

## **Expert Mechanism on the Rights of Indigenous Peoples**

**Third session, Geneva**

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### **Agenda Item 3: Study on indigenous peoples and the right to participate in decision-making**

## **Indigenous Peoples' Right to Participate in Decision-Making: International and Regional Processes**

**Joint Statement of the Grand Council of the Crees (Eeyou Istchee); International Organization of Indigenous Resource Development (IOIRD); Saami Council; International Indian Treaty Council; Indigenous World Association; Innu Council of Nitassinan; First Peoples Human Rights Coalition; Canadian Friends Service Committee (Quakers)**

1. Indigenous peoples and human rights organizations welcome this opportunity to contribute to the Expert Mechanism's "Study on indigenous peoples and the right to participate in decision-making" (Agenda Item 3).
2. This Joint Statement will focus on Indigenous peoples' right to participate in international and regional processes. In this context, there are a number of processes that may significantly affect the rights and interests of Indigenous peoples.
3. Internationally, this would include the current processes of negotiations relating to the *Convention on Biological Diversity* (CBD);<sup>1</sup> climate change; and intellectual property within the World Intellectual Property Organization (WIPO).
4. Regional processes would include those within the Organization of American States (OAS);<sup>2</sup> African Commission on Human and Peoples' Rights; and new ASEAN Intergovernmental Commission for Human Rights (AICHR).<sup>3</sup>
5. It is beyond the scope of this Joint Statement to examine each of these processes. The focus will be primarily on the negotiations of an international regime on access and benefit-sharing relating to the CBD.

### **Right to participate in decision-making**

6. In the Expert Mechanism's "Progress report on the study on indigenous peoples and the right to participate in decision-making" [hereinafter, "Progress Report"], it is emphasized that Indigenous peoples' right to participation is "a core principle and right under international human rights law."<sup>4</sup> The *United Nations Declaration on the Rights of Indigenous Peoples*<sup>5</sup> is

said to contain more than 20 provisions affirming indigenous peoples' right to participate in decision-making.<sup>6</sup>

7. In its preamble, the *Declaration* is proclaimed "as a standard of achievement to be pursued in a spirit of partnership and mutual respect". This standard can only be attained if there are genuine partnerships – particularly between States and Indigenous peoples. Such relationships must be consistent with the principle of equal rights and self-determination of peoples<sup>7</sup> and must fully respect Indigenous peoples' right to participate in decision-making.
8. With regard to its *Indigenous and Tribal Peoples Convention, 1989*, the International Labour Organization (ILO) emphasizes: "The principles of participation and consultation are the cornerstone of the Convention."<sup>8</sup>
9. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, concludes:

... 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.<sup>9</sup>

10. In regard to the duty of States to consult Indigenous peoples, Anaya affirms:

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 ... More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty.<sup>10</sup>

11. The human right of self-determination is an integral element in any democracy.<sup>11</sup> As affirmed by the Expert Mechanism's Progress Report, this right entails Indigenous peoples' free, prior and informed consent.<sup>12</sup> It would be undemocratic for States to engage in unilateral actions that undermine Indigenous peoples' human rights, including their right of self-determination and full and effective participation. As James Anaya underlines:

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 ...<sup>13</sup>

12. An inherent aspect of the duty to consult is the democratic right to participate in decision-making. As concluded by the ILO Committee of Experts on the Application of Conventions and Recommendations: "... consultations must be genuine. ... the obligation to consult should be viewed in the light of the fundamental principle of participation set forth in *Article 7(1) and (3)* of the Convention."<sup>14</sup>

13. In undertaking any study on the right of Indigenous peoples to participate in decision-making, it is essential to consider the relationship between democracy, human rights and the rule of law. At the UN General Assembly, heads of State and government have recommitted themselves:

to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations ...<sup>15</sup>

14. Consultation encompasses a wide spectrum of effective participation and, in many diverse circumstances, requires the free, prior and informed consent of Indigenous peoples.<sup>16</sup> This is also the case in regional<sup>17</sup> and domestic<sup>18</sup> contexts.

15. In relation to Indigenous peoples, the Committee on Economic, Social and Cultural Rights provides that a “core obligation applicable with immediate effect” includes the following:

States parties should obtain their *free and informed prior consent* when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.<sup>19</sup>

16. The Treaties of Indigenous peoples are by their very nature “consensual”. In ensuring that such Treaties remain living and dynamic agreements for present and future generations, the full and effective participation of such peoples is both a right and a responsibility.<sup>20</sup>

17. Indigenous peoples’ treaty rights generally constitute an elaboration of human rights.<sup>21</sup> Therefore, it is especially important for Indigenous peoples with Treaties to participate in international and other processes that may affect their human rights. Virtually every provision in the *UN Declaration* is relevant in some way to diverse Indigenous Treaties.

18. Treaties between States and Indigenous peoples cannot be validly entered into or amended without the consent of the parties. Such Treaties require good faith by such parties at all stages – from negotiation to implementation. Article 37(1) of the *Declaration* reinforces these essential elements as follows:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties ... concluded with States or their successors and to have States honour and respect such treaties ...<sup>22</sup>

19. Consultations with Indigenous peoples must always be carried out in good faith.<sup>23</sup> In cases where free, prior and informed consent may not be required, the duty of States to consult should be undertaken with the objective of obtaining consent. Article 6(2) of the *Indigenous and Tribal Peoples Convention, 1989* provides:

The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

20. For all measures contemplated in the *Convention*, State programmes must be carried out “in consultation and co-operation” with the peoples concerned.<sup>24</sup> In other provisions, the *Convention* requires “participation and co-operation”.<sup>25</sup>
21. Article 19 of the *UN Declaration* provides: “States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent ...” Article 38 of the *UN Declaration* adds: “States in *consultation and cooperation* with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”
22. Such added elements of “cooperation” require more than “consultation”. What is required is not only genuine dialogue, information and accommodation, but also negotiation and even partnership – depending on the circumstances.<sup>26</sup> Special Rapporteur Anaya comments:

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 ...<sup>27</sup>

### **Significance of the *UN Declaration***

23. The *UN Declaration* is the most comprehensive, universal international human rights instrument explicitly addressing the rights of Indigenous peoples. It elaborates on their economic, social, cultural, political, spiritual and environmental rights.
24. The *Declaration* includes many provisions that are relevant to the right to participate in decision-making. It also serves to interpret this and other rights of Indigenous peoples in other instruments.
25. The *Declaration* does not create new rights.<sup>28</sup> It elaborates on Indigenous peoples’ inherent rights, which throughout history have not been respected.<sup>29</sup> As concluded by Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, the *Declaration* provides a principled framework and context for interpreting the rights of Indigenous peoples:

[The *Declaration*] represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.<sup>30</sup>

26. International treaty monitoring bodies are referring to the *Declaration* and using it to interpret the rights of Indigenous peoples and individuals and related State obligations.<sup>31</sup> This practice underlines the significance of the *Declaration* and its implementation at all levels – international, regional and national. These bodies reinforce a human rights-based approach, when issues arise.

... the Committee [on the Rights of the Child] urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No.169 and the United Nations Declaration on the Rights of Indigenous Peoples.<sup>32</sup>

27. Thirty-one UN specialized agencies, including the Secretariat of the CBD, are represented in the Inter-Agency Support Group on Indigenous Issues (IASG). The IASG has emphasized that the adoption of the *Declaration*

constitutes a crucial opportunity ... according to Article 42 of the Declaration, to promote respect for and full application of its provisions and follow-up its effectiveness. The IASG pledges to advance the spirit and letter of the Declaration within our agencies' mandates and to ensure that the Declaration becomes a living document throughout our work.<sup>33</sup>

28. In regard to the *Indigenous and Tribal Peoples Convention, 1989*, the ILO has affirmed: "The Convention and the UN Declaration on the Rights of Indigenous Peoples adopted in 2007 are mutually reinforcing instruments providing the framework for the universal protection of indigenous and tribal peoples' rights."<sup>34</sup>

29. At the time of the revision process that led to the adoption of the *Convention*, the ILO Chair took the position that determination of the issue of self-determination "was outside the competence of the ILO. In his opinion, no position for or against self-determination was or could be expressed in the Convention".<sup>35</sup> As a result, the *Convention* includes the following statement in article 1(3):

The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

30. The right of self-determination, as provided in the international human rights Covenants, has since been confirmed to apply to the world's Indigenous peoples.<sup>36</sup> Thus, the right of self-determination and other human rights affirmed in the *UN Declaration* should now be used to interpret the *Convention*.<sup>37</sup> This is especially important since the right of peoples to self-determination is a prerequisite for the enjoyment of all other human rights.<sup>38</sup>

### **Indigenous peoples' right to participate in international processes**

31. The right of Indigenous peoples to participate in decision-making is not limited to domestic processes. This human right also pertains to international and regional processes.
32. Article 41 of the *UN Declaration* provides: "The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full

realization of the provisions of this Declaration ...” In regard to Indigenous peoples’ participation in international and other processes, the same article adds:

Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.”

33. Article 41 must be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” (art. 46(3)). The objective of ensuring the participation of Indigenous peoples is not simply to provide an opportunity to voice concerns, but also to do so in a manner that upholds the principles in article 46(3).
34. International and other processes that fail to respect such core principles in relation to Indigenous peoples are not consistent with the *Declaration* and international human rights law.
35. As indicated in the *Programme of Action for the Second International Decade of the World's Indigenous People*, “programmes and projects planned on traditional indigenous territories or otherwise affecting the situation of indigenous peoples should *foresee and respect the full and meaningful participation* of indigenous peoples.”<sup>39</sup> “Meaning participation” has been highlighted as a key human rights principle by the UN Secretary-General in the following terms:

The norms and values embedded in the Millennium Declaration and international human rights instruments must continue to provide the foundation for engagement, in particular the *key human rights principles of non-discrimination, meaningful participation and accountability*.<sup>40</sup>

36. Meaningful participation entails a range of important elements, such as empowerment, capacity (human and financial resources) and respect for human rights. As elaborated by Kyung-wha Kang, UN Deputy High Commissioner for Human Rights:

... while having the “space” for participation is a pre-requisite, this is not enough. An enabling legal, policy and institutional environment as well as some basic capacities for participation are also critical. In other words, individuals, in particular the poorest and the most marginalized, should be empowered so that they can claim their rights and participate actively in the formulation, implementation and monitoring of national development strategies.<sup>41</sup>

37. The right to development, which is both a collective and individual human right, also includes the right to meaningful participation. The *Declaration on the Right to Development* affirms that this right includes “active, free and meaningful participation in development”.<sup>42</sup> The African Commission on Human and Peoples’ Rights also affirms this aspect and emphasizes the importance of empowerment:

The result of development should be empowerment of the Endorois community. ... The capabilities and choices of the Endorois must improve in order for the right to development to be realised.<sup>43</sup>

38. Development is “a comprehensive economic, social, cultural and political process”.<sup>44</sup> The right to development is reinforced by the right of all peoples to self-determination, which includes the right to “freely pursue their economic, social and cultural development”.<sup>45</sup> The right of Indigenous peoples to development includes, *inter alia*, the right to their traditional knowledge which must be approached holistically and cannot be separated from their right to resources.

### **Examination of the CBD negotiations on access and benefit-sharing**

39. Examination of the current process of negotiations relating to the *Convention on Biological Diversity* can be instructive in illustrating some of the problems and challenges that Indigenous peoples and local communities face in various international processes. A related example would include intellectual property negotiations within the World Intellectual Property Organization (WIPO). The sub-standard approaches of many States are also apparent in the world talks on climate change.

40. Indigenous peoples are among the most disadvantaged peoples in the world. Yet, these peoples increasingly face threats to their traditional knowledge (TK) and resource rights. Although States commiserate about the debilitating poverty suffered by such peoples, too often the same States are unwilling to affirm and safeguard Indigenous rights to resources.

41. This ongoing injustice includes both prejudicial approaches to the human rights of Indigenous peoples and marginalizing them from decision-making:

... indigenous organisations are seeking protection of their knowledge systems as a whole: including the biological resources, landscapes and cultural values that form an *integral and vital part* thereof. They are concerned that UN agencies such as the CBD and the World Intellectual Property Organization (WIPO) address traditional knowledge separately from traditional resources and territories and customary laws, deal with TK protection within a paradigm of property, and marginalise the ancestral rights-holders from decision-making.<sup>46</sup>

42. A further problem that exacerbates the impoverishment of Indigenous peoples relates to “biopiracy” and the absence of safeguards in most States.

In recent years there has been a growing concern about ‘biopiracy’—the unauthorised commercial use of genetic resources and TK without sharing the benefits with the country or community of origin, and the patenting of spurious ‘inventions’ based on such knowledge and resources. ...<sup>47</sup>

43. The *Convention on Biological Diversity* has the potential to institute protections of Indigenous rights to traditional knowledge and related natural resources. This could be accomplished through the current negotiations on a Revised Draft Protocol<sup>48</sup> on access and benefit sharing from use of genetic resources. To date, the text of the draft Protocol reflects narrow self-interest of the Contracting Parties. The exploitation<sup>49</sup> of Indigenous peoples continues. The text, as drafted, does not prevent – and may even contribute to – the erosion and dispossession of Indigenous peoples’ human rights.<sup>50</sup>
44. It is not an objective of the draft Protocol to determine the specific nature and extent of the human rights of Indigenous peoples and individuals for diverse situations that may arise in the future. At the same time, it is not the purpose or intent of the draft Protocol to dispossess such peoples and individuals in any way of their human rights or diminish these rights.<sup>51</sup>
45. Any such dispossession or diminution of Indigenous rights would be incompatible with a key objective of both the CBD *Convention* and the draft Protocol, namely, “*fair and equitable sharing of the benefits arising out of the utilization of genetic resources*”. Any provision in the draft Protocol that may give rise to such interpretations would require revision. As affirmed in the *Convention’s* preamble, the Parties are: “*Determined to conserve and sustainably use biological diversity for the benefit of present and future generations*”.
46. In international law, State sovereignty is not absolute and is especially limited by the obligations accepted by States in the *Charter of the United Nations* and specific treaties. The *Convention on Biodiversity* itself affirms important limits, when it indicates: “States have, *in accordance with the Charter of the United Nations and the principles of international law*,<sup>52</sup> the sovereign right to exploit their own resources pursuant to their own environmental policies” (art. 3). The objective in the *Convention* relating to access and benefit sharing of genetic resources requires “taking into account *all rights over those resources*” (art. 1).
47. The *Convention* also requires State parties “as far as possible and as appropriate ... [s]ubject to its national legislation, [to] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ... and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices” (art. 8(j)).
48. Thus, national legislation must serve to safeguard and not undermine Indigenous “knowledge, innovations and practices”. These elements are critical to Indigenous peoples’ security and well-being, which include human, subsistence, cultural, environmental and territorial dimensions.
49. State parties are also required “as far as possible and as appropriate” to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable development” (art. 10(c)).<sup>53</sup>
50. These and other duties, rights and principles in international law require States to respect the human rights of Indigenous peoples. This would necessarily include upholding Indigenous peoples’ rights in the *United Nations Declaration on the Rights of Indigenous Peoples*.

51. A detailed Joint Statement by Indigenous and civil society organizations - recently submitted to the Parties in the CBD negotiations – concludes:

In relation to the world's Indigenous peoples, the current text of the Revised Draft Protocol is not consistent with the *Convention on Biological Diversity*, the *Charter of the United Nations* and other international law and standards. In relation to Indigenous peoples' human rights, the draft Protocol is not compatible with the international human rights obligations of States and the European Union.<sup>54</sup>

52. According to the same Joint Statement, a significant part of these failures are the result of procedural deficiencies that profoundly affect the right of Indigenous peoples to participate in decision-making:

Parties are taking advantage of one-sided procedures in the CBD process to undermine or ignore Indigenous peoples' human rights affirmed in the *UN Declaration on the Rights of Indigenous Peoples* and other international instruments. The *Declaration* provides a crucial global context for interpreting and implementing Indigenous rights and related State obligations.<sup>55</sup>

53. A further problem is the lack of financial support for Indigenous peoples from the different regions to adequately participate in the current negotiations on the Revised Draft Protocol. The Secretariat of the CBD has adopted many interesting and creative ways to enhance Indigenous participation in CBD-related activities.<sup>56</sup>

54. The CBD voluntary fund is not sufficient to ensure that adequate numbers of Indigenous peoples have the capacity to prepare for and attend the negotiations on the draft Protocol. This financial burden should not have to be carried solely by the voluntary fund.

55. Far too few Indigenous peoples are actually represented. There is an inadequate number of representatives at the meetings to ensure proper research and timely development of positions, and lobbying with the States and European Union. There is also an insufficient number of spokespersons at the negotiations table, with the necessary technical and legal expertise on a wide range of matters.

56. This ongoing lack of human and financial resources seriously affects the participation of Indigenous peoples in decision-making processes at the international level. It undermines the achievement of a democratic and fair process. In regard to international processes as those relating to biodiversity and climate change, the Expert Mechanism's Progress Report emphasizes: "consistent financial and administrative support is needed to ensure that indigenous peoples maintain appropriate participation in international bodies".<sup>57</sup>

57. It is essential to apply principles of democracy to international and regional processes and not only to those in domestic contexts. As concluded in a 2003 expert seminar on the interdependence between democracy and human rights:

In the current context of globalization, whereby decisions affecting people's lives are often taken outside the national context, the application of the principles of democracy to the international and regional levels has taken on added importance.<sup>58</sup>

### **Human rights must prevail over consensus**

58. Within the CBD process, Indigenous peoples have repeatedly expressed their appreciation to supportive States. It is only with such collaboration that standard-setting processes can effectively work.
59. The CBD process is especially challenging for Indigenous peoples, since the rules that are employed are wholly weighted in favour of States. These rules continue to evolve. Although they are participating in these negotiations, Indigenous peoples remain highly vulnerable to State discretion.
60. For example, Indigenous peoples are not permitted to table any proposed amendments to the Revised Draft Protocol. If Indigenous proposals are to be inserted into the text, they must be endorsed by at least one Party. Indigenous peoples are not part of any consensus<sup>59</sup> on provisions relating to Indigenous rights and concerns.
61. Since the final text is intended to reflect a consensus among State parties, it is often the *lowest common denominator* among their positions that is reflected in the Revised Draft Protocol. Such a substandard dynamic does not serve to fulfill the key objectives of the *Convention on Biodiversity*. In the Indigenous context, consensus is leading to unfair results.
62. The practice of seeking consensus solely among States is especially unjust in relation to Indigenous peoples. States continue to be major violators of Indigenous peoples' human rights. They should not be accorded procedural advantages that enable them to further undermine Indigenous peoples' status and rights.
63. International human rights standards are too often cast aside, in the interests of obtaining consensus. Such actions are not compatible with State obligations in the *Charter of the United Nations* and, more generally, international law. There is a tendency to excessively reinforce State sovereignty, while unjustly circumscribing Indigenous peoples' rights. Unjust actions by various States can severely impair the universality of Indigenous peoples' human rights and undermine the international system.
64. Consensus can show a unity of purpose, but it loses its significance if achieved at the expense of human rights. A similar concern relating to consensus has surfaced at the General Assembly. As underlined by the UN Secretary-General:

... unfortunately, consensus (often interpreted as requiring unanimity) has become an end in itself. ... This has *not proved an effective way of reconciling the interests of Member States*. Rather, it prompts the Assembly to retreat into

generalities, abandoning any serious effort to take action. Such real debates as there are tend to focus on process rather than substance and *many so-called decisions simply reflect the lowest common denominator of widely different opinions.*<sup>60</sup>

65. Similarly, James Anaya has commented on the problems generated by consensus when the lowest common denominator is a prevailing factor:

In the process of negotiation, however, the goal of consensus should not be used to impede progress on a progressive text. Consensus does not imply a veto power of every participant at every step ... Consensus does not mean perfect unanimity of opinion nor bowing to the lowest common denominator. It means coming together in a spirit [of] mutual understanding and common purpose to build and settle upon common ground.<sup>61</sup>

66. In regard to violations in Bolivia, the Permanent Forum on Indigenous Issues has emphasized that Indigenous peoples' human rights must be respected in processes of consensus-building:

With regard to attempts at consensus-building among the parties involved ..., the Permanent Forum recalls that human rights are inalienable and that they include the rights of indigenous peoples acknowledged in the United Nations Declaration.<sup>62</sup>

67. In relation to the standard-setting process on the *UN Declaration*, Indigenous peoples were acutely aware that any consensus on the draft text would need to include both States and Indigenous peoples. Otherwise, it would not have been possible to reach a compromise and achieve a just and balanced human rights instrument.

68. The Chair of the working group on the *Declaration* made it clear that any consensus would include both States and Indigenous peoples. While achieving consensus was desirable, no strict requirement was imposed. State and Indigenous representatives had equal rights to make interventions and propose text.

69. Thus, in regard to the negotiations on the *UN Declaration*, a highly inclusive and democratic process of participation<sup>63</sup> was established within the United Nations. It still constitutes today an impressive precedent and best practice.

## **Conclusions and recommendations**

70. A process based on consensus solely among Parties to the CBD is one-sided. It exacerbates the disadvantages of Indigenous peoples and perpetuates unjust dominance by State authorities. It is inconsistent with genuine partnerships with Indigenous representatives. The focus becomes one of reaching agreement based mostly on State interests. Such a process provides little or no incentive to reach fair and just affirmation of Indigenous peoples' rights to genetic resources and associated traditional knowledge.

71. The CBD process has increasingly accommodated Indigenous peoples' demands that they have a "voice" at the negotiations table. This alone does not meet the standard of meaningful participation in international law. While such participation should result in the empowerment of Indigenous peoples, the current situation in the negotiations in many ways weakens the peoples concerned.
72. Many State officials in the negotiations appear to have expertise in areas such as genetic resources, biodiversity and sustainable development. Too often, there is a lack of knowledge or insensitivity on Indigenous peoples' human rights. Such State actions are inconsistent with a human rights-based approach.
73. Although States commiserate about the debilitating poverty suffered by Indigenous peoples, too often the same States are unwilling to affirm and safeguard their rights to resources.
74. Parties are taking advantage of one-sided procedures in the CBD process to undermine or ignore Indigenous peoples' human rights affirmed in the *UN Declaration on the Rights of Indigenous Peoples* and other international instruments.
75. All States in the current negotiations on the Revised Draft Protocol have a responsibility toward Indigenous peoples and the international human rights system. International cooperation can only be genuinely attained, if States promote and defend Indigenous peoples' human rights. To date, not a single State in the CBD process has consistently invoked the *UN Declaration* and emphasized the need to respect its standards.
76. Should States show a commitment to working in partnership, Indigenous participation in the CBD process could lead to positive results. The principles of international cooperation and solidarity can have real meaning, if there is strong and consistent support among States for Indigenous peoples' human rights.
77. Whenever Indigenous peoples and their rights are involved, meaningful participation in international and regional processes should be a key objective. This can be facilitated through the implementation of FPIC as a foundational pillar of participation. In this regard, we recommend the following:
  - i) International and regional negotiations and other processes should not be based solely on consensus among States. To do so would unjustly increase any existing power imbalance.
  - ii) While it can be positive for State and Indigenous parties to aspire towards consensus, such an objective should remain flexible. In no case should consensus be achieved at the expense of Indigenous peoples' human rights. As such, it is our recommendation that the consensus based framework be re-examined and alternative negotiation frameworks be considered as needed.

- iii) Negotiations on procedural issues should include both State and Indigenous representatives. In this context, principles of equality and mutual respect among the parties would serve to generate increased confidence and trust.
- iv) The right of Indigenous peoples to participate in decision-making should be consistent with the principle and right of self-determination and free, prior and informed consent.
- v) Financial and other assistance should be available to Indigenous peoples involved in such processes, so as to ensure they have the capacity to participate in a full and effective manner.
- vi) States should be accountable for their actions in such processes. Accountability may be reinforced by a human rights framework that clarifies the duties and responsibilities of States involved.
- vii) A baseline and minimum standard in such processes should include the *United Nations Declaration on the Rights of Indigenous Peoples* and other relevant international human rights standards. States should fully respect their international and domestic obligations in favour of Indigenous peoples.
- viii) Whenever Indigenous Treaties and Treaty rights may be affected, special safeguards should be integrated in conjunction with the Indigenous peoples concerned.

## Endnotes

<sup>1</sup> *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

<sup>2</sup> For example, the issue of attaining consensus among OAS States has arisen in the context of the current negotiations on a Draft American Declaration on the Rights of Indigenous Peoples.

<sup>3</sup> Association of Southeast Asian Nations (ASEAN), “Terms of Reference of ASEAN Intergovernmental Commission on Human Rights”, adopted by ASEAN Foreign Ministers 20 July 2009, Phuket, Thailand, online: <<http://www.aseansec.org/DOC-TOR-AHRB.pdf>>.

<sup>4</sup> Human Rights Council, “Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples”, UN Doc. A/HRC/EMRIP/2010/2 (17 May 2010), para. 8.

<sup>5</sup> GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

<sup>6</sup> *Ibid.*, where such provisions are said to be “articulated as, *inter alia*: (a) the right to self-determination; (b) the right to autonomy or self-government; (c) indigenous peoples’ “right to participate”; (d) their “right to be actively involved”; (e) States’ duty to “obtain their free, prior and informed consent”; (f) the duty to seek “free agreement” with indigenous peoples; (g) the duty to “consult and cooperate” with indigenous peoples; (h) the duty to undertake measures “in conjunction” with indigenous peoples; and (i) the duty to pay due “respect to the customs” of indigenous peoples.”

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<sup>7</sup> All UN member States have a duty to respect the purposes and principles of the *Charter of the United Nations*. This requires actions “promoting and encouraging respect” for human rights (*UN Charter*, art. 1(3)). This duty is based on “respect for the principle of equal rights and self-determination of peoples” (*UN Charter*, art. 55 c).

The *UN Charter*’s purposes and principles are also highlighted in the *UN Declaration* (preambular para. 1). The principle of equal rights of peoples is affirmed in the *Declaration* (preambular para. 2 and art. 2). The right of self-determination is affirmed in art. 3.

<sup>8</sup> International Labour Organization, *Monitoring indigenous and tribal peoples’ rights through ILO Conventions: A compilation of ILO supervisory bodies’ comments 2009-2010* (Geneva: ILO, 2010), at 4. And at 46-47, para. 44: “consultation and participation are the cornerstone of the Convention and that such mechanisms are not merely a formal requirement but are intended to enable indigenous peoples to participate effectively in their own development.”

<sup>9</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 38. At para. 40, Anaya adds: “The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations”.

<sup>10</sup> *Ibid.* at para. 41.

<sup>11</sup> See, e.g., Commission on Human Rights, *Continuing dialogue on measures to promote and consolidate democracy: Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41*, UN Doc. E/CN.4/2003/59 (27 January 2003), para. 3: “The Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights provide democracy’s essential ingredients, including the principle and right of self-determination ...”

And at para. 7: “Modern democracy also has the principles of equality and self-determination as two of its main attributes. ... Democratic systems claiming adherence to human rights must aspire to the attainment of political as well as social and economic democracy.”

<sup>12</sup> Human Rights Council, *Progress Report*, *supra* note 4, para. 34: “Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination as defined in international human rights law.”

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 48. *Indigenous and Tribal Peoples Convention, 1989*, s. 7(1): “The peoples concerned ... shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”

Section 7(3): “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities.”

<sup>15</sup> General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 16 September 2005, adopted without vote, para. 119.

<sup>16</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. CERD/C/51/Misc.13/Rev.4, (18 August 1997), para. 4: “The Committee calls in particular upon States parties to: ... d. 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”.

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*Indigenous and Tribal Peoples Convention, 1989*, art. 2(1): “Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.” See also art. 4:

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

<sup>17</sup> African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, at para. 291:

... the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

*Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, Inter-Am. Court H.R. Series C No. 172, (Judgment) 28 November 2007, para. 134:

... the Court considers 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 Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

<sup>18</sup> See, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24, where the Supreme Court of Canada has indicated that “full consent” is required on “very serious issues”. See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168: “Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”

*Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, where the “informed consent” of the Maya people was required for any government act affecting the existence, value, use or enjoyment of their lands and resources. For a reaffirmation of Maya land and resource rights, see also *Maya Leaders Alliance and Toledo Alcaldes Association v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 366, Supreme Court of Belize, judgment rendered on 28 June 2010 by the Hon. Abdulai Conteh, Chief Justice.

<sup>19</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 55(e). [emphasis added]

<sup>20</sup> See also *UN Declaration*, preambular para. 15: “...treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States”.

<sup>21</sup> Paul Joffe & Willie Littlechild, “Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms” in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 12,, at 12-14:

Their treaties often entail a wide range of human rights considerations. Whether in general or specific terms, Indigenous peoples’ treaties constitute an elaboration of arrangements relating to

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the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned. These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals.

<sup>22</sup> It is inherent in the duty of States to honour treaties that it be fulfilled in good faith. Art. 37 is also interpreted in accordance with the principles indicated in art. 46(3), which includes “good faith”. See also *UN Declaration*, preambular para. 1: “Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter”.

IanM. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), at 119-120: “The principle of good faith underlies the most fundamental of all the norms of treaty law – namely, the rule *pacta sunt servanda*.” See also *New Zealand Maori Council v. Attorney General*, [1987] 1 N.Z.L.R. 641 (C.A.), at 682, where, in the context of government action under the Treaty of Waitangi of 1840, Richardson J. stated: “The concept of the honour of the Crown also has continuing expression ... in the international law doctrine of good faith”. The same judge also made reference to the *U.N. Charter*, Art. 2 and the *Vienna Convention on the Law of Treaties*, Arts. 26 (*pacta sunt servanda*) and 31(1) (treaty shall be interpreted in good faith).

<sup>23</sup> In Canada, see, e.g., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168: “... even in ... rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.”

<sup>24</sup> Art. 33(2):

These programmes shall include:

- (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
- (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned ...

<sup>25</sup> Arts. 5(c) and 7(2).

<sup>26</sup> For example, Indigenous participation in legislative processes may prove very different from that with State governments.

<sup>27</sup> Human Rights Council, *Report of the Special Rapporteur James Anaya*, *supra* note 9 at para. 46. [emphasis added]

<sup>28</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9 (11 August 2008), para. 40: “The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.”

<sup>29</sup> *UN Declaration*, seventh preambular para.: “Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.

<sup>30</sup> Human Rights Council, *Report of the Special Rapporteur James Anaya*, *supra* note 28 at para. 85 (Conclusions).

<sup>31</sup> See, e.g., Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (18 February 2010), para.83; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11; Committee on Economic, Social and Cultural Rights,

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*Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35.

<sup>32</sup> Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82. See also International Labour Organization, “ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners”, n.d., distributed at the Permanent Forum on Indigenous Issues, 7th Sess., April 2008 at 2: “The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing.”

<sup>33</sup> Inter-Agency Support Group on Indigenous Issues, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at its Annual Meeting in September 2007.

<sup>34</sup> International Labour Organization, *Monitoring indigenous and tribal peoples’ rights through ILO Conventions*, *supra*, note 8 at 4.

<sup>35</sup> International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76<sup>th</sup> Session, Geneva, 1989, No. 25, para. 42.

<sup>36</sup> See, e.g., Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

<sup>37</sup> Manuela Tomei & Lee Swepston, “Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169”, International Labour Office, Geneva, 1996, at 7: “... there is nothing in Convention No. 169 which would be incompatible with any international legal instrument which may establish or define the right of indigenous and tribal peoples to self-determination.”

<sup>38</sup> UN General Assembly, *Universal realization of the right of peoples to self-determination*, Res. 63/163 (18 December 2008) (adopted without vote), para. 1: “Reaffirms that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights”.

Human Rights Committee, *General Comment No. 12, Article 1*, 21<sup>st</sup> sess., A/39/40 (1984), para. 1: “The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”

UN General Assembly, *Universal realization of the right of peoples to self-determination*, Res. 63/163 (18 December 2008) (adopted without vote), para. 1: “Reaffirms that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights”.

<sup>39</sup> General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted by the General Assembly on 16 December 2005), para. 62. [emphasis added]

<sup>40</sup> General Assembly, *Keeping the promise: a forward-looking review to promote an agreed action agenda to achieve the Millennium Development Goals by 2015: Report of the Secretary-General*, UN Doc. A/64/665 (12 February 2010), para. 99. [emphasis added]

<sup>41</sup> “Presentation by Kyung-wha Kang, UN Deputy High Commissioner for Human Rights - Human Rights: Foundation for progress on the MDGs”, Conference organized by Amnesty International and Realizing Rights, New York, 10 June 2010, The Ford Foundation, New York, NY.

<sup>42</sup> *Declaration on the Right to Development*, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986), art. 2(3). Art. 1(1) affirms: “The right to development is an inalienable human right by virtue of which every human person and *all peoples are entitled to participate in*, contribute to, and enjoy economic, social, cultural and political development ...” [emphasis added]

In regard to Indigenous peoples’ right to development, see *UN Declaration*, preambular para. 6 and art. 23.

<sup>43</sup> African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya)*, *supra* note 17 at para. 283.

<sup>44</sup> *Declaration on the Right to Development*, *supra* note 42, preamble.

<sup>45</sup> *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, common art. 1. See also *UN Declaration*, art. 3. The *Declaration on the Right to Development*, art. 1(2) affirms: “The human right to development also implies the full realization of the right of peoples to self-determination”.

<sup>46</sup> Krystyna Swiderska, *Banishing The Biopirates: A New Approach To Protecting Traditional Knowledge*, Gatekeeper Series 129, International Institute for Environment and Development (London: IIED, 2006) at 8. The author adds: “[indigenous organizations] are calling for policies which are holistic and based on principles of human rights and self-determination, given that TK owes its existence to indigenous and local communities ...”

<sup>47</sup> *Ibid.* at 5. The author adds: “Despite provisions in the Convention on Biological Diversity which require equitable benefit-sharing ..., it is difficult to prevent biopiracy because laws required to enforce these CBD provisions are absent in most ‘user’ countries, and IPR [intellectual property rights] regimes allow patenting without requiring benefit-sharing.”

See also Mark Ritchie, Kristin Dawkins, Mark Vallianatos “Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge”, (1996) 11 St. John’s J. L. Comm. 431 at 453: “The recent expansion of international trade agreements, ... establishing a global regime of intellectual property rights, creates incentives which may destroy biodiversity, while undercutting social and economic development opportunities as well as cultural diversity.”

<sup>48</sup> “Revised Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity” in the report of the ninth meeting (first session) of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (UNEP/CBD/WG-ABS/9/3), Annex I.

<sup>49</sup> UN Secretary-General, “Secretary-General calls for renewed determination to ensure peace, development, human rights for indigenous people, in international message”, *Press Release*, SG/SM/9437, HR/4784, OBV/433, 30 July 2004:

For far too long, indigenous peoples’ lands have been taken away, their cultures denigrated or directly attacked, their languages and customs suppressed, their *wisdom and traditional knowledge overlooked or exploited*, and their sustainable ways of developing natural resources dismissed. [emphasis added]

<sup>50</sup> See, e.g., Valeria A. Gheorghiu, “Sailing The Seas of Treaties: Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture”, (2006) 7 Fourth World Journal 1 at 1:

Rather than outright theft of physical property, neo-imperialists have “discovered” intellectual property, or indigenous knowledge of bioresources, such as medicinal plants or seed varieties. Instead of supporting the theft of indigenous knowledge using the doctrine of discovery to promote their view of progress as they had with indigenous lands, they use their patent systems to rationalize the theft of indigenous knowledge because of their “inventive” genetic advancements thereupon in a form of “intellectual colonization.” Using their intellectual property regime, they *secure the profits of their genetic advancements based upon indigenous knowledge without compensating the original indigenous holders of that knowledge for their initial discoveries and developments.* [emphasis added]

Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, “Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities – Regional report: North America: Note by the Executive Secretary”, UN Doc. UNEP/CBD/WG8J/3/INF/8 (7 October 2003), at 12:

*The United Nations [S]ubcommission on Prevention of Discrimination and Protection of Minorities reports ... The annual market value of pharmaceutical products derived from medicinal plants discovered by Indigenous peoples [world wide] exceeds US\$43 billion...Traditional Healers have employed most of the 7000 natural compounds used in natural medicine for centuries; 25 percent of American prescription drugs contain active ingredients derived from Indigenous knowledge of plants ... [italics in original].*

<sup>51</sup> Many of the following paragraphs in this Joint Statement are reproduced from: Grand Council of the Crees (Eeyou Istchee) *et al.*, “Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples’ Human Rights”, *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Resumed Ninth meeting, Montreal, Canada (10-16 July 2010).

<sup>52</sup> The term “principles of international law” includes, *inter alia*, diverse principles in the *UN Declaration on the Rights of Indigenous Peoples* that underlie Indigenous peoples’ rights and related State obligations. See, e.g., *Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, para. 131, where the *UN Declaration* was cited and relied upon: “...where these ... Declarations contain principles of general international law, states are not expected to disregard them.”

<sup>53</sup> For the purposes of the *Convention on Biological Diversity*, “biological resources” includes, *inter alia*, genetic resources (art. 2).

<sup>54</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, “Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples’ Human Rights”, *supra* note 51 at para. 90.

<sup>55</sup> *Ibid.*, para. 91.

<sup>56</sup> Expert Mechanism on the Rights of Indigenous Peoples, “Contribution from the Secretariat of the Convention on Biological Diversity to the Study on ‘Indigenous Peoples and the Right to Participate in Decision-Making’, Undertaken by the Expert Mechanism on the Rights of Indigenous Peoples”, December 2009.

<sup>57</sup> Human Rights Council, *Progress Report*, *supra* note 4, para. 96. [emphasis added]

<sup>58</sup> UN Commission on Human Rights, *Continuing dialogue on measures to promote and consolidate democracy: Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41*,

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UN Doc. E/CN.4/2003/59 (27 January 2003), (expert seminar on the interdependence between democracy and human rights, Office of the High Commissioner for Human Rights, 25-26 November 2002, Geneva), at 19 (Chair's final conclusions). [bold in original]

<sup>59</sup> "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

<sup>60</sup> General Assembly, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), para. 159 [emphasis added].

<sup>61</sup> S.James Anaya, Presentation, April 14, 2008, in Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, "Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)", OEA/Ser.K/XVI, GT/DADIN/doc. 339/08 (14 May 2008), Appendix III, 23 at 27.

<sup>62</sup> Permanent Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2010/43-E/C.19/2010/15, para. 68.

<sup>63</sup> General Assembly, UN GAOR, 61st Sess, 107th plen. mtg., UN Doc. A/61/PV.107 (2007) at 10 (Mr. Chávez (Peru), original in Spanish):

... in 1995, the draft was submitted for consideration to a working group of the Commission ... [F]or the first time in the history of the United Nations, representatives of indigenous peoples, who would enjoy the rights cited in the Declaration, actively participated in such a working group, lending unquestionable legitimacy to the document.