

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

www.indianlaw.org

MAIN OFFICE
602 North Ewing Street, Helena, Montana 59601
(406) 449-2006 | mt@indianlaw.org



WASHINGTON OFFICE
601 E Street, S.E., Washington, D.C. 20003
(202) 547-2800 | dcoffice@indianlaw.org

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Enabling the Participation of Indigenous Governing Institutions At the United Nations

Written contribution to inform the electronic consultation as called for in A/RES/70/232

**SUBMISSION SUPPORTED BY THE ABORIGINAL COMMISSION ON
HUMAN RIGHTS AND JUSTICE, THE CITIZEN POTAWATOMI NATION,
THE MASHANTUCKET PEQUOT TRIBAL NATION, THE METIS
NATION, THE TONAWANDA SENECA NATION, AND THE UNITED
SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND**

The Indian Law Resource Center is a non-profit legal and advocacy organization established in 1978 by American Indians. The Center is dedicated to protecting the rights of Indian and Alaska Native nations and other indigenous peoples throughout the Americas. The Center, among other work, has supported indigenous nations and organizations in the negotiation of the Declaration on the Rights of Indigenous Peoples and in the World Conference on Indigenous Peoples. The Center has been in consultative status with the Economic and Social Council since 1981.

The following observations and proposals of the Center and supporting indigenous nations and organizations are intended to clarify the need for a new status particularly for **indigenous governing institutions** at the United Nations and to assure that the new status, the necessary standards for accreditation, and the rules for participation will permit indigenous governing institutions to participate and contribute effectively in the work of the United Nations.

I. The need for a new status for indigenous governing institutions

Indigenous governing institutions are not presently recognized by the United Nations system in any formal sense. Such institutions are entirely distinct from voluntary non-governmental organizations, including those indigenous organizations organized as civil society organizations that have received consultative status from the Economic and Social Council.

The United Nations, through the Outcome Document of the World Conference on Indigenous Peoples, has recognized the important distinction between voluntary indigenous organizations and indigenous governing institutions, as well as the need to remedy the situation by enabling indigenous governing institutions to participate in the work of the United Nations.

The World Conference on Indigenous Peoples was held, in part, “to pursue the objectives of the United Nations Declaration on the Rights of Indigenous Peoples,”¹ and it resulted in an outcome document² that included a commitment to consider “ways to enable the participation of indigenous peoples’ representatives and institutions in meetings of relevant United Nations bodies on issues affecting them, including any specific proposals made by the Secretary-General...”³ Following the World Conference, the General Assembly outlined a process to enable the participation of indigenous representatives and institutions (indigenous governing institutions) in the work of the United Nations in its annual resolution on the rights of indigenous peoples.⁴

Many international law standards relating to the rights of indigenous peoples, such as those established under the UN Declaration, apply to indigenous peoples and their governments or other decision-making institutions, not to voluntary indigenous organizations constituted as NGOs or civil society organizations. Article 18 of the Declaration states the right of indigenous peoples to participate in decision-making in matters affecting their rights through representatives chosen by themselves in accordance with their own procedures. Articles 33 and 34 further recognize the right of indigenous peoples to determine, promote, develop, and maintain their institutional structures and membership in accordance with their own procedures. Article 19 recognizes the duty of states to consult and cooperate with indigenous peoples through indigenous peoples’ governing or representative institutions before adopting or implementing measures that may affect them. Any process to enable the participation of indigenous governing institutions at the United Nations must promote respect for and full application of all of these provisions of the Declaration.

Past reports of the Secretary-General, the Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples, and the Permanent Forum on Indigenous Issues provide further evidence of the need for a new status for indigenous governing institutions to participate in the work of the United Nations.

In 2011, the Expert Mechanism recommended: “The United Nations should, in accordance with the UN Declaration on the Rights of Indigenous Peoples, establish a permanent mechanism or system for consultations with indigenous peoples’ governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure effective participation at all levels of the United Nations.”⁵

1 G.A. Res. 65/198, ¶ 8, U.N. Doc. A/RES/65/198 (Dec. 21, 2010).

2 G.A. Res. 66/295, ¶¶ 9-10, U.N. Doc. A/RES/66/295 (Sept. 17, 2012).

3 G.A. Res. 69/2, ¶ 33, U.N. Doc. A/RES/69/2 (Sept. 22, 2014).

4 G.A. Res. 70/232, ¶ 19, U.N. Doc. A/RES/70/232 (Dec. 23, 2015).

5 The Expert Mechanism on the Rights of Indigenous Peoples, *Final report of the study on indigenous peoples and the right to participate in decision-making*, ¶ 36, delivered to the Human Rights Council, U.N. Doc. A/HRC/18/42 (August 17, 2011).

In 2012, at the request of the Human Rights Council,⁶ the Secretary-General prepared a report on the ways and means of promoting participation at the United Nations of recognized indigenous peoples' representatives, recognizing that such institutions are "not always organized as non-governmental organizations."⁷

In 2015, at the request of the General Assembly in its World Conference Outcome Document, the Secretary-General prepared a second report on the topic, recommending states "move forward on developing measures to enable the effective participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them, through representatives chosen in accordance with their own procedures."⁸ Also in 2015, the Permanent Forum on Indigenous Issues recommended that the General Assembly establish "a new procedure, in collaboration with indigenous peoples, to guarantee the effective participation of representatives of indigenous peoples and, in particular, indigenous governance institutions, in the seventieth session of the Assembly, including a corresponding accreditation mechanism."⁹ Such United Nations resolutions and reports provide a clear and compelling need for indigenous peoples' representatives and institutions (indigenous governing institutions) to participate directly in the work of the United Nations through the creation of new and distinct measures.

Indigenous individuals and communities have so far participated in the work of the United Nations in a number of ways: first, as indigenous peoples' organizations in the work of the Expert Mechanism and Permanent Forum; second, as a matter of necessity, as non-governmental organizations in consultative status with the Economic and Social Council in the work of the Human Rights Council; finally, as non-governmental or civil society actors through ad hoc mechanisms in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, in meetings of the Conference of the Parties to the Convention on Biological Diversity, in the UN Environment Programme following adoption of the Indigenous Peoples Policy Guidance in 2012, and the International Fund for Agriculture Development following adoption of its Policy on Engagement with Indigenous Peoples in 2009. Indigenous individuals, as part of voluntarily-constituted civil society organizations, thus have several well-established mechanisms for being accredited to participate in the work of the United Nations. Such procedures should be maintained at the present time. Improvement may be needed in these procedures, but it was not called for by the World Conference Outcome Document and is thus beyond the scope of this consultative process.

Yet, none of these existing participation processes or mechanisms recognizes the distinct political, social, and legal nature of indigenous peoples' governing institutions. Indigenous

6 ¶ 13, HRC/RES/18/8 (29 Sept. 2011).

7 The Secretary-General, *Report of the Secretary-General on the Ways and means of promoting participation at the United Nations of indigenous peoples' representatives on issues affecting them*, ¶ 1, delivered to the Human Rights Council, U.N. Doc. A/HRC/21/24 (2 July 2012).

8 The Secretary-General, *Report of the Secretary-General on the Progress made in the implementation of the outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, ¶ 48, delivered to the Economic and Social Council, U.N. Doc. A/70/84-E/2015/76 (18 May 2015).

9 The Permanent Forum on Indigenous Issues, *Report on the fourteenth session (20 April-1 May 2015)*, ¶ 7, delivered to the Economic and Social Council, U.N. Doc. E/2015/43-E/C.19/2015/10.

governing institutions are unable to participate in their own right in important meetings and activities which may affect them. Without a special invitation, indigenous governing institutions, as such, cannot participate in, even to simply attend and observe, sessions of the Human Rights Council or the Third Committee of the General Assembly, which adopt annual resolutions on the rights of indigenous peoples. Nor can they participate in any meetings of the Commission on the Status of Women or other functional commissions of the Economic and Social Council.

For indigenous governing institutions, pursuing the accreditation process as a non-governmental entity or as a civil society actor is entirely inappropriate and inadequate. They are duly-constituted governments which represent their members or citizens. For these reasons, this consultative process should focus solely on the procedures to enable the participation of indigenous governing institutions at the United Nations, as called for in the World Conference Outcome Document and mandated by General Assembly resolution 70/232.

The summary of comments of states and others in the 2015 electronic consultation to inform the Secretary-General's report on progress made in the implementation of the outcome document of the World Conference on Indigenous Peoples¹⁰ shows explicitly the understanding that this consultative process is intended to establish a new specific category for indigenous governing institutions to participate in the work of the United Nations. Responses emphasized that this new category or status should be distinct from the NGO process and should be reserved for indigenous governing institutions only. In their responses, states also recognize that current opportunities for participation are inadequate and not reflective of the unique relationship of indigenous peoples' governing institutions with the state where they live. Importantly, the responses make clear that the intent of this consultative process is to "recognize these indigenous peoples' institutions and to establish a new indigenous category or observer status" and that the new process "should in no way prejudice indigenous peoples' non-governmental organizations that can and should continue to work within existing ECOSOC processes."¹¹

II. What rights of participation should indigenous governing institutions have?

Whatever new process, procedure, or mechanism is decided upon to enable the participation of indigenous governing institutions at the United Nations, the new status should ensure that indigenous governing institutions are able to participate in activities of the United Nations at the very minimum in a manner comparable to that exercised by non-governmental organizations in consultative status with the Economic and Social Council. This level of participation would include, among other things, attending meetings, submitting written statements, making oral statements, and proposing agenda items, all subject, of course, to reasonable rules for the conduct of meetings. Further, due to their political and legal nature as representative bodies of their citizens or members, indigenous governing institutions should have certain enhanced rights of participation beyond what non-governmental organizations enjoy, such as priority over non-governmental organizations with regard to seating and order of

¹⁰ Participation of indigenous peoples at the United Nations: Overview of responses by indigenous peoples and Member States to a 2015 questionnaire ("the summary of responses"), available at: http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/questionnaire_overview7Briefing.pdf.

¹¹ *Id.*

speaking. Indigenous governing institutions should also enjoy relaxed limitations and rules on the length of their oral statements and written submissions.

Indigenous governing institutions should be able to participate in an effective and meaningful way in all relevant United Nations meetings and bodies, and not just the indigenous-specific mechanisms such as the Permanent Forum on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples. Such bodies would include those with direct implications for indigenous interests such as the Economic and Social Council and its subsidiary bodies – the Commission on the Status of Women, the Commission on Social Development, and the Permanent Forum on Indigenous Issues; the Human Rights Council and its subsidiary bodies – the special procedures and the Expert Mechanism on the Rights of Indigenous Peoples; and the treaty bodies and relevant meetings of the General Assembly and its Main Committees. This preliminary listing is not intended to be exhaustive or to exclude participation in other UN bodies, mechanisms, or specialized agencies.

III. Who will the new status apply to?

The World Conference Outcome Document specifies that the new status shall apply to indigenous peoples' representatives and institutions. For the purposes of our submission, we refer to such groups as indigenous governing institutions, which are the authoritative and duly comprised decision-making bodies of their constituent indigenous peoples. Such bodies may be known by a number of different blanket terms such as, *inter alia*, customary, traditional, or constitutional governments, indigenous parliaments, assemblies, or councils. The new status, whatever it is called, should apply only to such duly established indigenous governing institutions recognized by their own indigenous constituents as such, and acting in a representative governmental capacity.

It appears very likely, perhaps certain, that it will be necessary to assure that the new status is limited to governing institutions of *indigenous peoples*, as that term is used and understood in the United Nations and other intergovernmental bodies. Although there is no universally agreed definition of who is “indigenous,” the term has a generally accepted meaning that has developed over the past 30 years in United Nations bodies and other intergovernmental organizations, including the International Labour Organization, the World Bank, and the Inter-American Development Bank, among others. It will be important to assure that the new status and rules for indigenous governing institutions apply only to *indigenous* peoples and not to ethnic, national, linguistic, racial, or other groups that are not, in fact, indigenous.

IV. The accrediting body

The General Assembly should decide to use an existing committee or working group or to create a new committee or working group to carry out the accreditation process, that is, to decide whether an applicant is qualified to participate as an indigenous governing institution in the work of the United Nations. The UN Charter recognizes the authority of the General Assembly to create such a committee or working group, providing that the “General Assembly may establish such subsidiary organs as it deems necessary for the performance of its

functions.”¹² And the United Nations Rules of Procedure further reference the “desirability of the Main Committees’ making use of subcommittees or working groups.”¹³

The committee or working group must include some indigenous government leaders or, at minimum, must consult with indigenous government leaders, experts, or advisers. The committee should be authorized to recommend to the General Assembly the accreditation of indigenous governing institutions that meet the requirements. Creation of a separate accreditation process and accrediting body by resolution of the General Assembly has occurred, for example, with respect to National Human Rights Institutions.

In order to ensure adequate participation by indigenous governing institutions, the United Nations system, as appropriate, should provide the necessary financial and technical support for indigenous peoples’ governing institutions seeking to participate in the work of the United Nations.

V. The accreditation process and criteria

To do the important work of processing applications and recommending the accreditation of indigenous governing institutions, there must be a new process with new rules and standards. Accreditation is the formal decision recognizing an indigenous government as qualified to participate in the United Nations. Accreditation standards must be strong but flexible and responsive to the differences among indigenous governing institutions in various regions of the world.

The process of accreditation for indigenous governing institutions must assure that applicants are in fact indigenous and are genuine, duly chosen representatives of the people and governing institution they purport to represent. While the accreditation body or committee could be responsible for elaborating standards and procedures for accreditation, a preliminary set of criteria for consideration of applications follows.

Self-identification alone should not be sufficient for accreditation though it must be taken into consideration. Rather, an applicant should provide documentary or other evidence of its identity as indigenous and of its character as an authentic indigenous governing body of the indigenous people concerned. No particular form or structure of government should be required, and all genuine, indigenous governing institutions should have an opportunity to apply and to demonstrate their qualifications for accreditation.

Applicants should be requested to provide, initially, among other things, documentation or other reliable evidence establishing their existence as a government or governing institution, authorizing the application to be made, and designating one or more representatives. Documentation could include written or oral testimony or statements. Each applicant should also,

¹² U.N. Charter art. 22.

¹³ See Rules of Procedure of the General Assembly (embodying amendments and additions adopted by the General Assembly up to September 2007), *Annex IV, Conclusions of the Special Committee on the Rationalization of the Procedures and Organization of the General Assembly*, ¶ 66, *establishment of subcommittees or working groups* A/520/Rev.17 (United Nations New York 2008).

for example, briefly describe the people, indigenous nation, or community that it represents, the governing powers or authority that it exercises, and the principal officials or office holders in the government. The committee should consider evidence and views from all relevant sources.

State recognition should be a consideration for accreditation, but cannot be a necessary criterion. The status of indigenous governments does not and must not depend on recognition by the states where they are located. Recognition by other indigenous peoples, however, can serve as some evidence that an indigenous governing institution is genuine and entitled to participate in the United Nations.

We are prepared to recommend and discuss further, more detailed rules and procedures for accreditation. We look forward to an appropriate time to submit further and more detailed recommendations. We also look forward to reviewing the proposals and comments of others and to the opportunity to respond to those proposals and comments.

VI. Benefits to the United Nations

The United Nations has now recognized the need to address barriers to the participation of indigenous governing institutions in the work of the UN system. Indigenous governing institutions have valuable contributions to make to the world community, and in 2016, their regular and permanent participation at the United Nations should be ensured by providing full recognition of their governmental status and by permitting them to participate in United Nations meetings and activities.

Indigenous governing institutions, duly-constituted and representing their constituents, members, and peoples, are the best and most appropriate actors to speak to matters that affect them in the United Nations, such as violence against indigenous women and protecting indigenous cultures, lands, and resources. The 2012 Secretary-General's report recognizes the functional advantages input from indigenous governing institutions provides to the United Nations system. The summary of responses to the 2015 Secretary-General's report further notes that indigenous peoples bring important perspectives to the work of the United Nations not only on indigenous issues, but to a whole range of themes considered by the United Nations.¹⁴

Enabling indigenous governing institutions greater and permanent participation in the United Nations will mean representative indigenous voices will always be heard. Enabling indigenous governing institutions to speak for themselves is not only the right thing to do in principle to meet the call of the World Conference Outcome Document, but it will also yield significant benefits to the United Nations system and result in more informed deliberations, better decisions, more successful programs, greater security for indigenous rights, and progress toward achieving the purposes of the Declaration.

¹⁴ Participation of indigenous peoples at the United Nations: Overview of responses by indigenous peoples and Member States to a 2015 questionnaire ("the summary of responses"), available at: http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/questionnaire_overview7Briefing.pdf.

Aboriginal Commission on Human Rights and Justice
201, 10812 – 178 Street
Edmonton, Alberta T5S 1J3
CANADA

Citizen Potawatomi Nation
1601 South Gordon Cooper Drive
Shawnee, Oklahoma 78401
UNITED STATES OF AMERICA

Mashantucket Pequot Tribal Nation
2 Matts Path
P.O. Box 3060
Mashantucket, Connecticut 06338-3245
UNITED STATES OF AMERICA

Metis Nation
#4 – 340 MacLauren Street
Ottawa, Ontario K2P 0M6
CANADA

Tonawanda Seneca Nation
7027 Meadville Road
Basom, New York 14013
UNITED STATES OF AMERICA

United South and Eastern Tribes Sovereignty Protection Fund
711 Stewarts Ferry Pike
Nashville, Tennessee 37214
UNITED STATES OF AMERICA