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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
INCLUDING THE RIGHT TO DEVELOPMENT**

**Report of the Special Rapporteur on the situation of human rights
and fundamental freedoms of indigenous people, James Anaya***

Summary

The present report is the second submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, pursuant to Human Rights Council resolution 6/12. In the report, the Special Rapporteur provides a reflection on his mandate in relation to those of the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples of the Human Rights Council, and notes areas for cooperation. There follows a discussion on the practical framework of his work, including a summary of his activities as they relate to four principal areas of work: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations. The Special Rapporteur devotes the second half of the report to an analysis of the duty of States to consult with indigenous peoples on matters affecting them, with the hope of offering insight into how this core issue may be addressed in the future by Governments, indigenous peoples, the United Nations system, and other stakeholders, and offers various recommendations in this regard.

* Late Submission.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1 - 5	3
I. IMPLEMENTATION OF THE MANDATE	6 - 35	4
A. Coordination with other mechanisms and bodies	6 - 17	4
B. Areas of work	18 - 35	7
II. A CORE ISSUE: THE DUTY TO CONSULT	36 - 57	12
A. The normative grounding and general character of the duty to consult	38 - 42	12
B. Situations in which the duty to consult applies	43 - 45	15
C. The requirement that consultations be in good faith, with the objective of achieving agreement or consent	46 - 49	16
D. Elements of confidence-building conducive to consensus	50 - 53	17
E. The duty to consult and private company responsibility	54 - 57	19
III. CONCLUSIONS AND RECOMMENDATIONS	58 - 74	20

Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, pursuant to Human Rights Council resolution 6/12. On 28 March 2008, the Human Rights Council appointed James Anaya, from the United States of America, as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. James Anaya assumed his mandate on 1 May 2008. This document is the Special Rapporteur's second annual report to the Human Rights Council. In his first annual report of 11 August 2008 (A/HRC/9/9), the Special Rapporteur provided a number of reflections concerning the normative framework for addressing indigenous peoples' concerns, and on the operationalization of the human rights norms affirmed in the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments.

2. In the first part of his second annual report, the Special Rapporteur will discuss the implementation of his mandate. In this regard, he will first provide a reflection on his mandate in relation to those of other United Nations mechanisms and institutions that deal with indigenous issues, especially the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples of the Human Rights Council, and note areas for cooperation. There follows a discussion on the practical framework of his work, in light of those other mechanisms, including a summary of the activities carried out over the past year as they relate to four principal areas of work: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations. The Special Rapporteur devotes the second half of the report to an analysis of the duty of States to consult with indigenous peoples on matters affecting them, one of the core issues he has faced in his work in relation to indigenous peoples in various countries, with the hope of offering insight into how this issue may be addressed in the future by Governments, indigenous peoples, the United Nations system, and other stakeholders.

3. The present report also contains a series of addenda of reports and other public documents issued by the Special Rapporteur over the past year. Addendum 1 contains a summary of communications sent to Governments and replies received concerning cases of alleged human rights violations, as well as observations by the Special Rapporteur on these cases. Addenda 2, 3, and 4 are the reports on the situation of indigenous peoples in Brazil, Nepal, and Botswana, following missions from 14 to 25 August, and 24 November to 2 December 2008, and from 19 to 27 March 2009, respectively. Addendum 5 is the report of the Special Rapporteur on the situation of the indigenous communities that are affected by the construction of a hydroelectric project on the Changuinola River, Panama, and observations of the Government of Panama in response. Addendum 6 contains the report of the Special Rapporteur on the human rights situation in Chile following his visit to that country from 6 to 9 April 2009 to assess the status of the implementation of the recommendations of his predecessor, Rodolfo Stavenhagen, with an annex containing a report outlining the international norms that are relevant to a consultation process in connection with constitutional reforms related to indigenous peoples in that country. Addendum 7 is the outcome report of a meeting in Madrid in February 2009 to enhance coordination between the three United Nations mechanisms with a mandate specific to indigenous issues: the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the United Nations Permanent Forum on Indigenous Issues, and

the Expert Mechanism on the Rights of Indigenous Peoples of the Human Rights Council. Finally, Addendum 8 is the report of the Special Rapporteur's examination of the human rights issues surrounding the confrontations between indigenous peoples and the police in Bagua, Peru.

4. The Special Rapporteur is grateful for the support provided by the staff at the United Nations Office of the High Commissioner for Human Rights. He would also like to thank staff and affiliated researchers of the Indigenous Peoples Law and Policy Program at the University of Arizona for their continued assistance with all aspects of his work. Further, the Special Rapporteur wishes to gratefully acknowledge and express his gratitude to the International Work Group for Indigenous Affairs, the Almáciga Intercultural Work Group, and the Spanish Agency for International Cooperation and Development of the Government of Spain for their support of the international expert seminar entitled "Implementation of the rights of indigenous peoples: the role of the United Nations machinery on the rights of indigenous peoples" in February 2009 and other support. Finally, the Special Rapporteur would like to thank the many indigenous peoples, Governments, United Nations bodies and agencies, non-governmental organizations (NGOs), and others that have cooperated with him over the past year to implement his mandate.

5. The Special Rapporteur is pleased to provide the Human Rights Council with the present report as he moves into the second year of fulfilling his mandate with optimism for a better future for indigenous peoples, encouraged by positive developments in many places, yet concerned by the reality of ongoing struggles and violations of indigenous peoples throughout the world. The Special Rapporteur reaffirms his strong commitment to his role as Special Rapporteur, acknowledges with humility the responsibility it represents, and thanks all those who have supported and continue to support him.

I. IMPLEMENTATION OF THE MANDATE

A. Coordination with other mechanisms and bodies

6. Before detailing his own areas of work and work methods, the Special Rapporteur would like to provide the Human Rights Council with some reflections on his mandate in relation to those of other United Nations mechanisms and institutions that deal with indigenous issues, especially the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples of the Human Rights Council. Coordination with these and other institutions is a fundamental aspect of the mandate of the Special Rapporteur, as the Human Rights Council calls on him, in its resolution 6/12, article 1, paragraph (d), "To work in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies, and human rights regional organizations."

1. The United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples

7. The Special Rapporteur is specifically required "To work in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session" (Human Rights Council resolution 6/12, art. 1, para. (e)). This cooperation also extends to the Expert

Mechanism, which is mandated by the Human Rights Council to invite the Special Rapporteur to its annual session in order to “enhance cooperation and avoid duplicating the work” of the respective mechanisms (Human Rights Council resolution 6/36, art. 5).

8. During the course of his work, the Special Rapporteur has noted a significant level of confusion among indigenous groups, NGOs, and other stakeholders about the respective roles and functions of the three mechanisms, as well as their place within the institutional structure of the United Nations. Continued education about the individual mandates and functions of these mechanisms is essential. The United Nations Permanent Forum on Indigenous Issues was established in 2000 as an advisory body to the United Nations Economic and Social Council, focusing mainly on indigenous issues in the field of economic and social development, culture, the environment, education, health and human rights.¹ The United Nations Permanent Forum is made up of 16 individual experts and meets annually for two weeks in New York. The Expert Mechanism on the Rights of Indigenous Peoples, which held its first annual session in October 2008, is composed of five individual experts with a mandate to provide the Human Rights Council with thematic expertise on the rights of indigenous peoples, mainly in the form of studies and research-based advice (Human Rights Council resolution 6/36, art. 1, para. (a)). This year, the Human Rights Council has requested the Expert Mechanism to prepare a study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education, which was concluded this year (Human Rights Council resolution 9/7).

9. The three United Nations mechanisms with a mandate on indigenous issues were not necessarily designed with a complementary purpose, but were developed separately in response to different historical and political contexts and the demands of the indigenous peoples’ movement. Consequently, on paper, the mandates of these three mechanisms overlap to a certain extent and, in practical terms, many of the activities carried out by the respective mandate-holders could be structured more effectively in relation to those of the other mechanisms.

10. From 4 to 6 February 2009, the Special Rapporteur participated in a seminar in Madrid with the members of the Expert Mechanism and four members of the Permanent Forum, along with a group of experts from various regions, including the former Special Rapporteur, Rodolfo Stavenhagen. The main objective of the meeting was to promote an informal dialogue among the members of the three mechanisms to better coordinate their work, as well as their activities with other United Nations agencies and bodies. During the meeting, the experts discussed methods for streamlining the work of the three mechanisms by examining the priority work area or areas of the respective mandates and identifying ways in which the aspects of each mandate might be maximized.

11. For example, in contrast to the Expert Mechanism and the Permanent Forum, the Special Rapporteur has a clear mandate to investigate and make recommendations on specific human rights situations of indigenous peoples. Nevertheless, as was noted during the expert meeting, following a pattern similar to that of the Working Group on Indigenous Populations, which is no longer active, numerous indigenous groups attend the annual sessions of the Permanent Forum

¹ United Nations Economic and Social Council resolution 2000/22.

and the Expert Mechanism with the intention of presenting allegations of specific situations of human rights violations, despite the fact that there is no specific mandate and no procedural mechanism currently in place for the Permanent Forum and Expert Mechanism to take action on these allegations.

12. Given the recognized expectations on the part of indigenous peoples to have these specific concerns heard, the Special Rapporteur and members of the Permanent Forum and Expert Mechanism recommended in the report following the Madrid meeting that the Special Rapporteur develop methodologies for receiving allegations of human rights violations and, as required, of direct dialogue between the Governments and indigenous peoples, during his participation at the annual sessions of the Permanent Forum and the Expert Mechanism. In this connection, during the past year, the Special Rapporteur has attended the annual meetings of the Permanent Forum and the Expert Mechanism, and has started to develop methods for receiving communications in coordination with these mechanisms in order to maximize the participation of indigenous groups, their organizations, and NGOs at these sessions. The Special Rapporteur continues to refine and realize these procedures.

13. Further, it is worth pointing out that, because the mandate of the Expert Mechanism is primarily research-based and study oriented, the Special Rapporteur considers his role in this regard as focusing mainly on providing observations on the core issues that have arisen during his work evaluating specific countries and examining specific situations of allegations of human rights violations. These will, for the most part, be practically oriented and identify best practices, where they exist. The Special Rapporteur will also provide input to the Permanent Forum and the Expert Mechanism on the basis of this work.

14. While the Permanent Forum, the Expert Mechanism and the Special Rapporteur have different roles, a common purpose that joins them is the advancement of the human rights of indigenous peoples worldwide. Clearly, an important point of reference for pursuing this common purpose is the United Nations Declaration on the Rights of Indigenous Peoples. In article 42 of the Declaration, the General Assembly calls upon all United Nations bodies and agencies to “promote respect for and full application of the provisions of this Declaration”. The Special Rapporteur is committed to continued collaboration with these two mechanisms as he enters the second year of his mandate.

2. Coordination with United Nations agencies, and with regional and other bodies

15. The Special Rapporteur has also been active in engaging with agencies of the United Nations Secretariat on indigenous issues. He participated in two regional seminars in Latin America on the United Nations Declaration on the Rights of Indigenous Peoples, one in Lima, Peru between 6 and 8 October 2008, and one in Montelimar, Nicaragua between 10 and 13 June 2009, organized by the Office of the High Commissioner for Human Rights, which, at the regional level, promotes implementation of the rights and corresponding State obligations expressed in the Declaration through education, information-gathering, and advisory services. During the seminars, he gave presentations on the content and means of implementing the Declaration, especially as it pertains to the Latin America region. The Declaration was also the subject of a presentation he gave to representatives of various United Nations agencies in a seminar organized by the United Nations Development Programme in New York,

on 20 May 2009, in which the Special Rapporteur emphasized the role of United Nations agencies and programmes in implementing the Declaration. The following day, the Special Rapporteur met in New York with members of the United Nations Department of Political Affairs to exchange views on indigenous issues in relation to major political and economic trends.

16. At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have played groundbreaking roles in developing a distinct body of jurisprudence concerning the rights of indigenous peoples in the Americas, with an important normative effect in other regions. On 25 October 2008, the Special Rapporteur participated in an expert seminar on indigenous land rights and the principle of free, prior, and informed consent in Washington, D.C., sponsored by the Inter-American Commission on Human Rights; he has exchanged information with the Commission on various cases. The Special Rapporteur has also confirmed his willingness to cooperate with the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights, and looks forward to exploring concrete ways in which he may enhance collaboration with the Commission in the future.

17. The Special Rapporteur has also cooperated with the World Bank, and on 3 June 2008 was the featured speaker in a seminar on "Advancing indigenous rights and development in Latin America and the Caribbean" in Washington, D.C., in which he focused on the role of the World Bank in relation to various challenges and initiatives concerning indigenous peoples. He continues to maintain contact with representatives of the World Bank to explore ways of further coordination.

B. Areas of work

18. The Special Rapporteur has engaged in a range of activities within the terms of his mandate to monitor the human rights conditions of indigenous peoples worldwide and promote steps to improve those conditions. He has sought to incorporate a gender perspective, and be attentive to the particular vulnerabilities of indigenous children. Overall, the Special Rapporteur has tried to develop work methods oriented towards constructive dialogue with Governments, indigenous peoples, NGOs, relevant United Nations agencies and other actors, in order to address challenging issues and situations and build on advances already made. The various activities that he has carried out in this spirit can be described as falling within four, interrelated spheres of activity: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations.

1. Promoting good practices

19. A first area of the Special Rapporteur's work follows from the directive given by the Human Rights Council "to identify ... and promote best practices" (Human Rights Council resolution 6/12, art. 1, para. (a)). The Special Rapporteur has been focused on working to advance legal, administrative, and programmatic reforms at the domestic level to implement the standards of the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments. Reform of this kind is a major undertaking, as it is full of all kinds of complexities and requires a strong commitment, both financial and political, on the part of Governments.

20. During the course of his work, the Special Rapporteur has been asked to provide assistance with constitutional and legislative reform initiatives by providing orientation on how to harmonize those initiatives with relevant international standards. As reported to the Human Rights Council last year, shortly after assuming his mandate in May 2008, the Special Rapporteur was asked by indigenous organizations and the President of the Constituent Assembly of Ecuador to provide technical assistance with the constitutional revision process. Ecuador's new Constitution was approved by referendum in September 2008 with significant provisions affirming indigenous collective rights. The Special Rapporteur continues to monitor Ecuador's implementation of those reforms and subsequent legislation.

21. The Special Rapporteur has also promoted good practices by encouraging positive steps that States have made. In December 2008, the Special Rapporteur was invited to attend a ceremony in Awas Tingni, Nicaragua, during which the Government handed over to that indigenous community the much-awaited title to its ancestral lands, as required by a 2001 judgement of the Inter-American Court of Human Rights. In a press release following the titling, the Special Rapporteur commended the Government of Nicaragua for taking affirmative steps to implement the judgement. The Special Rapporteur will continue to monitor progress towards ensuring that the rights of Awas Tingni to the titled lands are fully respected in practice by third parties and towards addressing the land and related claims of other indigenous communities.

22. Also, in April 2009, the Special Rapporteur visited Chile to assess the situation of the indigenous peoples, as a follow-up to the 2003 visit to the country by his predecessor. While many problems persist for indigenous peoples in Chile, the Government has taken important steps within the last year to advance the protection of their rights, including by ratifying in September 2008 International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), and by committing to enact constitutional reforms to recognize and promote indigenous rights. In light of the constitutional reform process, the Special Rapporteur developed and submitted to the Government a report, which was subsequently made public, outlining and analysing the various applicable elements of the right to consultation, and providing examples of consultation mechanisms in other countries. The Government has initiated consultations with the indigenous groups of Chile on the constitutional reform process, and the Special Rapporteur continues to monitor their progress.

23. The Special Rapporteur participated in a seminar on indigenous rights in Jakarta, from 16 to 17 March 2009, sponsored by the Indonesian National Human Rights Commission (KOMNAS HAM) and the Indigenous Peoples' Alliance of the Archipelago (AMAN - Aliansi Masyarakat Adat Nusantara). At the seminar, KOMNAS HAN and AMAN announced an agreement for a joint programme for addressing indigenous issues - a good example of coordination between a State's independent human rights commission and a major indigenous organization.

24. From 27 to 31 October 2008, the Special Rapporteur joined Saami representatives from throughout the Saami territory in the Nordic countries and Russia, Government representatives, and others in attendance at the 19th Saami Conference, in Rovaniemi, Finland. At the conference, the Special Rapporteur was able to meet with the Saami Council and the Saami

Parliaments in the Nordic countries to discuss ways of strengthening institutional arrangements for protecting Saami rights. The Saami Parliaments have become an increasingly effective means for Saami people to enhance control over matters affecting their lives and communities.

25. An important component of efforts to build good practices at the domestic level is a policy of commitment to advance the rights of indigenous peoples in accordance with the Declaration. This year, Australia, one of only four States to have voted against it, officially endorsed the Declaration and, in a widely circulated statement, committed to fully implement the standards contained therein. This is a welcome development in Australia's policies towards indigenous peoples, which the Special Rapporteur noted in a press release issued jointly with the Chairpersons of the Expert Mechanism and the Permanent Forum in April 2009. Likewise, Colombia, which had abstained in the vote on the Declaration, sent a letter to the United Nations High Commissioner for Human Rights on 20 April 2009 expressing its support for the Declaration and the principles contained therein and "subscribed to the concepts of equality, respect for diversity, and non-discrimination that constitute the foundation of the Declaration".²

26. In his future work, the Special Rapporteur will continue to promote positive developments, and reiterates his willingness to offer constructive technical and advisory assistance to Governments, companies, indigenous peoples and other stakeholders, where needed, in their efforts to establish legal, administrative, and programmatic initiatives and reforms in indigenous matters. The work of the Special Rapporteur in this regard will be oriented in practical terms and aimed at identifying and promoting models that can be applied in various contexts. The Special Rapporteur foresees detailing these models, where they exist and have been successful, in his subsequent annual reports to the Human Right Council and in other public reports.

2. Thematic studies

27. A second area of the Special Rapporteur's work, which is intended to contribute to good practices in specific country situations, involves conducting or participating in studies on issues or themes that are of interest to indigenous peoples across borders and regions of the world. The former Special Rapporteur carried out a number of thematic studies to identify major issues and to provide a foundation for subsequent positive practical action and reform, including on the impacts of development projects on indigenous communities, the implementation of domestic laws and international standards to protect indigenous rights, indigenous peoples and the education system, the relationship between formal State law and customary indigenous law, and international norms concerning indigenous peoples. However, as previously noted, taking into consideration the establishment of the Expert Mechanism with a mandate to provide thematic expertise and recommendations to the Human Rights Council on issues affecting indigenous peoples, the Special Rapporteur now sees his own work carrying out thematic studies as secondary to the other areas of his work. His role will, for the most part, be complementary and supportive of the work of the Expert Mechanism. In this regard, early this year he provided information, based on his experiences as Special Rapporteur, for the Expert Mechanism's current study on the right of indigenous peoples to education.

² Letter from the Deputy Minister of Multilateral Affairs to the United Nations High Commissioner for Human Rights.

28. Apart from this input, in the interest of further understanding specific challenges facing indigenous women, the Special Rapporteur participated in the Regional Consultation on “Violence against Indigenous Women in Asia Pacific” with the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. The Regional Consultation was organized by the Asia Pacific Forum on Women, Law and Development, and Mahila Sarvangeen Utkarsha Mandal, and was followed by a National Consultation on Indigenous Women in India, with activities from 14 to 18 October 2008 in New Delhi. Participants in the consultations, many of them indigenous women from the region, identified key recurring issues contributing to violence, including discriminatory acts against indigenous women around the following themes: economic globalization, militarization and armed conflict, and culture, tradition and religion and their intersectional impacts on the lives of indigenous women. The discussions with the two Special Rapporteurs were directed towards identifying effective strategies and mechanisms for addressing multiple forms of violence against indigenous women at the national, regional and international levels and to learn from good practices.

29. Additionally, the Special Rapporteur is collaborating with NGOs and indigenous experts on two initiatives related to two thematic areas of recurrent concern to indigenous peoples. One is a seminar, organized by the NGOs Khredda and the UNESCO Centre of Catalonia (UNESCOCAT) to take place in October of this year, on dispute resolution mechanisms with regard to extractive industries operating or seeking to operate within indigenous territories. This seminar and the report it will generate correspond to a recommendation made last year by the Permanent Forum that the Special Rapporteur carry out a study on transnational corporations, and it is intended to complement the Permanent Forum’s own work on this subject. A second initiative is a multifaceted study on legal pluralism and indigenous customary law, to be carried out in collaboration with the International Council on Human Rights Policy and the United Nations Office of the High Commissioner for Human Rights. This study is likely to begin with a workshop at the University of Arizona, United States of America, early next year.

3. Country reports

30. A third area of the Special Rapporteur’s work involves investigating and reporting on the overall human rights situations of indigenous peoples in selected countries. The reports of the country situations include conclusions and recommendations aimed at strengthening good practices, identifying areas of concern, and improving the human rights conditions of indigenous peoples. The reporting process typically involves a visit to the countries under review, including to the capital and selected places of concern within the country, during which the Special Rapporteur interacts with Government representatives, indigenous communities from different regions, and a cross section of civil society actors that work on issues relevant to indigenous peoples. In accordance with the Code of Conduct for special procedures mandate-holders, these visits can only take place with Government consent and cooperation.

31. Over the past year, the Special Rapporteur has visited Brazil, Nepal, Botswana, and Australia to report on those countries, and he has conducted follow-up visits to Chile and Colombia to evaluate their progress in implementing the recommendations in the reports of his predecessor. Additionally, the Special Rapporteur has received positive indications from the Governments of the Republic of the Congo and the Russian Federation for forthcoming visits, and has outstanding requests for visits to India and Indonesia, which he hopes will be considered favourably in the near future.

4. Cases of alleged human rights violations

32. Finally, the fourth, and perhaps principal, area of work involves responding, on an ongoing basis, to specific cases of alleged human rights violations. A fundamental aspect of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as reaffirmed by the Human Rights Council in its resolution 6/12 is “to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms” (art. 1, para. (b)). The Special Rapporteur has placed special emphasis on his mandate “to develop a regular cooperative dialogue with all relevant actors” (art. 1, para. (f)) by developing ongoing long-term strategies for all the work he undertakes.

33. The Special Rapporteur’s ability to address specific situations of alleged violations relies, to a large extent, on the information provided to him by indigenous peoples and their organizations, NGOs and other sources. Over the past year, the Special Rapporteur has received information about cases of alleged human rights violations in countries on every continent and, in response, has sent numerous communications to Governments about these situations. These cases involve, inter alia, infringements of the right to free, prior and informed consent, especially in relation to natural resource extraction and displacement or removal of indigenous communities; denial of the rights of indigenous peoples to lands and resources; the situation of indigenous peoples in voluntary isolation; incidents of threats or violence against indigenous peoples and individuals, including defenders of indigenous rights; and concerns about constitutional or legislative reforms in indigenous subject matter. A complete summary of communications sent, responses received from Governments, and observations of the Special Rapporteur can be found in the communications report attached to the present report as Addendum 1.

34. Given the limited resources available, it is impossible for the Special Rapporteur to respond to every case that comes to his attention. However, in general, he does his best to act on detailed and credible information that presents a serious situation falling within his mandate in which intervention has a reasonable chance of having a positive impact, either by drawing needed attention to the situation or by prompting Government authorities or other actors into corrective action. Alternatively, the Special Rapporteur may take action where the situation is representative of, or connected to, a broader pattern of human rights violations against indigenous peoples. The Special Rapporteur has been careful to respond to allegations of human rights violations from a wide range of regions and countries.

35. The usual first step in taking action on such information is to write a letter to the Government concerned, along with a request that the Government respond. In some cases, the Special Rapporteur has issued public statements calling attention to, or expressing concern over, the human rights violations alleged. If circumstances warrant it and the Government concerned consents, the Special Rapporteur may conduct a country visit to examine a specific situation, as he did in visits to Panama and Peru. In addition, as he has done with regard to the situations examined in those two countries and expects to do in future cases, he may issue detailed observations with analyses and recommendations, in the hope that they will be of use to the Governments and indigenous peoples concerned in their efforts to address the problems raised. The Special Rapporteur is aiming to avoid the “revolving door” approach of simply sending a

communication and receiving a response from the Government concerned, but rather aims to engage actively with States, indigenous peoples and other actors to closely monitor and evaluate situations, identify underlying causes of immediate problems, promote specific action that builds on advances already made, and develop recommendations that are practical, well founded in available knowledge, and in accordance with relevant human rights standards.

II. A CORE ISSUE: THE DUTY TO CONSULT

36. The Special Rapporteur has sought to identify common patterns of problems facing indigenous peoples throughout the world and to develop measures to target those issues directly. He has noticed, frequently and in a wide variety of situations, a lack of adequate implementation of the duty of States to consult with indigenous peoples in decisions affecting them, and a need on the part of Governments and other stakeholders for orientation about the measures necessary for compliance with this duty. The Special Rapporteur has observed that, without the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programmes, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust, which, in some cases, have spiralled into violence.

37. There is not one specific formula for carrying out consultations with indigenous peoples that applies to all countries and in all circumstances. In this respect, article 34 of ILO Convention No. 169 affirms: “The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.” While the implications of the duty to consult are many and varied, during the past year, the Special Rapporteur has touched upon issues related to consultation mainly in two areas: in the context of constitutional and legislative reforms touching upon indigenous subject matters; and in the context of development and natural resource extraction initiatives and, in some cases, related relocation efforts affecting indigenous peoples. The Special Rapporteur will devote the rest of the report to reflecting on certain aspects of the duty to consult and its implementation that are relevant to issues he has confronted, in the hope of providing useful points of clarification and orientation.

A. The normative grounding and general character of the duty to consult

38. It should be emphasized that the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples, and is firmly rooted in international human rights law. This duty is referenced throughout the Declaration in relation to particular concerns (arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, and 38), and it is affirmed as an overarching principle in article 19, which provides: “States shall 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.”

39. Like the Declaration, ILO Convention No. 169 requires States to consult with indigenous peoples in good faith, with the objective of achieving their agreement or consent on the aspects of management schemes or projects that affect them, and calls upon States to

carry out consultations with indigenous communities in connection with a variety of contexts (arts. 6, paras. 1 and 2, 15, para. 2, 17, para. 2, 22, para. 3, 27, para. 3, and 28). A tripartite committee of the ILO Governing Body has in fact said that “the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based”.³ The jurisprudence of the ILO draws out some of the contours of the duty to consult, which are referenced below.

40. The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations, including the International Convention on the Elimination of All Forms of Racial Discrimination⁴ and the International Covenant on Civil and Political Rights. Most recently, the Committee on the Elimination of Racial Discrimination, which oversees compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has called upon numerous Governments to carry out consultations with indigenous peoples on matters affecting their rights and interests, specifically in its concluding observations on Canada,⁵ Indonesia,⁶ New Zealand,⁷ the Democratic Republic of the Congo,⁸ the United States of America,⁹ Ecuador,¹⁰ Sweden,¹¹ and Namibia;¹² and also in its review of specific situations under its early-warning measures and urgent procedures, including in Belize,¹³

³ Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.

⁴ States are required to “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.” General recommendation No. 23 (1997) on Indigenous Peoples (CERD/C/51/Misc.13/Rev.4), art. 4, para. (d).

⁵ CERD/C/CAN/CO/18, paras. 15 and 25.

⁶ CERD/C/IDN/CO/3, para. 17.

⁷ CERD/C/NZL/CO/17, para. 20.

⁸ CERD/C/COD/CO/15, para. 18.

⁹ CERD/C/USA/CO/6, para. 29.

¹⁰ CERD/C/ECU/CO/19, para. 16.

¹¹ CERD/C/SWE/CO/18, para. 19.

¹² CERD/C/NAM/CO/12, para. 18.

¹³ Letter dated 7 March 2008, available at: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Belize070308.pdf.

Brazil,¹⁴ Chile,¹⁵ Panama,¹⁶ and Peru.¹⁷ Similarly, the Human Rights Committee has made reference to the duty to consult in a number of its reports to Governments on their compliance with the International Covenant on Civil and Political Rights, most recently in its concluding observations on Chile,¹⁸ Costa Rica,¹⁹ Panama,²⁰ Botswana,²¹ and Nicaragua.²² Additionally, the duty to consult arises from the obligations assumed by States under the American Convention on Human Rights, as affirmed by the Inter-American Court of Human Rights.²³

41. This duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property, as indicated in the referenced statements and decisions, respectively, of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Inter-American Court of Human Rights. More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples affirms in its article 3 that: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This affirmation responds to the aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them. The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed. Related principles of popular sovereignty and democracy join in opposition to government by imposition and uphold the imperative of government by consent. Consistent with these principles, the duty of States to consult with indigenous peoples in decisions affecting them

¹⁴ Letter dated 7 March 2008, available at: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Brazil070308.pdf.

¹⁵ Letter dated 24 August 2007, available at: http://www2.ohchr.org/english/bodies/cerd/docs/chile_letter.pdf.

¹⁶ Letter dated 15 August 2008, available at: http://www2.ohchr.org/english/bodies/cerd/docs/Panama_letter150808.pdf.

¹⁷ Letter dated 7 March 2008, available at: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Peru070308.pdf.

¹⁸ CCPR/C/CHL/CO/5, para. 19.

¹⁹ CCPR/C/CRI/CO/5, para. 5.

²⁰ CCPR/C/PAN/CO/3, para. 21.

²¹ CCPR/C/BWA/CO/1, para. 24.

²² CCPR/C/NIC/CO/3, para. 21.

²³ *Saramaka v. Suriname*, judgement of 28 November 2007, paras. 133-134.

is aimed at reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached.

42. As a general matter, decisions of the State should be made through democratic processes in which the public's interests are adequately represented. Procedures for notice to and comment by the general public often appropriately reinforce representative democratic processes for State decisions. However, special, differentiated consultation procedures are called for when State decisions affect indigenous peoples' particular interests. Such special procedures are justified because of the nature of those particular interests, arising as they do from indigenous peoples' distinctive cultural patterns and histories, and because the normal democratic and representative processes usually do not work adequately to address the concerns that are particular to indigenous peoples, who are typically marginalized in the political sphere. The duty of States to consult with indigenous peoples and its various normative components are premised on widespread acknowledgment, as manifested in the Declaration, of indigenous peoples' distinctive characteristics and the need for special measures to address their disadvantaged conditions.

B. Situations in which the duty to consult applies

43. It would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the indigenous peoples of the State along with the rest of the population in one way or another. Rather, a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence, leads to the following assessment of the scope of application of the duty to consult: it applies whenever a State decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation. For example, land or resource use legislation may have broad application but, at the same time, may affect indigenous peoples' interests in particular ways because of their traditional land tenure or related cultural patterns, thus giving rise to the duty to consult.

44. The duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement. The Special Rapporteur notes with concern that some States have effectively or purposefully taken the position that direct consultation with indigenous peoples regarding natural resource extraction activity or other projects with significant environmental impacts, such as dams, is required only when the lands within which the activities at issue take place have been recognized under domestic law as indigenous lands. Such a position is misplaced since, commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of indigenous peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement. In this regard, a tripartite committee of the ILO Governing Body has expressly affirmed: "The consultations referred to in article 15, paragraph 2, are required in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or

otherwise use, whether or not they hold ownership title to those lands.”²⁴ One can easily imagine innumerable ways in which indigenous peoples and their interests may be affected by development projects or legislative initiatives in the absence of a corresponding legal entitlement.

45. The specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples. Constitutional or legislative reform measures that concern or affect all the indigenous peoples of a country will require appropriate consultation and representative mechanisms that will in some way be open to, and reach, all of them. By contrast, measures that affect particular indigenous peoples or communities, such as initiatives for natural resource extraction activity in their territories, will require consultation procedures focused on the interests of, and engagement with, those particularly affected groups.

C. The requirement that consultations be in good faith, with the objective of achieving agreement or consent

46. The character of the consultation procedure and its object are also shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure. The Declaration establishes that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. In this regard, ILO Convention No. 169 provides that consultations are to take place “with the objective of achieving agreement or consent on the proposed measure” (art. 6, para. 2). The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.

47. Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. 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, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands, and in cases

²⁴ Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), para. 48.

involving the storage or disposal of toxic waste within indigenous lands (arts. 10 and 29, para. 2, respectively). In the same vein, in a case involving the Saramaka people of Suriname, the Inter-American Court of Human Rights held that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.²⁵

48. In all cases in which indigenous peoples’ particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated, this requirement does not provide indigenous peoples with a “veto power”, but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration.

49. These principles 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. As emphasized earlier, the duty of States to consult with indigenous peoples and related principles have emerged to reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples. At the same time, principles of consultation and consent do not bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest. Rather, the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making.

D. Elements of confidence-building conducive to consensus

50. A good faith effort towards consensual decision-making of this kind requires that States “endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with indigenous peoples which favours productive dialogue”.²⁶ The creation of a climate of confidence is particularly important in relation to indigenous peoples, “given their lack of trust in State institutions and their feeling of marginalization, both of which have their origins in extremely old

²⁵ *Saramaka v. Suriname*, para. 134.

²⁶ Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC) GB.294/17/1; GB.299/6/1 (2005), para. 53.

and complex historic events, and both of which have yet to be overcome”.²⁷ As a tripartite committee of the Governing Body of ILO noted in a case involving a constitutional reform process in Mexico, “the climate of confrontation, violence and lack of mutual trust stopped the consultations from being conducted more productively”.²⁸ Further, indigenous peoples are typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education in comparison to the State institutions or private parties, such as companies, that are their counterparts in the consultations.

51. In order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. The Special Rapporteur has observed that, in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures. Additionally, States must duly address the imbalance of power by ensuring arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous positions in the consultations.

52. The building of confidence and the possibility of genuine consensus also depends on a consultation procedure in which indigenous peoples’ own institutions of representation and decision-making are fully respected, as explicitly required by the Declaration (art. 19) and ILO Convention No. 169 (art. 6, para. 1 (a)). The Special Rapporteur notes that indigenous peoples may also need to develop or revise their own institutions, through their own decision-making procedures, in order to set up representative structures to facilitate the consultation processes. The Special Rapporteur has noted that the failure of indigenous groups to clarify their representative organization structures can confuse and slow down the consultation process. In this respect, it may be helpful to bear in mind that the Declaration recalls that the functioning of indigenous institutions should be “in accordance with international human rights standards” (art. 34) and calls for particular attention “to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities”, including in the elimination of all forms of discrimination and violence against indigenous children and women (art. 22).

53. In cases involving natural resource exploitation or development projects affecting indigenous lands, in order for the indigenous peoples concerned to make free and informed decisions about the project under consideration, it is necessary that they are provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment. In this connection, it is essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. These studies must be presented to the indigenous groups

²⁷ Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Authentic Workers’ Front (FAT), para. 107.

²⁸ *Ibid.*

concerned at the early stages of the consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns. Further, a consensus-driven consultation process in such contexts should not only address measures to mitigate or compensate for adverse impacts of the project, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership.

E. The duty to consult and private company responsibility

54. Frequently, issues of consultation arise when Governments grant concessions to private companies to extract natural resources, build dams, or pursue other development projects within or in close proximity to indigenous lands. In this connection, the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples' rights and lands. In accordance with well-grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity. Further, as is the case in other contexts, consultations on extractive or other development activities affecting indigenous peoples should take place at the earliest opportunity and in all phases of decision-making, such that consultations should occur before concessions to private companies are granted.

55. The Special Rapporteur has observed several instances in which the State hands over consultation obligations to the private company involved in a project. In addition to not absolving the State of ultimate responsibility, such delegation of a State's human rights obligations to a private company may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be in complete alignment with the public interest or the best interests of the indigenous peoples concerned. That is not, however, to discount the possibility of substantial convergence of these interests in a way that allows for consensus through negotiations in which imbalances of power are overcome.

56. For their part, private companies that promote or engage in extractive or other development activities affecting indigenous peoples should themselves, as a matter of company policy, endeavour to conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation. While in strict legal terms, with the exception of some circumstances, international law does not impose direct responsibility on companies to respect human rights, private companies are in fact increasingly evaluated for their compliance with international human rights norms. More and more, there is widespread expectation that companies will follow these norms within their respective spheres of influence, an expectation that has been expressed by international civil society, international human rights institutions, States, and companies themselves.²⁹ Additionally, in situations in

²⁹ See the report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights" (A/HRC/8/5) (2008).

which company activities will have a significant impact on indigenous communities, it is usually ill-advised for companies to ignore relevant international norms for practical reasons. As the Special Rapporteur has observed in his work, a failure to act in conformity with these norms makes companies vulnerable to difficulties such as lost time and economic resources, and impedes them from attaining or maintaining an image of social responsibility.

57. The Special Rapporteur has observed that many companies lack an adequate understanding of the international human rights norms concerning indigenous peoples that are applicable in the countries in which they conduct business, and that many companies lack a code of conduct that adequately incorporates human rights principles. In order for private companies to meaningfully comply with relevant human rights norms within their respective spheres of influence, it is necessary for them to identify, fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of their work related to the projects they undertake. In addition, as part of its required due diligence, each private company operating in proximity to indigenous peoples should ensure that, through its behaviour, it does not ratify or contribute to any act or omission on the part of the State that could infringe the human rights of the affected communities, such as a failure on the part of the State to adequately consult with the affected indigenous community before proceeding with a project. For its part, the State should, at all times, closely monitor company behaviour to ensure that indigenous peoples' rights are fully respected, and that required consultations are fully and adequately employed.

III. CONCLUSIONS AND RECOMMENDATIONS

Implementation of the mandate

1. Cooperation with other mechanisms and bodies

58. **Coordination with the Permanent Forum on Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples is an important aspect of the implementation of the mandate of the Special Rapporteur. The respective mandates of those three mechanisms, which were created at different times and in response to different moments in the international movement to protect the rights of indigenous peoples, are complementary but also overlapping in certain ways. Ongoing efforts at coordination among the three mechanisms should be strengthened and consolidated into a permanent feature of their work both jointly and separately.**

59. **Likewise, the Special Rapporteur welcomes opportunities for his cooperation with agencies and programmes throughout the United Nations system, as well as with regional and specialized institutions. This cooperation should continue in order to promote awareness of indigenous issues and programmatic action that is conducive to mainstreaming those issues and to effectively implementing standards of indigenous rights as affirmed in relevant international instruments.**

2. Areas of work

60. **The Special Rapporteur's work pursuant to his mandate falls within four interrelated and mutually reinforcing areas: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations, with the latter category being the one**

that has required the greatest amount of attention on an ongoing basis. The Special Rapporteur is grateful for the cooperation he has received from several States, indigenous peoples and others in all aspects of his work. He urges States that have not responded to his communications of alleged human rights violations to do so, and also urges States to respond positively to requests for country visits.

3. The duty to consult

61. A core issue that the Special Rapporteur has repeatedly confronted is a lack of adequate consultation with indigenous peoples on matters that affect their lives and territories. A lack of adequate consultation is related to conflictive situations and profound expressions of discontent, mistrust and even anger on the part of indigenous peoples in various scenarios across the world. The Special Rapporteur perceives a need on the part of States and other stakeholders for orientation about the relevant normative parameters and measures necessary for compliance with the duty to consult with indigenous peoples, in accordance with international standards. In the following paragraphs, the Special Rapporteur summarizes his conclusions on certain aspects of the duty to consult, and adds recommendations.

4. Normative framework and national laws, policies and practice

62. In accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent. Premised on an understanding of indigenous peoples' relative marginalization and disadvantaged conditions in regard to normal democratic processes, this duty derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles.

63. The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State's general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests. The duty to consult does not only apply when substantive rights that are already recognized under domestic law, such as legal entitlements to land, are implicated in the proposed measure.

64. States should develop mechanisms for determining and analysing if, and the extent to which, proposed legislative or administrative measures, including those for natural resource extraction or other development activities, affect indigenous peoples' particular interests, in order to determine the need for special consultation procedures well before the measures are taken.

65. The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope of its impact on indigenous peoples, and the nature of the indigenous interests or rights at stake. Yet, in all cases in which the duty to consult applies, the objective of the consultation should be to obtain the

consent or agreement of the indigenous peoples concerned. Hence, consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making.

66. The principle that indigenous consent should be the objective of consultation does not mean that obtaining consent is an absolute requirement for all situations. In all cases, what fundamentally matters is that a good faith effort by the State is made to achieve agreement. Indigenous peoples, as well, should seek in good faith to reach consensus on proposed measures and avoid inflexible positions when the proposed measures are based on legitimate public interests.

67. Notwithstanding the necessarily variable character of consultation procedures in various contexts, States should define into law consultation procedures for particular categories of activities, such as natural resource extraction activities in, or affecting, indigenous territories. Such mechanisms that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in consultation with indigenous peoples.

68. Consulting with indigenous peoples on the very elements of the consultation procedure to be employed not only helps to ensure that the procedure is effective, it is also an important, necessary confidence-building measure. Other measures for confidence-building are also needed.

69. In this regard, States should make every effort to allow indigenous peoples to organize themselves and freely determine their representatives for consultation proceedings, and should provide a climate of respect and support for the authority of those representatives. For their part, indigenous peoples should work, when needed, to clarify and consolidate their representative organizations and structures in order that they may function effectively in relation to consultation procedures.

70. States should also develop adequate analyses and impact assessments of proposed legislative or administrative measures, and make them available to the indigenous peoples concerned along with all relevant information well in advance of negotiations. States should also endeavour to ensure that indigenous peoples have adequate technical capacity and financial resources in order to effectively participate in consultations, without using such assistance to leverage or influence indigenous positions in the consultations.

71. Relevant agencies and programmes within the United Nations system, as well as concerned NGOs, should develop ways to provide indigenous peoples with access to the technical capacity and financial resources they need to effectively participate in consultations and related negotiations.

72. Even when private companies, as a practical matter, are the ones promoting or carrying out activities, such as natural resource extraction, that affect indigenous peoples, States maintain the responsibility to carry out or ensure adequate consultations. For their part, as a matter of policy if not legal obligation, private companies should conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation.

73. Private companies that operate or seek to operate on or in proximity to indigenous lands should adopt codes of conduct that bind them to respect indigenous peoples' rights in accordance with relevant international instruments, in particular the United Nations Declaration on the Rights of Indigenous Peoples. States should develop specific mechanisms to closely monitor company behaviour to ensure full respect for indigenous peoples' rights, and to ensure that required consultations are fully and adequately employed.

74. States should take measures to improve the mediation capacity of Government agencies, in partnership with companies if applicable, to deal with potentially conflicting interests in relation to indigenous land and resources, and to work with all stakeholders to implement such mechanisms and ensure protection from discrimination and equal opportunities to indigenous peoples in this regard.
