



# Forest Peoples Programme

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**Statement of Forest Peoples Programme before  
the Committee on the Elimination of Racial Discrimination  
Thematic Discussion: Special Measures/Affirmative Action and the  
Convention on the Elimination of All Forms of Racial Discrimination  
(4 August 2008)  
*“Indigenous Rights versus Special Measures”***

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Esteemed members of the Committee on the Elimination of Racial Discrimination (“Committee”), my name is Vanessa Jiménez. I am a Senior Attorney with Forest Peoples Programme, an NGO based in the United Kingdom. Over the past few years my colleagues and I have submitted a series of reports and brought a number of urgent situations involving the rights of indigenous peoples before this Committee – particularly involving the indigenous and tribal peoples in Suriname, Guyana, Indonesia, Brazil, Peru, India and the Democratic Republic of Congo. We have been very appreciative of the thoughtful attention and careful consideration this Committee has given to each of these situations. We are grateful for the manner in which this Committee, through its communications with governments, concluding observations, follow-up and urgent action decisions, and general recommendations, has contributed to the advancement of the rights of indigenous peoples throughout the world and broadened the international community’s understandings of the duties and obligations that States have under the Convention on the Elimination of All Forms of Racial Discrimination (“Convention”) with respect to these peoples. For this we are in your debt and we are honoured to be taking part in this important thematic discussion.

In 2005 and 2007 the Forest Peoples Programme compiled the jurisprudence of the UN treaty bodies relating to indigenous peoples. These compilations demonstrate that on numerous occasions, in the context of the protection of the rights of indigenous peoples, this Committee and other treaty bodies found it necessary to discuss the nature of the special measures regime (particularly its objective and duration) and to call for special measures to protect, among others, the rights of indigenous peoples to their lands and resources, to education, health, and employment.<sup>1</sup> We are therefore certain that

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<sup>1</sup> Botswana: 01/11/2002, CERD/A/57/18, paras. 303; Surinam: 12/03/2004, CERD/C/64/CO/9, par. 19; Fiji: 02/06/2003, CERD/C/62/CO/3, par. 15; Ecuador: 21/03/2003, CERD/C/62/CO/2, par. 3; Botswana: 01/11/2002, A/57/18, par. 303; New Zealand: 15/09/07, CERD/C/NZL/CO/17, para. 17; India: 17/09/96, CERD/C/304/Add.13, par. 27; Fiji: 02/06/2003, CERD/C/62/CO/3, par. 15; Bangladesh: 27/04/2001.

whatever general recommendation this Committee finally drafts and adopts regarding the matter of affirmative action and special measures, its content and its guidance will be of great value and assistance to the indigenous peoples through the world.

In the interest of time, I would like to move directly to our concerns and recommendations. Of primary concern is the need to clarify the distinction between the State's recognition of indigenous peoples' rights on one hand, and the adoption of special measures to promote, enforce, and ensure the enjoyment of those rights on the other. This Committee has previously cautioned States which have ratified the Convention against confusing "special measures" with actual recognition and protection of indigenous peoples' rights – the latter being a duty and obligation of the State which stands independent of the special measures paradigm.

For instance, in its 2007 review of New Zealand, the Committee noted with concern that "historical treaty settlements have been categorized [by New Zealand] as special measures for the adequate development and protection of Maori." The Committee refuted this erroneous assertion by emphasizing "the distinction to be drawn between special and temporary measures for the advancement of ethnic groups on the one hand and permanent rights of indigenous peoples on the other hand."<sup>2</sup>

Respectfully, this point will also require emphasis in the case of Guyana. Recently Guyana submitted to this Committee a report responding to a request for information in the context of the Committee's consideration of the situation of indigenous peoples of Guyana under its early warning and urgent action procedure. In this report Guyana states that indigenous persons have the same rights as all Guyanese citizens and that they also benefit from an additional, special rights regime that is set forth in the country's 2006 Amerindian Act. Guyana goes on to say that the Amerindian Act (essentially its entire legislative framework for indigenous peoples) is "a special measure discriminating in favour of Amerindians and is a special measure within Article 1 paragraph 4 of the Convention." In relation to that law's provisions pertaining to mining, Guyana further asserts that the Act "gives Amerindian villages a right which no other section of Guyanese society has. This right must be limited to what is justifiably necessary to protect Amerindians but it cannot give Amerindians rights to the detriment of others."<sup>3</sup>

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CERD/C/304/Add.118, par. 4; Colombia: 05/05/97. CCPR/C/79/Add.76, par. 33; Brazil: 01/10/2004, CRC/C/15/Add.241, par. 29; India: 26/02/2004. CRC/C/15/Add.228. par. 28 ; Fiji: 07/05/2002. A/57/38 (Part I), pars. 48 &49; Guatemala: 28/05/96. E/C.12/1/Add.3, par. 27; India: 01/02 /2000. A/55/38, paras.30 -90, par. 74.

<sup>2</sup> Concluding Observations onto New Zealand: 14/08/07. CERD/C/NZL/CO/17, para. 17.

<sup>3</sup> Comments of the Government of Guyana on the concluding observations of the Committee on the Elimination of Racial Discrimination. UN Doc. CERD/C/GUY/CO/14/Add.1, 14 May 2008, pp. 1 & 20. Available at: <http://www2.ohchr.org/english/bodies/cerd/docs/followup/CERD.C.GUY.CO.14.Add1.pdf>.

Like the assertions made by the Government of New Zealand, these statements by Guyana contain fundamental misunderstandings regarding the rights of indigenous peoples that too many States share. For these reasons clarifications by this Committee are warranted and Forest Peoples Programme respectfully suggests that in its pending General Recommendations on Special Measures, the Committee clarifies the following three points:

*One, indigenous peoples' rights are inherent human rights.* They are not rights or privileges that are 'given' or 'granted' by the State, nor are they dependent on the good will of the State for their existence.

*Two, indigenous rights are not special rights they are the rights that all peoples and individuals possess.* As the recently adopted United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms, "indigenous peoples and individuals are free and equal to all other peoples and individuals" and have the right "to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms" enjoyed by all other peoples and individuals.<sup>4</sup> In fact, the increased recognitions of indigenous peoples' rights in State laws and policies; this very Committee's decisions, general recommendations and observations; rulings by international and domestic tribunals; and most recently in the UNDRIP, reflect the international community's evolving understanding of how existing, recognized human rights are to be understood and applied to indigenous peoples – both collectively and individually.<sup>5</sup>

*Three, and most important for this discussion, is the affirmation that the recognition of the permanent rights of indigenous peoples in State legislation and policies is not a temporary affirmative/special measure as contemplated by the Convention at 1.4 and 2.2, but rather a duty and obligation of all States that have ratified the Convention.* The Convention requires States to adopt in their laws and policies not only recognitions of the right of indigenous peoples, but also mechanisms to promote the respect for and protection of these rights. These recognitions and mechanisms -- for example, an affirmation of the right to their ancestral territories and then the adoption of a process for demarcation and titling -- are not meant to be temporary in nature, but in fact permanent legal and administrative frameworks that are required of any State party to the Convention. These frameworks guarantee that the rights of indigenous peoples shall forever be made effective in that country. The Convention also requires

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<sup>4</sup> UNDRIP, Arts. 1 & 2 (12 September 2007).

<sup>5</sup> Indeed the Inter-American Court correctly stated in its precedent-setting case of *Awas Tingni* regarding indigenous peoples' rights to lands and resources, that our interpretation of human rights "has to adjust to the evolution of the times, and in particular, to the conditions of life today." Judgment of the Inter-American Court of Human Rights in the case of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua* Issued 31 August 2001, Inter-Am. Court on Human Rights, Series C, No. 79 (2001), at par. 146.

States to adopt affirmative action/special measures, “when the circumstances so warrant”, to ensure that indigenous peoples may fully enjoy and exercise their rights. These are meant to be temporary mechanisms adopted in large part to bridge the gap between equality at law and equality in practice. This is particularly true where the existence of “persistent inequalities”<sup>6</sup> arising from “deep structural inequalities”<sup>7</sup> and historic discrimination, have resulted in adverse impacts that, if not addressed with certain urgency and specificity, would not likely disappear within any acceptable timeframe. It is expected that these measures are to be monitored so that their effectiveness, continued necessity, impacts on the non-targeted groups, and appropriate termination can be regularly determined. These temporary special measures, however, are distinct from the permanent recognition of the permanent rights of indigenous peoples and their members.

In a society where indigenous peoples have regularly found themselves on the losing side of the balancing scale of justice and continue to suffer extreme discrimination and disparities on most, if not all indices of well-being, including in the world’s richest countries, the Convention’s sanction of special measures as a rectifying tool must be preserved and diligently applied where warranted. At all times, however, it must be clarified that while “affirmative/special measures” are legitimate tools for addressing the affects of systematic and pervasive discrimination, they are not synonymous with, nor do they satisfy the duty of the State to recognize the rights of indigenous peoples and adopt permanent mechanisms to ensure the enjoyment, protection and enforcement of those rights.

Forest Peoples Programme respectfully requests that this Committee ensure that any General Recommendation it develops on this issue clarifies the above points and also affirm its prior statement that the United Nations Declaration on the Rights of Indigenous Peoples be used by States “as a guide to interpret [their] obligations under the Convention relating to indigenous peoples”<sup>8</sup>, including its duty to not only recognize indigenous peoples rights, but also to adopt special measures, when warranted, to make those rights effective.

Once again, I thank you for the opportunity to present before this esteemed body and express my organizations profound appreciation for the work it has done to advance the rights of indigenous peoples throughout the world.

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<sup>6</sup> Brazil: 01/10/2004. CRC/C/15/Add.241, par. 29.

<sup>7</sup> Brazil: 12/03/2004. CERD/C/64/CO/2, par. 12 (addressing the state’s National Affirmative Action Programme to address black, Mestizo, and indigenous populations).

<sup>8</sup> United States: 02/2008, CERD/C/USA/CO/6, at par. 29 (advanced unedited version).