work contributes to the development of international jurisprudence.

NHRIs can play an important role in these functions by providing relevant information to the treaty bodies. NHRIs can also use treaty body findings and recommendations when lobbying their Government to implement their international obligations and to monitor State compliance with the treaty.²⁸⁶

As part of their responsibility for public awareness and education, NHRIs can publicize and disseminate core international human rights instruments, as well as concluding observations, views and decisions on communications and general comments of the treaty bodies.

There is also a need for NHRIs to raise awareness of individual treaty body communications procedures, to support their use by victims of human rights violations and to be strategic in promoting cases that may build specific jurisprudence. In addition, NHRIs can expand their education role to include professional training on the treaty body reporting and implementation process for key national and international stakeholders.

Across each of the treaty bodies' functions, NHRIs can promote the Declaration as an interpretative tool to understand how the relevant treaty applies to a State party's indigenous peoples.



Villagers in Kyauk Ka Char, Shan State, Myanmar. UN Photo/Mark Garten.

286 *Marrakech Statement on Strengthening the Relationship Between NHRIs and the Human Rights Treaty Body System* (10 June 2010), p. 4, cl. 17.

In its general comment on the rights of indigenous children²⁸⁷, the **Committee on the Rights of the Child** made explicit use of the Declaration in interpreting how the Convention applies to indigenous children:

10. In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples which provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas.
45. The Committee draws the attention of States to article 8 (2) of the Convention which affirms that a child who has been illegally deprived of some or all of the elements of his or her identity shall be provided with appropriate assistance and protection in order to re-establish speedily his or her identity. The Committee encourages States parties to bear in mind article 8 of the United Nations Declaration on the Rights of Indigenous Peoples which sets out that effective mechanisms should be provided for prevention of, and redress for, any action which deprives indigenous peoples, including children, of their ethnic identities.
82. Finally, the Committee urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples. In order to guarantee effective monitoring of the implementation of the rights of indigenous children, States parties are urged to strengthen direct cooperation with indigenous communities and, if required, seek technical cooperation from international agencies, including United Nations entities. Empowerment of indigenous children and the effective exercise of their rights to culture, religion and language provide an essential foundation of a culturally diverse State in harmony and compliance with its human rights obligations.



1. STATE PARTY REPORTING

Upon ratifying or acceding to a human rights treaty, the State party undertakes to submit an initial report and periodic reports to the treaty body on the domestic implementation of that treaty. This is done through a dialogue process.

Some treaty bodies have pre-session meetings during which they adopt a list of questions that the State will be required to answer. The report is then examined in a public session of the treaty body, in the presence of a delegation of the State party, which considers all the information provided by the State and information received from other sources. Based on this process, the treaty body adopts concluding observations, which refer to the positive aspects of the State's implementation and areas where they recommend the State to take further action.

In each phase of the reporting process, NHRIs should use the Declaration to interpret how the relevant treaty applies to indigenous peoples in their country and to what extent it has been implemented in this regard. NHRIs should advocate that the treaty body and their State also utilize the Declaration for this purpose.

287 Committee on the Rights of the Child, general comment No. 11 (2009) on indigenous children and their rights under the Convention.

1.1. PRE-REPORTING PROCESS

NHRIs can play an important role in the pre-reporting process. In particular, they can discuss the reporting process with their Government and help ensure that their State's report is submitted on time. NHRIs should also work to ensure that specific and disaggregated information is continually being collected by their State so that it can be used in future reports.

The Philippines Commission for Human Rights has established a “Government Linkages Office” (GovLink) to focus specifically on engaging with governmental institutions to more effectively monitor and promote State compliance with its treaty obligations.

GovLink has prepared the Commission's submissions and organized workshops and publications to raise awareness and allocate responsibility for the implementation of the recommendations made to the Philippines by the Committee on Economic, Social and Cultural Rights (the Committee) among relevant government agencies, non-governmental organizations and civil society.

Supported by the United Nations Development Programme and in partnership with PhilRights, an NGO, GovLink has pursued a programme of activities aimed at ensuring that these responsibilities are understood by, and engaged with by, Government and civil society organizations, which can then be properly monitored by the Commission in accordance with its mandate.

These activities have included:

- **The production of a handbook on how to engage with the Committee's reporting process, intended as an internationally accessible guide for “all duty holders, Government, civil society as well as national human rights institutions in highlighting the importance of heeding the recommendations of the Committee”**
- **The production of a flyer for general distribution, outlining the concluding observations as suggested instructions on “what the Philippines Government must do” to improve its compliance with the International Covenant on Economic, Social and Cultural Rights**
- **Development of a mapping tool to help allocate and monitor responsibilities.²⁸⁸**



1.2. REPORTING PROCEDURE

The role of NHRIs in the reporting procedure can differ from one treaty body to another. However, as a minimum NHRIs can:

- Be consulted about the content of the State party's report
- Submit their alternative report on the State's compliance with, and implementation of, the treaty, including a specific focus on indigenous peoples' human rights issues
- Attend the session when their State reports to the treaty body.

²⁸⁸ *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, p. 121.

1.3. STATE PARTY REPORT

Increasingly, treaty bodies expect that NHRIs will be consulted in the preparation of reports by States parties.

NHRIs should lobby their State to ensure that indigenous peoples and their organizations are also adequately consulted in the preparation of State reports. They can also use this opportunity to encourage their State to report on the implementation of the Declaration.

In terms of content, NHRIs can work with their State to ensure that indigenous peoples' issues are given specific and disaggregated attention.

At all times, however, NHRIs should ensure that they retain their independence. As such, they should not prepare or draft the report on behalf of the State.

1.4. ALTERNATIVE REPORTS

NHRIs can prepare an alternative or "parallel" report and submit it directly to the treaty body. In this report, NHRIs might include comments about the State's report, if there is sufficient time to do so.

An alternative report can follow the structure of the relevant treaty, considering each article and highlighting areas of progress or concern regarding the implementation of its provisions by the State. Alternatively, the report could be structured from a thematic perspective, with a section of the report dedicated to an analysis of indigenous peoples' human rights issues as they relate to the treaty. It is recommended that NHRIs also refer to relevant sections of the Declaration to interpret how obligations under the treaty apply and are being implemented in regards to the indigenous peoples in the country.

PREPARING AN ALTERNATIVE REPORT²⁸⁹

NHRI parallel reports should:

- **Be objective and based on factual sources, not mere assertions or subjective opinions**
- **Be reliable**
- **Not be abusive and not worded in or with an overtly partisan tone**
- **Provide information specific to the treaty**
- **Be structured following State reporting guidelines**
- **Give a clear indication of the provisions breached and in what way**
- **Propose recommendations that the treaty body should make to the State at the end of the examination.**



The preparation and submission of a parallel report by the NHRI has clear, positive results in that:

- **It encourages more honest State reporting**
- **It encourages better State representation at the treaty body's interactive dialogue with the State**
- **It enables the identification of a better and more relevant list of issues and questions to be presented to the State prior to the interactive dialogue**
- **It provides more significant questions for discussion during the dialogue.**

289 Ibid., p. 73.

The report should be balanced and consider both positive and negative developments. If the State has taken constructive steps towards the promotion and protection of human rights, these steps should be acknowledged.

Alternative reports should also suggest questions and issues that the treaty body can raise in discussion with the State, as well as propose recommendations that the treaty body could consider in its concluding observations.

The New Zealand Human Rights Commission routinely raises indigenous issues in its alternative reports to treaty bodies. In its most recent report to the Committee on Economic, Social and Cultural Rights in 2012, the Commission provided information on a number of matters adversely impacting on indigenous rights in New Zealand. In particular, the Commission drew the Committee's attention to entrenched inequalities across a number of areas, including health, housing, employment and education.²⁹⁰



1.5. OTHER ACTIONS

Some treaty bodies provide NHRIs with additional opportunities to participate in the reporting process, such as:

- Holding a private meeting with the treaty body
- Submitting information to assist with drafting the written list of issues sent to the State before the session
- Making a statement during the plenary session
- Informal lobbying of treaty body members during the session.

The website of each treaty body provides information on the participation opportunities for NHRIs (and NGOs) in the reporting process.²⁹¹



Aboriginal and Torres Strait Islander performers at the opening ceremony of the *Indigenous Peoples: Honouring the Past, Present and Future* cultural exhibition. UN Photo/Mark Garten.

²⁹⁰ Information provided by the New Zealand Human Rights Commission.

²⁹¹ A compiled list of the treaty bodies is available at www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

In 2010, the **Australian Human Rights Commission** engaged with the **Committee on the Elimination of Racial Discrimination** in jointly examining Australia's 15th, 16th and 17th reports under the **International Convention on the Elimination of All Forms of Racial Discrimination**.

The Commission learned a great deal from this engagement, particularly about the importance of preparatory dialogue with the Government and NGOs and the need to build relationships with those for whom the treaty could have the most impact.

Commission representatives found it imperative to ensure that, along with members of the NGO delegation, the indigenous Elders who formed part of the NGO parallel reporting group had adequate support to feel ownership of the reporting process.

Attending side sessions organized by the NGO delegation, which included indigenous peoples' organizations, proved to be a good way for Commission representatives to do this, helping build trust and strengthen relationships during the course of the reporting process.

The Commission observed engagement techniques used by the Australian NGO delegation, including side sessions with the Committee. It found that offering lunch and keeping sessions to approximately 45 minutes in length was a useful way to involve numerous Committee members but that it was important to ensure that members had enough time to ask questions. NGO representatives distributed handouts that summarized their verbal presentations, an effort which the Committee members appreciated, commenting several times on how beneficial they were.

Since then, the Commission has been engaged in activities to lay the foundations for ongoing implementation of Convention. Relationship-building with the relevant government department has continued. Through subsequent dialogue, the Commission found that departmental staff felt ill-positioned for this implementation work. In response, the Commission has begun investigating the options for collaborating with the government department on a model for domestic implementation of treaties. This has included discussions about the design of such a model with various NGOs and has resulted in a commitment to continue working in partnership with the NGOs on this. The Commission will incorporate some of this work as part of its core business.²⁹²



1.6. FOLLOW-UP TO THE REPORTING PROCESS

NHRIs can play a key role in the follow-up to the reporting process. They can publish, disseminate and, where necessary, translate the concluding observations adopted by the treaty body. They can also encourage their State to implement the recommendations made by the treaty body, as well as monitor progress in this regard.

Treaty body recommendations in concluding observations about indigenous peoples' human rights issues can inform the work plans of NHRIs. Findings and recommendations can also be used as authoritative statements when NHRIs monitor and report on their State's human rights performance.

²⁹² *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, pp. 118-119.

The Ombudsman for the Promotion and Protection of the Rights of Indigenous Peoples in Panama has engaged with the Government to follow up on recommendations made by treaty bodies. As a result of this advocacy work, the Government has committed to undertake actions to promote the rights of indigenous peoples.²⁹³



2. INDIVIDUAL COMPLAINTS/COMMUNICATIONS

Most of the human rights treaty bodies²⁹⁴ can consider individual complaints from individuals who believe their rights have been violated under the treaty (see table on page 118). This is a quasi-judicial function. Complaints may be brought only against States that have recognized the competence of the treaty body to consider individual complaints. Depending on the treaty concerned, this will involve becoming a party to an Optional Protocol or making a declaration under an article of the treaty.

2.1. COMPLAINTS PROCESS

Anyone can lodge a complaint with a treaty body against a State provided that it satisfies the following conditions:

- The State must recognize the competence of the treaty body to receive individual complaints
- The complaint must be brought by the person whose rights have been violated or on her or his behalf
- Domestic remedies must be exhausted.

In principle, there is no formal time limit for filing a complaint. However it is preferable that it is submitted as soon as possible. In urgent situations, the treaty body may request the State to grant “interim measures” to prevent “irreparable harm”.

Complaints are considered on the basis of the written information supplied by the complainant, or her or his representative, and the State in closed meetings. The treaty body's decisions on individual complaints are included in its annual reports. If a violation is found, the State is requested to provide an effective remedy and respond to the treaty body within a set deadline. The remedy recommended will depend on the violations found. The State has a good faith obligation to implement the treaty body's findings and grant appropriate remedies. However, the views on communications concerning individual complaints are not legally binding.

The treaty body actively encourages the State to implement its decision, including through the State party reporting process. The Human Rights Council, through the UPR process, also encourages States to implement decisions made by treaty bodies.

Although some States do not comply with decisions of treaty bodies, a significant number have granted a variety of remedies to complainants following decisions. These decisions also influence the development of international standards by creating a body of quasi-judicial interpretations of the treaties.

In regards to indigenous peoples, decisions by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination have had significant influence on the development of international human rights standards. It is envisaged that the Declaration will provide further impetus for the work of the treaty bodies.

293 Response to OHCHR questionnaire on possible good practices in addressing the rights of indigenous peoples.

294 Information on complaints procedures under the treaty bodies is at www2.ohchr.org/english/bodies/petitions/index.htm.

2.2. THE ROLE OF NHRIS IN THE TREATY BODY COMPLAINTS PROCEDURE

If the State has accepted the individual complaints procedure, NHRIs can raise public awareness about this procedure and can consider assisting individuals to submit a complaint. Depending on their mandate, NHRIs may be able to submit cases on behalf of individuals. Where a State has not recognized the competence of the treaty body to consider individual complaints, the NHRI can lobby the State to take steps in this regard.

NHRIs can disseminate the decisions of treaty bodies concerning individual complaints, as well as follow up on relevant decisions and advocate for their State to comply with them.

The findings of the treaty bodies provide an important source of jurisprudence that NHRIs can use in their work, including advocating for law and policy reforms. Consequently, NHRIs should monitor and record findings by treaty bodies that relate to indigenous peoples' human rights and use them in their programmes and activities.

3. GENERAL COMMENTS

Treaty bodies also issue general comments to elaborate on the normative content of substantive and procedural obligations of a treaty. These authoritative elaborations assist States parties to interpret and implement their treaty obligations.

Treaty bodies have specifically considered indigenous peoples' human rights issues in a number of their general comments or general recommendations, including:

Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997) on indigenous peoples.

Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life.

Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

Committee on Economic, Social and Cultural Rights, general comment No. 17 (2005) on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

Human Rights Committee, general comment No. 23 (1994) on the rights of minorities.

Committee on the Rights of the Child, general comment No. 11 (2009) on indigenous children and their rights under the Convention.

NHRIs may be consulted on draft general comments. They may also recommend that a treaty body considers an issue where a general comment is required.

General comments are valuable sources of authoritative information to inform the normative content of the human rights treaties. NHRIs can utilize these general comments to guide recommendations to their State about how best to implement its human rights obligations.

NHRIs should monitor and record general comments that relate to indigenous peoples' human rights.

In the *Social Justice Report 2005*,²⁹⁵ the Aboriginal and Torres Strait Islander Social Justice Commissioner of the **Australian Human Rights Commission** called on the Australian Government to commit to achieving health and life expectation equality between indigenous and non-indigenous Australians within a generation.

In adopting a human rights-based approach to this call for health equality, the Social Justice Commissioner applied the right to the highest attainable standard of health, as articulated in general comment No. 14 of the Committee on Economic, Social and Cultural Rights, to the health crisis facing indigenous Australians. The report sparked positive action by the Australian Government, including the signing of a Statement of Intent to achieve health quality by 2030.²⁹⁶



4. EARLY WARNING MEASURES AND URGENT PROCEDURES

In 1993, the Committee on the Elimination of Racial Discrimination adopted new preventative procedures, early warning measures and an urgent procedure to enable it to respond more effectively to violations of the International Convention on the Elimination of All Forms of Racial Discrimination.²⁹⁷ Early warning procedures aim to prevent problems escalating into violence and urgent action procedures aim to respond to serious violations of the Convention. There is minimal distinction between these procedures and, in practice, they are used concurrently.

The Committee is able to invoke this procedure when it deems it necessary to address serious violations of the Convention in an urgent manner. Given that the Committee has actively used the Declaration as a reference point to interpret the obligations of States parties under the Convention as they relate to indigenous peoples, a serious violation of the Declaration might arguably lead the Committee to invoke this procedure.

Guidelines issued by the Committee specifically state that this procedure can be invoked in response to the “encroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands, in particular for the purpose of exploitation of natural resources”.²⁹⁸

In its early warning and urgent action procedure with the **Laos People’s Democratic Republic**, the Committee expressed concern that the Hmong people allegedly faced continuing military action. It urged the State to immediately stop any military action and withdraw military troops from the territory. In doing so, the Committee drew the attention of the State to article 30 of the Declaration, which states that military activities shall not take place in the lands or territories of indigenous peoples.²⁹⁹



295 Australian Human Rights Commission, *Social Justice Report 2005* (2005), chap. 2.

296 Further information is available at www.humanrights.gov.au/social_justice/health/index.html.

297 A/48/18, annex III.

298 A/62/18, annexes, chap. III, para. 12 (h).

299 See www2.ohchr.org/english/bodies/cedr/docs/Laos_12.03.1010.pdf.

The Committee may decide to consider a specific situation under its early warning and urgent action procedure on the basis of information provided to it by an NHRI.³⁰⁰

NHRIs should also promote awareness of these procedures to indigenous peoples.

KEY POINTS: CHAPTER 12

- **NHRIs can submit alternative reports regarding State implementation of treaty obligations, including those that relate directly to the human rights of indigenous peoples.**
- **NHRIs can lobby their States to accept the complaints jurisdiction of treaty bodies and can assist victims with the submission of complaints to treaty bodies.**
- **Concluding observations and recommendations made by treaty bodies can be useful tools for NHRIs in their advocacy to advance the rights of indigenous peoples.**



300 A/62/18, annexes, chap. III, para. 13.

Chapter 13:

Mechanisms specific to indigenous peoples' rights

KEY QUESTIONS

- In what ways can NHRIs contribute to the work of the United Nations Permanent Forum on Indigenous Issues?
- How can NHRIs interact with the Expert Mechanism on the Rights of Indigenous Peoples?
- How can NHRIs support and contribute to the work of the Special Rapporteur on the rights of indigenous peoples?



FOUNDING PRINCIPLES FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

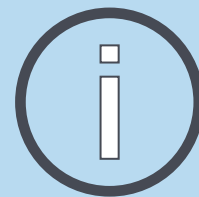
3. A national institution shall, inter alia, have the following responsibilities:

- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights

Human Rights Council resolution 6/36

The Human Rights Council:

- 9. Also decides that the annual meeting of the expert mechanism shall be open to the participation, as observers, of... national human rights institutions.



There are three major United Nations mechanisms that work exclusively to advance the rights of indigenous peoples:

- The United Nations Permanent Forum on Indigenous Issues, a subsidiary body of the Economic and Social Council
- The Expert Mechanism on the Rights of Indigenous Peoples, a five-member expert advisory body of the Human Rights Council
- The Special Rapporteur on the rights of indigenous peoples, one of the special procedures of the Human Rights Council.

1. UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

1.1. OVERVIEW

The Permanent Forum was established as a subsidiary organ of the Economic and Social Council in 2000 by its resolution 2000/22, with a mandate to discuss issues relating to economic and social development, culture, the environment, education, health and human rights. It has a role to:

- Provide expert advice and recommendations on indigenous issues to the Economic and Social Council, as well as to United Nations programmes, funds and agencies through the Economic and Social Council
- Raise awareness and promote the integration and coordination of activities related to indigenous issues within the United Nations system
- Prepare and disseminate information on indigenous issues.³⁰¹

The Permanent Forum has adopted the Declaration as its legal framework and is integrating the Declaration into recommendations on its six substantive mandated areas of work, as well as into special thematic focuses.³⁰²

In 2010, the ninth session of the Permanent Forum focused on the theme of “Indigenous peoples: development with culture and identity; articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples”.³⁰³



The Permanent Forum holds annual two-week sessions at the United Nations Headquarters in New York. It held its first meeting in May 2002.

The Permanent Forum is comprised of 16 members, who are independent experts serving in their personal capacity. Each member sits for three years and may be re-elected or reappointed for one additional term. Eight members are elected by indigenous peoples’ organizations, while the remaining eight members are nominated by States and elected by the Economic and Social Council.³⁰⁴

The Permanent Forum is supported by a secretariat, based at United Nations Headquarters within the Division for Social Policy and Development of the United Nations Department of Economic and Social Affairs, which:

- Prepares for annual sessions of the Permanent Forum and provides support for members
- Advocates, facilitates and promotes the coordination of implementation within the United Nations system of the recommendations that emerge from each annual session and promote awareness of indigenous peoples’ issues within the United Nations system and among Governments and the public
- serves as a source of information and coordination for advocacy efforts that relate to the Permanent Forum’s mandate and the ongoing issues concerning indigenous peoples.³⁰⁵

301 Economic and Social Council resolution 2000/22, para. 2.

302 E/C.19/2009/14, annex, para. 23.

303 E/2010/43-E/C.19/2010/15.

304 A list of current members is available at www.un.org/esa/socdev/unpfii/en/members.html.

305 Further information is available at www.un.org/esa/socdev/unpfii/en/secretariat.html.

1.2. THE ROLE OF NHRIs AND THE PERMANENT FORUM

1.2.1 Attending sessions of the Permanent Forum

Historically, registration for annual sessions of the Permanent Forum has been confined to Government delegations, indigenous peoples' organizations, NGOs with Economic and Social Council accreditation and academics. However, in 2010, a category for registration was created for NHRIs. The following institutions may attend, as observers,³⁰⁶ sessions of the Permanent Forum:

- Institutions accredited as complying with the Paris Principles ("A status" NHRIs)
- The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, as the representative body of NHRIs globally
- Regional coordinating committees of NHRIs, speaking on behalf of "A status" member institutions.³⁰⁷

Attendance at the Permanent Forum's sessions provides valuable opportunities for NHRIs to develop relationships with indigenous peoples' organizations from their country and their region.

The sessions provide an important source of current information on the broad range of issues confronting indigenous peoples, which includes hearing oral interventions from indigenous peoples and their organizations. The information gathered, and the expertise developed, during the Permanent Forum sessions can be utilized by NHRIs in their regular work.



An indigenous delegate at the opening of the twelfth session of the UN Permanent Forum on Indigenous Issues. UN Photo/Rick Bajornas.

306 As stated in Economic and Social Council resolution 2000/22, para. 1, all participants are observers.

307 Further information is available at www.un.org/esa/socdev/unpfii/en/session_faq.html#3.

The **Australian Human Rights Commission** provides support to a delegation of Aboriginal and Torres Strait Islander representatives attending the annual sessions of UNPFII. This delegation includes the Aboriginal and Torres Strait Islander Social Justice Commissioner, who makes a number of interventions and submits reports on various agenda items.

At times, the Commission also supports joint interventions with Australian and Pacific indigenous peoples' organizations.³⁰⁸



NHRIs can contribute to the Permanent Forum's sessions by giving oral statements on relevant agenda items, including on the standing agenda item on the Declaration. They can also host, independently or in partnership with other NHRIs or indigenous peoples' organizations, side events to draw attention to a specific issue.³⁰⁹ Finally, NHRIs can seek to present oral interventions during the session.

1.2.2 Other work of the Permanent Forum

At various times, the Permanent Forum's Secretariat organizes and hosts meetings and workshops on a range of topics. NHRIs can attend and submit reports to these events. They can also seek to work with the Secretariat to co-host a workshop.

In August 2005, the Permanent Forum's Secretariat co-organized a conference with the **Australian Human Rights Commission** on "Partnerships between Indigenous Peoples, Governments and Civil Society".³¹⁰



Article 42 of the Declaration 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 Permanent Forum has interpreted this as providing it with a "new mandate" to promote the full application of the Declaration and to follow-up on its effectiveness. It has suggested that this implies an authority for it to arrange dialogues with States regarding the domestic application of the Declaration. It also suggests that the treaty bodies could be regarded as possible models for undertaking this work.³¹¹

NHRIs are uniquely positioned to engage with the Permanent Forum in the work they undertake at the national level. As they do with the treaty bodies, NHRIs can be a valuable source of credible and independent information for the Permanent Forum.

The Permanent Forum also has a function of coordinating and mainstreaming indigenous issues throughout the United Nations system. NHRIs can assist the Permanent Forum in this function by working with United Nations agencies operating in their jurisdiction.

308 Information provided by the Australian Human Rights Commission.

309 Guidelines for hosting side events are available at www.un.org/esa/socdev/unpfii/documents/session_tenth_side_event_guidelines.doc.

310 Further information is available at www.humanrights.gov.au/social_justice/conference/engaging_communities/index.html.

311 E/C.19/2009/14, annex, paras. 14-25.

In 2009, the Permanent Forum visited the Chaco region in the Plurinational State of Bolivia and Paraguay to consider the slavery situation of the indigenous Guarani peoples. As part of this visit, the Permanent Forum held discussions with the [Defensor del Pueblo de Bolivia](#).

In 2010, the Permanent Forum held discussions with the [Defensor del Pueblo de la República de Colombia](#) regarding the massacres of the indigenous Awa peoples.³¹²



1.2.3 Dissemination

NHRIs can disseminate reports and recommendations of the Permanent Forum, as well as follow up on recommendations that are directed towards States.

2. EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

2.1. OVERVIEW

The Expert Mechanism was established in 2007 by Human Rights Council resolution 6/36. It is comprised of five independent experts who are appointed by the Human Rights Council, which is to give due regard to experts of indigenous origin as well as to gender balance and geographic representation. It meets annually in Geneva. Its first meeting was held from 1-3 October 2008.

The Expert Mechanism provides the Human Rights Council with thematic advice, in the form of studies and research, on the rights of Indigenous peoples as directed by the Council. It may also suggest proposals to the Human Rights Council for its consideration and approval.

Some NHRIs have contributed to the studies prepared by the Expert Mechanism.³¹³

The Expert Mechanism completed its first study on indigenous peoples' right to education in 2009, along with advice – including recommendations – about how indigenous peoples' right to education might be realized. Its second study on indigenous peoples and the right to participate in decision-making was completed in September 2011. In September 2012, the Expert Mechanism submitted the following studies and reports to the Human Rights Council:

- **Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples**
- **A report on indigenous peoples and the right to participate in decision-making with a focus on extractive industries**
- **A report on its questionnaire for States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the Declaration.**³¹⁴



312 Presentation to subregional consultation organized by OHCHR, *The Operationalization of the United Nations Declaration on the Rights of Indigenous Peoples by National Human Rights Institutions*.

313 Reports contributed by NHRIs to the Expert Mechanism are available at www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ContributionsSession3.aspx.

314 Further information is available at www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx.



Indigenous Amazigh woman from Morocco at the seventh session of the UN Permanent Forum on Indigenous Issues. UN Photo/Paulo Filgueiras.

2.2. THE ROLE OF NHRIs AND THE EXPERT MECHANISM

2.2.1 Participation in sessions of the Expert Mechanism

Human Rights Council resolution 6/36 establishes that NHRIs can participate as observers in the annual meetings of the Expert Mechanism. NHRIs can contribute to these sessions by making oral statements on relevant agenda items.

The standing agenda item on the Declaration at sessions of the Expert Mechanism provides an opportunity for a general discussion on the Declaration. This discussion focuses on good practices, highlighting how the Declaration can be used at the international, regional and national levels to promote and protect the rights of indigenous peoples. At its fifth session in 2012, the Expert Mechanism held an inaugural interactive dialogue between the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum and participants attending the session.



The annual session of the Expert Mechanism, like that of the Permanent Forum, provides NHRIs with a valuable opportunity to work with indigenous peoples' organizations and to share information on good practices. Examples of good practice involving the use of the Declaration to promote and protect the rights of indigenous peoples can inform the work of NHRIs.

The **New Zealand Human Rights Commission** has provided information to a number of studies undertaken by the Expert Mechanism. For example, the Commission contributed to the study on “lessons learned and challenges to achieve the implementation of the rights of indigenous people to education”. Its contribution highlighted the steps taken to fully implement the rights of indigenous people to education, the gaps in the current legislative and policy framework and the key enduring challenges.³¹⁵ The Commission also contributed to the Expert Mechanism’s study on “the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples”.



2.2.2 Dissemination

NHRIs can disseminate the Expert Mechanism’s studies and advice, as well as follow up on recommendations it has made.

3. THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES

3.1. OVERVIEW

In 2001, the Commission on Human Rights authorized the establishment of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. This mandate – now known as the Special Rapporteur on the rights of indigenous peoples – reports to the Human Rights Council and to the General Assembly.³¹⁶ It also works cooperatively with the Expert Mechanism and the Permanent Forum.



UN Photo/Paulo Filgueiras.

³¹⁵ Information provided by the New Zealand Human Rights Commission.

³¹⁶ On 30 September 2010, the Human Rights Council adopted resolution 15/14 to, inter alia, change the title of the mandate to “Special Rapporteur on the rights of indigenous peoples”.

THE MANDATE OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES³¹⁷

The Human Rights Council requests the Special Rapporteur:

- (a) To examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples, in conformity with his/her mandate, and to identify, exchange and promote best practices.
- (b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples.
- (c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the rights of indigenous peoples.
- (d) To work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies and regional human rights organizations.
- (e) To work in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session.
- (f) To develop a regular cooperative dialogue with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, as well as indigenous peoples, national human rights institutions, non-governmental organizations and other regional or subregional international institutions, including on possibilities for technical cooperation at the request of Governments.
- (g) To promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate.
- (h) To pay special attention to the human rights and fundamental freedoms of indigenous children and women, and to take into account a gender perspective in the performance of his/her mandate.
- (i) To consider relevant recommendations of the world conferences, summits and other United Nations meetings, as well as the recommendations, observations and conclusions of the treaty bodies on matters regarding his/her mandate.
- (j) To submit a report on the implementation of his/her mandate to the Council in accordance with its annual programme of work.



Importantly, the Special Rapporteur is charged with promoting the Declaration and other relevant international instruments. The Special Rapporteur is also mandated to work cooperatively with NHRIs.

317 Human Rights Council resolution 15/14.

To fulfil this mandate, the Special Rapporteur:

- Promotes good practices, including new laws, government programs and constructive agreements between indigenous peoples and States, to implement international standards concerning the rights of indigenous peoples
- Reports on the overall human rights situations of indigenous peoples in selected countries (noting that the Special Rapporteur can only visit a country following an official invitation from the State)
- Addresses specific cases of alleged violations of the rights of indigenous peoples through communications with States and others
- Conducts or contributes to thematic studies on topics of special importance regarding the promotion and protection of the rights of indigenous peoples.³¹⁸

The current Special Rapporteur, in his first report to the Human Rights Council, undertook an analysis of the Declaration and the actions that need to be taken by relevant stakeholders, including States, the United Nations system, indigenous peoples and civil society. In this report, the Special Rapporteur indicated that he would use the Declaration as the normative framework to guide his work.³¹⁹

Following his visit to the Republic of the Congo, the Special Rapporteur reported that the establishment of the National Human Rights Commission was a major initiative to advance the rights of indigenous peoples:

The National Human Rights Commission, a relatively new body instituted in 2003 following the adoption of the new Constitution, is an independent State institution that operates autonomously. Its general objectives are to contribute to the promotion and consolidation of the rule of law in Congo; contribute to the widespread acceptance and understanding of human rights; assist with conceptualizing and realizing educational campaigns that promote the protection of vulnerable peoples, including indigenous peoples; promote and assist the Government of Congo with the signing and ratification of international human rights instruments; and strengthen relationships with the relevant agencies of the United Nations and with foreign diplomats.³²⁰



3.2. CONTRIBUTIONS OF NHRIs TO THE WORK OF THE SPECIAL RAPPORTEUR

NHRIs are key dialogue partners for the Special Rapporteur. They can provide the Special Rapporteur with independent and authoritative information, assist with preparations for country visits, monitor the implementation of recommendations and undertake other follow-up action after a country visit. NHRIs can recommend that their State invite the Special Rapporteur to examine the situation of indigenous peoples' human rights. In preparing for a country visit, the NHRI should provide the Special Rapporteur with a report of relevant information. In addition, the NHRI should identify and suggest locations which the Special Rapporteur should visit, as well as people and organizations that should be consulted. During the visit, the Special Rapporteur will usually meet with representatives of the NHRI. This provides an important opportunity for the NHRI to provide updated information regarding the human rights situation of indigenous peoples in the country. (See Chapter 11 for a general discussion on the contribution of NHRIs to special procedures).

318 Further information is available at www2.ohchr.org/english/issues/indigenous/rapporteur/index.htm.

319 A/HRC/9/9.

320 A/HRC/18/35/Add.5, para. 53.

In July 2009, the Special Rapporteur visited Peru to examine the situation of a violent clash between police and indigenous protesters in the Bagua region, which resulted in numerous people dead and injured. During his visit, the Special Rapporteur met with the **Defensoria del Pueblo de Perú** and, in his report of the visit, relied on the initial investigations that the institution had carried out immediately after the clash in relation to the number of people who had disappeared following the event.



KEY POINTS: CHAPTER 13

- NHRIs can contribute to the work of the Permanent Forum and the Expert Mechanism by contributing to reports and participating in meetings of these mechanisms.
- NHRIs can encourage their Government to issue an invitation to the Special Rapporteur on the rights of indigenous peoples to undertake a country visit.
- NHRIs can support the work of the Special Rapporteur through a variety of means, including submitting information on the human rights situation of indigenous peoples, providing assistance before and during a country visit and following up on recommendations made by the Special Rapporteur.



Summary

CHAPTER 1: BACKGROUND TO THE DECLARATION

- Indigenous peoples have unique and distinctive cultures, languages, legal systems and histories. Most have a strong connection to the environment and their traditional lands and territories. They also often share legacies of removal from traditional lands and territories, subjugation, destruction of their cultures, discrimination and widespread violations of their human rights.
- After decades of obtaining little or no attention from the international community, indigenous peoples have increasingly gained visibility and successfully made their voices heard at international forums.
- The Martinez Cobo Study helped to build the foundations for the modern indigenous international human rights system.
- The Declaration is the most comprehensive instrument on the rights of indigenous peoples.
- The United Nations system has not developed a strict definition of “indigenous peoples”, as such a definition may not be workable in all contexts and may be over-inclusive or under-inclusive.
- Self-identification is a key criterion for determination of a group of peoples or an individual as indigenous

CHAPTER 2: THE CONTENT OF THE DECLARATION: EQUALITY AND NON-DISCRIMINATION; CULTURAL INTEGRITY; AND COLLECTIVE RIGHTS

- The elimination of formal discrimination may require that a State’s constitution, legislation and/or policies do not discriminate against indigenous peoples.
- The elimination of de facto discrimination may require States to implement laws and policies that facilitate substantive equality for indigenous peoples in the enjoyment of their rights and to adopt special measures.
- The Expert Mechanism has commended national-level programmes which, in addition to seeking to redress imbalances between non-indigenous and indigenous peoples, specifically seek to ensure equality between indigenous men and women.
- The Declaration does not specifically define “culture”. The Expert Mechanism has noted that it is not necessary, and may not even be appropriate, to define culture. A broad view of indigenous cultures should be adopted.
- Indigenous peoples often organize their societies as a group, which is why recognition of collective rights is essential for indigenous peoples.

CHAPTER 3: THE CONTENT OF THE DECLARATION: SELF-DETERMINATION; AUTONOMY; AND PARTICIPATION, CONSULTATION AND CONSENT

- The right to self-determination is a collective right held by all members of an indigenous community or nation as a group and must be exercised in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.
- Autonomous political, economic and social structures of indigenous peoples support the effective exercise of the right to self-determination by indigenous peoples.

- Indigenous peoples have the right to participate in decision-making in matters that may affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
- The Declaration requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- Consultation and participation are crucial components of a consent process.

CHAPTER 4: THE CONTENT OF THE DECLARATION: LANDS, TERRITORIES AND RESOURCES; DEVELOPMENT WITH IDENTITY, AND REDRESS AND COMPENSATION

- What constitutes the lands, territories and resources of a particular indigenous people will depend on the specific circumstances of the community in question.
- Key impediments to the full and free enjoyment of indigenous peoples' rights to lands, territories and resources include the failure of States to recognize the existence of indigenous use, occupancy and ownership and the failure of States to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land.
- States have an obligation to provide effective mechanisms for redress when the free, prior and informed consent of the indigenous peoples has not been sought.

CHAPTER 5: THE IMPLEMENTATION OF THE DECLARATION

- The Declaration is a resolution of the General Assembly. Resolutions per se do not create legally binding obligations on States.
- The Declaration does not create new rights for indigenous peoples. It elaborates on existing human rights standards and articulates them as they apply to indigenous peoples.
- The Declaration adopts language that imposes obligations and responsibilities on States.
- Treaty bodies are using the Declaration in their work and recommendations to States.
- The Paris Principles establish a broad normative framework from which NHRIs can undertake distinct programmes of work to advance the protection, promotion and realization of the rights of indigenous peoples.

CHAPTER 6: ACCESSIBILITY OF NHRIs TO INDIGENOUS PEOPLES

- NHRIs must be accessible to indigenous peoples in order to effectively advance the protection, promotion and realization of their human rights.
- It is important that NHRIs promote awareness among indigenous peoples of who they are and what they do. This may require targeted promotional campaigns.
- NHRIs should recognize that indigenous peoples may be reluctant to engage with them.
- NHRIs should take actions to engage indigenous peoples in remote locations.
- Collaborations and partnerships with indigenous peoples' organizations can foster greater engagement by NHRIs with indigenous peoples.
- NHRIs are encouraged to have an indigenous presence within their organization. It is important to engage with indigenous peoples and their organizations in the recruitment process of indigenous staff.

- Indigenous-specific programmes of work will foster an indigenous presence within NHRIs. Staff working in these units should meet additional selection criteria to ensure that they have the necessary skills and experience to work sensitively and appropriately with indigenous peoples.
- NHRIs should be guided by a human rights-based approach when working with indigenous peoples.

CHAPTER 7: AWARENESS RAISING AND EDUCATION

- Promoting awareness of, and respect for, human rights is a core function of NHRIs.
- Raising awareness of indigenous peoples' human rights is of fundamental importance for their protection, promotion and realization.
- There are a range of educational and training activities that NHRIs can undertake on the Declaration and indigenous peoples' human rights. This includes both formal and informal human rights education activities, as well as working with the media and using social media to raise awareness and understanding of human rights issues affecting indigenous communities.

CHAPTER 8: PROMOTING DOMESTIC COMPLIANCE WITH THE DECLARATION

- NHRIs have a mandate to provide advice and issue recommendations to their Government, as well as to other stakeholders.
- NHRIs can use their mandates to promote change to laws, policies and State practices which violate or restrict the rights of indigenous peoples.
- NHRIs are encouraged to use the Declaration as a common standard of reference in their work to advocate for the rights of indigenous peoples.

CHAPTER 9: INVESTIGATIONS AND COMPLAINTS

- Depending on their mandate, NHRIs can consider individual and collective complaints regarding violations of indigenous peoples' human rights and make recommendations for redress and remedies to the appropriate authorities.
- Some NHRIs have mandates that allow them to refer human rights complaints to the relevant authorities, including government agencies, the parliament, the judiciary and prosecuting authorities, and also to seek redress or remedies on behalf of complainants.

CHAPTER 10: PUBLIC INQUIRIES

- Conducting a public inquiry on indigenous peoples' human rights allows NHRIs to perform several functions simultaneously. It can be very effective mechanism for law and policy reform. However, public inquiries also pose challenges that should be considered before a decision is made to proceed.
- Undertaking an effective public inquiry on indigenous peoples' human rights involves a number of steps, including defining the inquiry's terms of reference, research and analysis, collecting complaints, holding public hearings, interviewing indigenous peoples, preparing a report and follow-up after the report is launched.

CHAPTER 11: THE HUMAN RIGHTS COUNCIL

- NHRIs can use the universal periodic review as an opportunity to encourage their Government to respect, protect, promote and advance the rights of indigenous peoples.
- NHRIs can interact with relevant special procedures to submit information regarding violations of indigenous peoples' human rights, to assist in country visits and to contribute towards studies.
- NHRIs can consider using the Human Rights Council's complaints procedure to submit a complaint on behalf of indigenous peoples.

CHAPTER 12: TREATY BODIES

- NHRIs can submit alternative reports regarding State implementation of treaty obligations, including those that relate directly to the human rights of indigenous peoples.
- NHRIs can lobby their States to accept the complaints jurisdiction of treaty bodies and can assist victims with the submission of complaints to treaty bodies.
- Concluding observations and recommendations made by treaty bodies can be useful tools for NHRIs in their advocacy to advance the rights of indigenous peoples.

CHAPTER 13: MECHANISMS SPECIFIC TO INDIGENOUS PEOPLES' RIGHTS

- NHRIs can contribute to the work of the Permanent Forum and the Expert Mechanism by contributing to reports and participating in meetings of these mechanisms.
- NHRIs can encourage their Government to issue an invitation to the Special Rapporteur on the rights of indigenous peoples to undertake a country visit.
- NHRIs can support the work of the Special Rapporteur through a variety of means, including submitting information on the human rights situation of indigenous peoples, providing assistance before and during a country visit and following up on recommendations made by the Special Rapporteur.



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