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FAO Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

Discrimination and Subjugation of Indigenous Peoples and Rights

Joint Submission of the Grand Council of the Crees (Eeyou Istchee); Inuit Circumpolar Council; Indian Confederation of Indigenous and Tribal Peoples North East Zone (ICITP-NEZ); Na Koa Ikaika KaLahui Hawaii; Assembly of First Nations; Union of British Columbia Indian Chiefs (UBCIC); Jharkhand Mines Area Coordination Committee; Enlace Continental de Mujeres Indígenas de las Américas-ECMIA; Yukon Aboriginal Women's Council; Treaty Four First Nations; First Nations Summit; Chirapaq, Centro de Culturas Indígenas del Perú; Network of the Indigenous Peoples-Solomons (NIPS); Maya Institute of Belize - U'kuxtal Masewal; Indigenous Peoples Law and Policy (IPLP) Program - University of Arizona Rogers College of Law; Nunavut Tunngavik Inc.; Maritime Aboriginal Peoples Council; BC Assembly of First Nations; Bindrai Institute for Research Study and Action (BIRSA); Chiefs of Ontario; Hul'qumi'num Treaty Group; Atlantic Policy Congress of First Nations Chiefs Secretariat; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Canadian Friends Service Committee (Quakers); Khan Kaneej Aur ADHIKAR (Mines minerals & RIGHTS); Haudenosaunee of Kanehsatake; IKANAWTIKET; Jharkhandis Organisation for Human Rights (JOHAR); Northern Saskatchewan Trappers Association; Innu Council of Nitassinan; Nishnawbe Aski Nation; Congress of Aboriginal Peoples (CAP); Omon Mahila Sangathan; First Peoples Human Rights Coalition; Center for World Indigenous Studies; TARA-Ping Pu (Taiwan).

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EXECUTIVE SUMMARY

There continues to be a critical need to affirm and safeguard the land and resource rights of Indigenous peoples globally. Customary rights to lands and resources are affirmed as legal rights in international human rights law. However, the absence of formal legal recognition and recording of such rights within States has led to dispossession and other human rights violations.

These and other related challenges are being addressed within the Food and Agriculture Organization (FAO). In this regard, the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* that were recently negotiated are not a positive contribution.

Based on the diverse concerns elaborated in this Joint Submission, it is concluded that the FAO Committee on World Food Security (CFS) should not approve these Guidelines at the special session in Rome in mid-May 2012. Thus, a request is made that FAO evaluate on an urgent basis the serious concerns raised.

The 2012 Guidelines do not constitute a principled and balanced instrument. States are not *required* to do anything to improve land and resource tenure rights relating to Indigenous peoples. Reliance on voluntary measures is so extreme that even existing international and national State obligations are couched in discretionary terms.

The Objectives of the Guidelines seek to "improve governance of tenure of land, fisheries and forests" and to do so "for the benefit of all". Yet the Guidelines, as drafted, appear to significantly lower international standards and unjustly favour States to the detriment of Indigenous peoples.

The Guidelines fail to conform to FAO's own progressive policies relating to Indigenous peoples. Major concerns include, *inter alia*:

- **Weakening** States' international commitments through the notion of "voluntary commitments"
- **Defining** "rule of law" in a manner that is not fully inclusive of international human rights standards and law
- **Devaluing** the legal status of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) and undermining Indigenous rights and related State obligations
- **Failing** to characterize land and resource tenure rights as human rights
- **Subjugating** Indigenous peoples and rights, in a manner that may increase State domination and control

- **Unjustly altering** the legal concept of "free, prior and informed consent"
- **Allowing** States to exploit consensus, so that the lowest common denominator among positions can prevail.

Inadequate FAO procedural rules favouring States contribute significantly to the wide range of human rights deficiencies and other injustices in the 2012 Guidelines. As a result, Indigenous peoples' right to full and effective participation continues to be impeded.

The extent to which States are prejudicing Indigenous peoples' human rights and disrespecting related State obligations is reaching crisis levels. States cannot evade their international human rights obligations by acting through international organizations.

The procedures within the FAO and other international organizations require urgent redress. The global importance of FAO and its objectives are a positive catalyst for procedural reform.

FAO Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

Discrimination and Subjugation of Indigenous Peoples and Rights

I. Introduction

1. Indigenous peoples and civil society organizations welcome this opportunity to share fundamental concerns relating to FAO's *Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.¹ Negotiations of these Guidelines were completed on 9 March 2012.²
2. The Voluntary Guidelines will be considered for final approval by the FAO Committee on World Food Security (CFS)³ at a special session in Rome in mid-May 2012. Upon the adoption, the focus will shift to the implementation of the Guidelines.
3. We urge that the concerns raised in this Joint Submission be addressed on an urgent basis. As currently drafted, the Guidelines could serve to undermine the rights of Indigenous peoples globally and weaken the international human rights system.
4. Despite claims to the contrary, the Guidelines are not "consistent with ... international and regional instruments".⁴ They are not "complementary to, and support, ... regional and international initiatives that address human rights and provide secure tenure rights to land, fisheries and forests".⁵ The Guidelines are also not compatible with key FAO policies and principles relating to Indigenous peoples.⁶
5. The ongoing, critical need to affirm and safeguard the land and resource rights of Indigenous peoples is beyond question. Security⁷ and governance of tenure remain crucial objectives – especially in the context of food security. As FAO policy affirms: "indigenous communities make up a substantial portion of the world's food insecure"⁸ and there is ongoing concern regarding "subjugation, marginalization, dispossession, exclusion or discrimination".⁹
6. The Objectives of the 2012 Voluntary Guidelines include elements of a human rights-based approach and seek to "improve governance of tenure of land, fisheries and forests" and to do so "for the benefit of all".¹⁰ The Objectives also seek to "strengthen the capacities and operations" of Indigenous peoples, among others.¹¹
7. However, key approaches and provisions in the Voluntary Guidelines appear to run counter to such Objectives and fail to conform to international human rights law. Major concerns include, *inter alia*:
 - **Weakening** States' international commitments through the notion of "voluntary commitments"

- **Defining** "rule of law" in a manner that is not fully inclusive of international human rights standards and law
 - **Devaluing** the legal status of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) and undermining Indigenous rights and related State obligations
 - **Failing** to characterize land and resource tenure rights as human rights
 - **Subjugating** Indigenous peoples and rights, in a manner that may increase State domination and control
 - **Unjustly altering** the legal concept of "free, prior and informed consent"
 - **Allowing** States to exploit consensus, so that the lowest common denominator among positions can prevail.
8. A key rationale for adopting "voluntary" guidelines is to encourage States and others to strive for higher human rights and environmental standards than they might be willing to agree to in a legally binding instrument. Yet the Guidelines, as drafted, appear to significantly lower international standards and unjustly favour States to the detriment of Indigenous peoples.
 9. In commenting on an earlier draft of the Guidelines in May 2011, the Special Rapporteur on the right to food cautioned that the overemphasis on their "voluntary" nature could lead States to "underestimate their obligations" and lead to the undermining of existing standards:

... the current emphasis on the 'voluntary' nature of the Guidelines bears the risk that States would tend to interpret them as 'optional' and would consequently underestimate their obligations. This risk must be avoided as it would lower existing agreed standards. The Guidelines do not create new legal obligations; but they cannot undermine existing standards.¹²
 10. It is unacceptable that the Guidelines are drafted in a manner that may serve to legitimize substandard approaches that devalue UNDRIP, undermine the human rights of Indigenous peoples and reinforce their domination and subjugation by States.
 11. In view of the serious deficiencies, the 2012 Guidelines fail to advance food security for Indigenous peoples or their land and resource tenure rights at the national level. Thus the reasons for approving the Guidelines, as currently drafted, are far from clear.
 12. According to its own "Basic Texts": "The FAO strives for the highest international standards in its evaluation practice" and "adheres to norms and standards established by the United Nations Evaluation Group (UNEG)".¹³ "It is FAO policy that all the work carried out by the Organization is subject to evaluation".¹⁴
 13. **Prior to the CFS approving the Voluntary Guidelines, we request that the FAO evaluate urgently the serious concerns described in this Submission.** Such concerns include, *inter alia*, discriminatory provisions, lowering of standards and derogations from international

human rights law. The FAO Evaluation Service appears to have a solid mandate to carry out this crucial responsibility in a principled, independent and thorough manner.¹⁵

II. States' International Commitments Are Not Discretionary

14. The Preface of the 2012 Voluntary Guidelines indicates:

These Guidelines are consistent with, and draw on, international and regional instruments, including the Millennium Development Goals, that address human rights and tenure rights.

15. In particular, the Preface states: "This initiative built on and supports the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*" adopted in 2004.¹⁶

16. However, the Guidelines are not "consistent with" international and regional human rights instruments, including the 2004 Voluntary Guidelines on Right to Food.

17. For example, in regard to international and regional instruments, the 2012 Guidelines provide:

These Guidelines should be interpreted and applied consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. ... Nothing in these Guidelines should be read as limiting or undermining any legal obligations to which a State may be subject under international law.¹⁷

18. The 2004 Voluntary Guidelines stipulated: "The progressive realization of the right to adequate food requires States to fulfil their relevant human rights obligations under international law."¹⁸ In contrast, the 2012 Guidelines repeatedly address "obligations" under national and international law as if they were discretionary.

19. The 2012 Guidelines opt for a lower standard – namely, the Guidelines "should be interpreted and applied consistent with existing obligations" and "with "due regard" to "voluntary commitments". This excessively limited and misguided approach is used throughout the Guidelines and could prove to be prejudicial.¹⁹

20. By solely referring to "existing obligations" without explicitly highlighting what these include, the Guidelines are likely to contribute to confusion and uncertainty in the future. The Guidelines should have referred to a wide range of international norms, principles, commitments and standards. This would be consistent with a human rights-based approach, which FAO endorses:

FAO activities that affect indigenous peoples will be guided by the human rights-based approach to development, premised on the notion that everyone should live in dignity and attain the highest standards of humanity guaranteed by international human rights law. It will be guided in particular by the core

principles expressed in this policy document and by the UN Declaration on the Rights of Indigenous Peoples.²⁰

21. **We strongly object to the introduction of a new category of "voluntary commitments". It significantly derogates from other relevant FAO instruments. It is also inconsistent with basic concepts in international law.**
22. In the 2004 Voluntary Guidelines on the Right to Food, there is no reference to "voluntary commitments". Reference is generally made to "international commitments" without distinction. Such commitments include those in international treaties and the *Charter of the United Nations*.²¹ They also include those in the "Millennium Declaration, including the development goals, as well as the outcomes and commitments of the major UN conferences and summits in the economic, social and related fields".²²
23. In the FAO *Code of Conduct for Responsible Fisheries*,²³ there is also no reference to "voluntary commitments". Reference is repeatedly made to "international standards",²⁴ which go beyond "existing international obligations".
24. In the 2012 Guidelines, the stark distinction of "existing obligations" vs. "voluntary commitments" fails to appreciate that differences between "hard" and "soft" law instruments are often blurred.²⁵ Further, the text fails to take into account that international instruments – that are not legally binding in the same way as treaties – can have diverse legal effects.²⁶
25. In the above-quoted paragraph,²⁷ it is added: "Nothing in these Guidelines should be read as limiting or undermining any legal obligations to which a State may be subject under international law." By using "should" (and not "shall"), it could suggest that States have the discretion of interpreting States' international obligations in a more limiting manner under the 2012 Guidelines.
26. The Guidelines should also have added: "Nothing in these Guidelines shall be construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future."²⁸

III. Double Standards on the "Rule of Law"

27. Respect for the rule of law is critical for the legitimacy of the 2012 Guidelines. As affirmed by the United Nations in April 2011, the rule of law requires laws that are “consistent with international human rights norms and standards”:

The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.²⁹

28. The UN adds in the same paragraph: “[The rule of law] requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”³⁰
29. In contrast, the "rule of law" in the 2012 Guidelines is more restrictive and refers to the unacceptable distinction between "existing obligations" and "voluntary commitments":

Rule of law: adopting a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.³¹

30. The Guidelines' re-conception of the rule of law makes no specific reference to being "consistent with international human rights norms and standards". In the Guidelines, respect for the rule of law is discretionary.³²
31. However, investors "have the responsibility to respect ... the rule of law".³³ At the same time, it is discretionary that investments "not contribute to food insecurity and environmental degradation".³⁴
32. While States have the discretion to respect human rights under the Guidelines, a higher standard is included for "non-state actors":

Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others.³⁵

33. At the UN General Assembly, heads of State and government 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 ...³⁶

34. Such core values and principles are significantly distorted in the 2012 Guidelines.

IV. Need to Affirm Inseparable Link to Water

35. In addressing "food security", the 2012 Guidelines fail to make the essential link to water and water security. Such a serious omission detracts from the central objective of food security. The 2004 Guidelines on the Right to Food include diverse references to water.³⁷

36. As underlined by the Office of the High Commissioner for Human Rights: "Water is essential for life, but is also key to food security, income generation and environmental protection."³⁸ In his May 2011 comments on an earlier draft of the 2012 Guidelines, the Special Rapporteur on the right to food stressed the need to highlight the significance of water.³⁹
37. In regard to the *International Covenant on Economic, Social and Cultural Rights*, the UN Committee on Economic, Social and Cultural Rights emphasizes the "inextricable" link of the right to water to rights relating to health, housing and food:
- The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)⁴⁰ and the rights to adequate housing and adequate food (art. 11, para. 1).⁴¹ The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.⁴²
38. Deterioration of water quality in inland waters and oceans is exacerbating food insecurity among Indigenous peoples.⁴³ The human right to drinking water⁴⁴ is not being respected.⁴⁵ Unilateral actions by States in relation to water are especially prejudicial, when other human rights are adversely affected or denied.
39. For example, the government of Canada recently tabled in Parliament the *Safe Drinking Water for First Nations Act* (Bill S-8). In this proposed Act, the government purportedly confers on itself the power to abrogate or derogate from any existing Aboriginal or Treaty right that is protected by Canada's Constitution – "to the extent necessary to ensure the safety of drinking water on First Nation lands".⁴⁶ For such purposes, rights of self-determination and self-government are being dishonourably cast aside.⁴⁷
40. In the United States Senate, the *Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012* (S.2109) was introduced in February 2012. It is reported that the draft Act, if adopted, "would require the tribes to waive their water rights for 'time immemorial' in exchange for groundwater delivery projects to three remote communities."⁴⁸
41. With few exceptions, human rights may be subject to some limitations. However, in international human rights law, they are not generally viewed as being subject to extinguishment or destruction.⁴⁹
42. In relation to Indigenous peoples' water and other human rights, **free trade agreements** remain an area of particular concern. In different regions of the world, such agreements continue to be negotiated by States in a secret and fragmented manner that too often fails to effectively respect and safeguard human rights. As the Special Rapporteur on the right to food points out in regard to the World Trade Organization (WTO):

The human rights obligations of WTO members and the commitments they make through the conclusion of agreements under the WTO framework remain uncoordinated. ... All too often, this failure of global governance mechanisms is replicated at domestic level: trade negotiators either are not aware of the human rights obligations of the Governments they represent, or they do not identify the implications for their position in trade negotiations.⁵⁰

43. The Special Rapporteur adds that this approach is not satisfactory:

It amounts to treating obligations incurred under trade agreements as equivalent in normative force to human rights obligations. This fails to recognize that, both as a result of Article 103 of the Charter of the United Nations and because human rights norms have the status of peremptory norms of international law, human rights should prevail over any other international commitments.⁵¹

V. Guidelines Must Not Devalue UNDRIP

44. The new, confused notion of "voluntary commitments" in FAO's 2012 Guidelines could prove highly problematic to Indigenous peoples. If the Guidelines are adopted, this notion might be unfairly invoked by States to undermine the status and legal effects of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).
45. The 2012 Guidelines ambiguously highlight UNDRIP in provisions that refer to both "obligations" and "voluntary commitments" under international law. For example:

In the case of indigenous peoples, States should meet their relevant obligations and voluntary commitments to protect, promote and implement human rights, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous Peoples.⁵²

46. Similarly, the Guidelines provide:

In the case of indigenous peoples and their communities, States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples.⁵³

47. In regard to these Guidelines, the notion of "voluntary commitments" did not exist in FAO's earlier "Zero Draft". Yet the Special Rapporteur on the right to food underlined: "The Zero Draft does insist on the importance of consistency with international obligations in different paragraphs, but in a way that still leaves too much space for ambiguity."⁵⁴
48. According to the Objectives of the 2012 Guidelines, "existing obligations" under international law include those in the *Universal Declaration of Human Rights*:

All programmes, policies and technical assistance to improve governance of tenure through the implementation of these Guidelines should be consistent with

States' existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments.⁵⁵

49. In contrast, UNDRIP is treated in an ambiguous and subordinate manner in the 2012 Guidelines. Special Rapporteur James Anaya describes UNDRIP's diverse legal characteristics as follows:

... even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies.⁵⁶

50. States, such as Canada and the United States, erroneously characterize UNDRIP as "aspirational" in nature. Should the term "voluntary commitments" be applied to UNDRIP, it would invite States to distort and diminish the legal significance of this human rights instrument and other declarations as well. Such actions undermine the international human rights system.
51. UNDRIP has diverse legal effects and commands "utmost respect".⁵⁷ UN treaty bodies are increasingly using it to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging its implementation.⁵⁸
52. Domestic courts are free to rely on UNDRIP when interpreting Indigenous peoples' human rights.⁵⁹ For example, the Supreme Court of Canada has confirmed that, declarations and other international instruments and norms are "relevant and persuasive" sources for interpreting human rights in Canada:

The various sources of human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the [*Canadian*] *Charter's* provisions.⁶⁰

53. The legal effects of UNDRIP are also evident from the diverse provisions that reflect customary international law and treaty-based law. These include fundamental principles,⁶¹ rights and obligations relating to non-discrimination, self-determination, self-government, cultural integrity and property.⁶² They also include the rights to life, freedom from torture, freedom from genocide, and reparation and redress.⁶³
54. Reflections of customary international law and treaty-based law in UNDRIP also include: the international law principle of *pacta sunt servanda* ("treaties must be kept");⁶⁴ *UN Charter* obligation of States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all";⁶⁵ and the duty of good faith in the fulfillment of the obligations assumed by States in accordance with the *UN Charter*.⁶⁶

55. **It is unconscionable for the 2012 Voluntary Guidelines to generate confusion and devalue UNDRIP.** Indigenous peoples are among the most vulnerable and disadvantaged in the world.⁶⁷ The *Declaration* was discussed and debated for more than twenty years.
56. UNDRIP is the most comprehensive and universal international human rights instrument explicitly addressing the rights of Indigenous peoples. It affirms a wide range of political, civil, economic, social, cultural, spiritual and environmental rights. UNDRIP is an instrument for justice and reconciliation.⁶⁸

VI. UNDRIP Integral to a Human Rights-Based Approach

57. In regard to Indigenous peoples, a comprehensive framework for adopting a "human rights-based and culturally sensitive approach" would include the principles, standards and rules in international human rights instruments and law. As described by the United Nations Development Group, this would necessarily include UNDRIP.

The human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as the recognition of indigenous peoples' collective rights, provide the framework for adopting a human rights-based and culturally sensitive approach when addressing the specific situation of indigenous peoples.⁶⁹

58. The global consensus in support of UNDRIP reinforces its weight as a universal human rights instrument.⁷⁰ The widespread human rights violations against Indigenous peoples worldwide underline the urgency of realizing full and effective implementation of the *Declaration*. This is especially crucial in the context of Indigenous land and resource rights and the importance of ensuring food security.
59. The Office of the UN High Commissioner for Human Rights emphasizes that the "*Declaration* is now among the most widely accepted UN human rights instruments. It is the most comprehensive statement addressing the human rights of indigenous peoples to date, establishing collective rights and minimum standards on survival, dignity, and wellbeing to a greater extent than any other international text."⁷¹
60. UNDRIP includes several compliance provisions that many treaties do not have.⁷² In particular, article 42 of UNDRIP provides:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies ... and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

61. In February 2011, IFAD (International Fund for Agricultural Development) announced the establishment of an "indigenous peoples' forum". The new forum "will be guided by the

principles of mutual respect, promoting complementarities, *adherence to UNDRIP*, inclusiveness, pluralism, reciprocity, accountability and solidarity.”⁷³

62. In 2010, the FAO indicated that it has a “responsibility to observe and implement UNDRIP”.⁷⁴ In 2008, the Permanent Forum on Indigenous Issues affirmed that the *Declaration* “will be its legal framework” and will therefore ensure that the *Declaration* is integrated in all aspects of its work.⁷⁵
63. At the regional level, the African Commission on the Human and Peoples’ Rights has officially sanctioned and used UNDRIP to interpret Indigenous peoples’ rights.⁷⁶ Also, the Inter-American Commission on Human Rights (IACHR) has highlighted the legal “relevance and importance” of UNDRIP in construing Indigenous rights within the Inter-American system:

The IACHR and the Inter-American Court, in their elaboration of the right to indigenous property, view as relevant and important the United Nations Declaration on the Rights of Indigenous Peoples. ... Its provisions, together with the System’s jurisprudence, constitute a corpus iuris which is applicable in relation to indigenous peoples’ rights ... The Inter-American Court has resorted to its provisions in order to construe specific rights.⁷⁷

VII. Indigenous Peoples' Collective Rights Are Human Rights

64. Indigenous peoples’ collective rights are human rights, as affirmed in UNDRIP and other international and regional instruments.⁷⁸
65. In its Agenda and Framework for the Programme of Work, the Human Rights Council has permanently included the “rights of peoples” under Item 3 “Promotion and protection of all human rights ...”⁷⁹ For decades, the established practice is to address Indigenous peoples’ collective rights within international and regional human rights systems.
66. Failure to affirm and address Indigenous peoples' collective rights as human rights constitutes racial discrimination.⁸⁰ Yet the 2012 Guidelines restrict human rights principles and concepts to individuals.⁸¹
67. For example, in the "principles of implementation" that are identified as "essential to contribute to responsible governance of tenure of land, fisheries and forests", "human dignity" is described as "recognizing the inherent dignity and the equal and inalienable human rights of all individuals".⁸²
68. In contemporary international human rights law, respect for "human dignity" is described as "the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law".⁸³ As indicated in the UNESCO *Declaration on Race and Racial Prejudice*:

The principle of the equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognized principle of international law. Consequently any form of racial discrimination practised by a State constitutes a violation of international law giving rise to its international responsibility.⁸⁴

69. UNDRIP affirms that "dignity" applies to the world's Indigenous peoples – and the rights in this human rights instrument constitute "minimum standards" in regard to their survival, dignity and well-being.⁸⁵ The Supreme Court of Canada has ruled that "human dignity" applies to individuals and groups:

Human dignity means that an individual or group feels self-respect and self-worth. ... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.⁸⁶

70. In the 2012 Guidelines, the principles of "equity and justice" are described as referring solely to individuals and "may require acknowledging differences between individuals":

Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people ...⁸⁷

71. Under international human rights law, the principles of "equality" and "justice" apply to both individuals and peoples. UNDRIP affirms: "The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination ..."⁸⁸
72. The *Declaration on Race and Racial Prejudice* affirms: "All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such."⁸⁹ In regard to "peoples", UNDRIP affirms a similar provision.⁹⁰

VIII. Tenure Rights Are an Essential Part of Human Rights

73. The 2012 Voluntary Guidelines repeatedly address land and resource tenure⁹¹ rights as separate from human rights. For example, as part of the "General Principles" for responsible tenure governance, it is provided:

Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. ...⁹²

74. The Guidelines also refer to rights "linked to access and use of land" as separate from "all civil, political, economic, social and cultural rights":

Given that all human rights are universal, indivisible, interdependent and interrelated, the governance of tenure of land, fisheries and forests should not only take into account rights that are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights.⁹³

75. Separation from human rights is further indicated: "States should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights."⁹⁴
76. Such distinctions between land and resource tenure rights and human rights severely distort international legal concepts. The segregation of Indigenous peoples' tenure rights from human rights is incompatible with international human rights law.
77. Indigenous peoples' traditional land and resource tenure "is a form of property and is crucial to the cultural and physical survival of indigenous peoples".⁹⁵ Protections are "grounded in the affirmation of rights to property, physical well being, and cultural integrity, and in the requirement that these rights extend to indigenous peoples on a non-discriminatory basis".⁹⁶
78. Land and resource tenure rights are property rights,⁹⁷ which constitute human rights under international law.⁹⁸ The FAO also affirms: "In the case of land tenure, it is sometimes described more precisely as property rights to land."⁹⁹
79. The Inter-American Court interpreted Indigenous peoples' right to property under Article 21 of the *American Convention on Human Rights* in a manner consistent with international human rights law – including the right of self-determination:

... by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the two international Covenants], they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.¹⁰⁰

80. The Committee on the Elimination of Racial Discrimination (CERD) underlines that it is discriminatory to deprive Indigenous peoples of their human rights relating to their lands and resources. CERD has emphasized that "in many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights ... and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises."¹⁰¹
81. To address such discrimination, the Committee calls upon States parties to: "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories

and resources".¹⁰² **The 2012 Voluntary Guidelines are discriminatory, in failing to address and safeguard Indigenous land and resource rights in a human rights context.**

IX. Need to Affirm Indigenous Peoples' Right of Self-Determination

82. As repeatedly affirmed by UN treaty bodies, the collective human right of self-determination applies to Indigenous peoples worldwide.¹⁰³ It is inextricably linked to the right of food, food security and food sovereignty.¹⁰⁴ According to the two international human rights Covenants: "In no case may a people be deprived of its own means of subsistence."¹⁰⁵
83. The two Covenants affirm: "The States Parties ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."¹⁰⁶
84. The UN Human Rights Committee has reaffirmed recognition and protection of Indigenous peoples' right of self-determination as an "essential condition" for guaranteeing and strengthening individual human rights:
- ... the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.¹⁰⁷
85. UNDRIP affirms the right of Indigenous peoples to self-determination.¹⁰⁸ It also affirms: "Indigenous peoples have the right ... to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."¹⁰⁹ When read as a whole, UNDRIP affirms Indigenous peoples' right to food security.¹¹⁰
86. Yet in the 2012 Guidelines, there is no mention of the right of Indigenous peoples to self-determination or "subsistence". The right of self-determination is a prerequisite for the enjoyment of all other human rights.¹¹¹ Special Rapporteur on the right to food, Jean Ziegler, underlined in 2005 the "special importance" of this core human right:
- Of special importance to the right to food of indigenous peoples is common article 1 of both human rights covenants, which recognizes the rights of all peoples to self-determination and the right to freely pursue their economic, social and cultural development. Moreover, paragraph 2 of that article also stipulates that in no case may a people be deprived of its own means of subsistence.¹¹²
87. The 1993 *Vienna Declaration* affirms: "The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right."¹¹³

88. In the 2012 Guidelines, the Objectives highlight the "goals of food security and progressive realization of the right to adequate food." In the Indigenous global context, violations of this right have continued for countless years and "progressive realization" is not a valid defence for State complicity or inaction.¹¹⁴
89. The "obligation to realize the right to adequate food has become today part of customary international law".¹¹⁵ It is concluded: "All Governments, individually and in cooperation with others, have a duty to respect, protect and fulfil the right to adequate food of all peoples."¹¹⁶
90. A central purpose of the 2012 Guidelines is to improve "responsible governance"¹¹⁷ in the national context. However, this is unlikely to be achieved. Although related to governance and food security, Indigenous peoples' right of self-determination is not explicitly included in the Guidelines. There is no principled framework that all actors are *required* to respect.¹¹⁸
91. It is provided: "These Guidelines should be interpreted and applied in accordance with national legal systems and their institutions."¹¹⁹ In the crucial context of lands and resources and food security, the Guidelines fail to address respect and protection by States of the right of Indigenous peoples to self-government, through their own decision-making institutions.¹²⁰
92. For example, an earlier draft of the Guidelines indicated: "States should recognize indigenous and other customary tenure rights and governance systems of communities, consistent with international and regional human rights obligations."¹²¹ However, even this modest reference to "governance systems" was omitted in the 2012 Guidelines.
93. Within the context of the Guidelines, core principles and values in the international and domestic human rights systems may be ignored by States. It is not acknowledged that lands, fisheries and forests have diverse values for Indigenous peoples, but left to the discretion of "State and non-state actors":

State and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples ... with customary tenure systems.¹²²

X. Indigenous Peoples and Rights Must Not Be Subjugated

94. Some provisions in the Guidelines are biased against Indigenous peoples and favour States and other parties. For example:

All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes. Such measures should be determined by law, solely for the purpose of promoting general welfare including environmental protection and consistent with States' human rights obligations.¹²³

95. In the above paragraph, it is stated as a rule that the "rights of others" limit all tenure rights. Rights are generally relative, but this does not mean that the rights of others always limit Indigenous peoples' tenure rights and not the reverse.¹²⁴ A fair and balanced outcome would

depend on the facts and law in each case. Tenure rights are not subservient to the rights of others.

96. The Guidelines add that measures taken by States for public purposes "should" be determined by law, "solely for the purpose of promoting general welfare". The purpose of "promoting general welfare" is exceedingly broad and could be used to justify virtually any public purpose.
97. During the negotiations on UNDRIP at the UN, limitations based on "general welfare" were flatly rejected as being too vague and far-reaching. Instead, UNDRIP includes *inter alia* the following criteria:

Any ... limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.¹²⁵

98. In addition, Indigenous rights and State obligations in UNDRIP are interpreted in accordance with the basic principles and values of the international legal system:

The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.¹²⁶

Takings for public purposes

99. The above-quoted paragraph¹²⁷ in the Guidelines also presumes that all tenure rights will as a rule be limited "by the measures taken by States necessary for public purposes". It is inconsistent with international human rights law to adopt such a one-sided approach, in the absence of the facts and law in each case. There is also no indication as to what "public purposes" entail.
100. As emphasized by the Special Rapporteur on the right to food, the exercise of indiscriminate State power in favour of development projects can have far-reaching adverse effects:

... the right to food of indigenous peoples is frequently denied or violated, often as a result of systematic discrimination or the widespread lack of recognition of indigenous rights. ... [I]nappropriate development efforts often intensify the marginalization, poverty and food insecurity of indigenous peoples, failing to recognize indigenous ways of securing their own subsistence and ignoring their right to define their own path toward development.¹²⁸

101. Consistent with the right of self-determination, UNDRIP affirms: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."¹²⁹ Similarly, the *Indigenous and Tribal Peoples Convention, 1989* affirms:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual

well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.¹³⁰

Formal legal recognition, allocation and recording of traditional lands

102. In regard to formal legal recognition, allocation and recording of Indigenous peoples' traditional lands, the 2012 Guidelines presume that States have the discretion to determine the nature and scope of such rights and the size of any demarcated lands. According to the Guidelines, States have no legal duty to act. Consultations with the peoples concerned are contemplated but are not mandatory. Such powers are only exercised, when States "intend" to recognize or allocate tenure rights":

Where States intend to recognize or allocate tenure rights, they should first identify all existing tenure rights and right holders, whether recorded or not. Indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected should be included in the consultation process, consistent with paragraphs 3B.6 and 9.9.¹³¹

103. **Such a process is potentially exploitive and self-serving. It invites State domination and subjugation of Indigenous peoples and their rights. It runs counter to Indigenous peoples' inherent land and resource rights and related States' obligations under international human rights law.**

104. Any such process of formal legal recognition and recording should only be undertaken in conjunction with the Indigenous peoples concerned and with their free, prior and informed consent. Otherwise, such customary rights should be determined by a competent tribunal or other impartial body consistent with international human rights law. In regard to Indigenous peoples' traditional land and resource rights, States have a duty to recognize and register the property rights involved.¹³²

105. As concluded by the African Commission on Human and Peoples' Rights, "(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title".¹³³

... the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the [African] Charter and international law.¹³⁴

106. The Inter-American Court has ruled that when rights and title to traditional lands have been determined, the State has a duty to adopt special measures to "respect, protect and guarantee" the property right to such lands:

... the Court thus concludes that the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied,

derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.¹³⁵

107. UNDRIP also affirms: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."¹³⁶
108. This State duty to demarcate and protect traditional lands and resources is now considered to be customary international law.¹³⁷ The 2012 Guidelines should not be presuming that each State has the power to determine to what extent it will recognize and protect such lands and resources, in a manner that could seriously derogate from conventional and customary international law.
109. Experience to date has repeatedly demonstrated that national legislation alone cannot be relied upon to safeguard Indigenous rights and interests. Even where such legislation or other special measures may exist, the record of implementation is generally poor and ineffective.¹³⁸

XI. "Free, Prior and Informed Consent" – A Crucial Right and Standard

110. In regard to Indigenous peoples, "free, prior and informed consent" (FPIC) is an essential international right and standard. FPIC is the standard required or supported by the UN General Assembly,¹³⁹ international treaty bodies,¹⁴⁰ regional human rights bodies,¹⁴¹ UN special rapporteurs¹⁴² and specialized agencies.¹⁴³ FPIC is also the standard under UNDRIP and the *Indigenous and Tribal Peoples Convention, 1989*.¹⁴⁴
111. UNDRIP consistently uses the standard of FPIC.¹⁴⁵ This is the standard relating to Indigenous cultural heritage, including traditional knowledge and genetic resources.¹⁴⁶ FPIC is a "crucial dimension", "requirement" and "manifestation" of Indigenous peoples' right of self-determination.¹⁴⁷
112. In the 2012 Guidelines, FPIC is undermined by adding "with due regard for particular positions and understandings of individual States":

... projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States.¹⁴⁸
113. The additional phrase was insisted upon by Canada in the negotiations of the Guidelines in Rome, Italy. In effect, the phrase appears to invite each State to provide its own political positions and understandings of FPIC. If so, it could significantly alter the essential meaning of FPIC as an inherent human right.

114. Such State actions are based on narrow self-interest and are incompatible with the international law principles of non-selectivity, impartiality and objectivity. As reaffirmed by the UN General Assembly:

... the promotion, protection and full realization of all human rights ..., as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends.¹⁴⁹

115. Canada and the United States have already indicated that FPIC means a "process of meaningful consultation" and not consent.¹⁵⁰ Such selective positions serve to politicize human rights in a self-serving manner and are inconsistent with the rule of law, domestically and internationally.¹⁵¹
116. According to Canada's highest court, "full consent" is required on "very serious issues".¹⁵² It is clearly a serious issue, when the human rights, cultures and well-being of Indigenous peoples are at stake in the context of food security, biodiversity, environment and resource development.
117. Since its election in 2006, the government of Canada has failed to consult Indigenous peoples on UNDRIP and on international negotiations relating to the right to food and food security, biodiversity, intellectual property and climate change. Instead, Canada has sought to lower international human rights standards – as evident in these 2012 Guidelines.

XII. Effective Remedies Must Apply to Indigenous Peoples' Rights

118. In the 2012 Guidelines, section 4 on "Rights and responsibilities related to tenure" appears to contemplate effective remedies solely for "persons" (not "peoples" or "groups"):

States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies, which may include a right of appeal, as appropriate. ... States should strive to ensure that vulnerable and marginalized persons have access to such means, in line with paragraphs 6.6 and 21.6. States should ensure that any person whose human rights are violated in the context of tenure has access to such means of dispute resolution and remedies.¹⁵³

119. Similarly, in section 21 on "Resolution of disputes over tenure rights", effective remedies are addressed as applying to "women and men"¹⁵⁴ and to "persons".¹⁵⁵
120. By in effect excluding Indigenous peoples from the human right to an effective remedy, the 2012 Guidelines are not consistent with international human rights law.

121. Although effective remedies initially focussed on individuals, contemporary international human rights law also affirms the human right to an effective remedy¹⁵⁶ to "Indigenous peoples" and other groups.¹⁵⁷

122. In addition to addressing resolution of conflicts and disputes, UNDRIP affirms the right to effective remedies for "all infringements" of collective and individual rights:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.¹⁵⁸

123. The *Indigenous and Tribal Peoples Convention, 1989* affirms: "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."¹⁵⁹ Such collective human rights would include the right to effective remedies.

124. In regard to the right to adequate food, the UN Committee on Economic, Social and Cultural Rights applies the right of access to effective remedies to any "person" or "group":

Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.¹⁶⁰

125. In regard to the right to water, the Committee on Economic, Social and Cultural Rights also indicated that any "persons" or "groups" should have access to effective remedies:

Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels ...¹⁶¹

126. The Inter-American Commission on Human Rights concluded that the Maya people be provided with an effective remedy, in regard to their "communal property right to the lands that they have traditionally occupied and used":

Based upon these findings, the Commission recommended that the State provide the Maya people with an effective remedy, which includes recognizing their communal property right to the lands that they have traditionally occupied and used, without detriment to other indigenous communities, and to delimit, demarcate and title the territory in which this communal property right exists, in accordance with the customary land use practices of the Maya people.¹⁶²

XIII. FAO Rules of Procedure Require Reform

127. The procedures within international organizations require urgent redress. The extent to which States are prejudicing Indigenous peoples' human rights and disrespecting related State obligations is reaching crisis levels. Indigenous concerns relating to such crucial global issues, such as biodiversity,¹⁶³ food security, climate change and intellectual property,¹⁶⁴ are being addressed to the detriment of Indigenous peoples.¹⁶⁵
128. Within the FAO and other international bodies and processes, unfair procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. The UN Expert Mechanism on the Rights of Indigenous Peoples highlights in its *Final report of the study on indigenous peoples and the right to participate in decision-making*:
- Reform of international and regional processes involving indigenous peoples should be a major priority and concern.¹⁶⁶
129. A vivid example is the negotiation of FAO's 2012 *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. FAO's rules of procedure are ineffective in preventing States from advancing proposals that violate their most solemn international human rights obligations.
130. As elaborated in this Joint Submission, States freely proposed and agreed to provisions in the Guidelines that run counter to their commitments under the *Charter of the United Nations*; undermined Indigenous peoples' rights and downplayed related State obligations; devalued UNDRIP; and repeatedly engaged in racial discrimination.
131. Since the prohibition against racial discrimination is a peremptory norm or *jus cogens*,¹⁶⁷ all States and international organizations are bound to respect this norm.¹⁶⁸
132. **Whether through joint or separate action, States Parties cannot evade their international human rights obligations by acting through international organizations.** In the event of conflict between the obligations of States under the *Charter of the United Nations* and those under any other international agreement,¹⁶⁹ the *Charter* obligations would prevail.¹⁷⁰ This is especially the case, since human rights "occupy a hierarchically superior position among the norms of international law".¹⁷¹
133. Even where discriminatory provisions in any international agreement were adopted by consensus among the Parties, such texts lack validity.¹⁷² In regard to Indigenous peoples, interpretations would need to be adopted that do not discriminate against them or else the offending provisions would require amendment. Otherwise the superior human rights norms would prevail.¹⁷³

13.1 "Consensus" exploited in undermining Indigenous rights

134. In negotiating the 2012 Guidelines, the Parties chose to proceed by way of consensus. Proposals were approved by consensus among States that violate principles of justice, democracy, non-discrimination, respect for human rights and rule of law.
135. Within FAO procedures, there does not appear to be any legal obligation to require consensus among the Parties. Even if such a duty existed, it could not prevail over the obligations of States to respect the *Charter of the United Nations* and international human rights law.
136. Since the final text was intended to reflect a consensus among the Parties, it was often the lowest common denominator among their positions that was reflected in the Guidelines. Such a substandard dynamic served to impede achieving a text consistent with the stated Objectives.
137. In its study on participation in decision-making, the UN Expert Mechanism on the Rights of Indigenous Peoples emphasized: "Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples."¹⁷⁴
138. Consensus can show a unity of purpose, but it loses its significance and validity if achieved at the expense of human rights. Even where a consensus "rule" exists, the UN Secretary-General has described consensus as a "privilege ... [and] that this privilege comes with responsibility".¹⁷⁵ Concerns relating to consensus have also surfaced at the General Assembly.

... 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.¹⁷⁶

139. 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.¹⁷⁷

140. Consensus was not a rigid requirement in the climate change talks in Cancún, Mexico in December 2010. When Bolivia objected and insisted that improvements be made to the text that had majority support, the Chair of the meeting indicated that consensus did not mean that a State had a right of veto and declared the text adopted.¹⁷⁸

13.2 Right to full and effective participation not achieved

141. Ensuring "full and effective participation" of Indigenous peoples is especially challenging in international forums, where treaties and other instruments are being negotiated. Even those international processes that claim they support such Indigenous participation are far from achieving it.
142. In many instances, the number of Indigenous peoples' representatives that are afforded an opportunity to participate is severely limited. The international body concerned may deem it sufficient if there are two or three Indigenous people funded from each geographic region. In some cases, the level of Indigenous participation may be even less.¹⁷⁹
143. When new instruments are being negotiated, the few Indigenous representatives that are funded to attend may have valuable technical expertise, however, there may be a lack of legal counsel. This inequitable situation has led to international agreements that favour States and others, but often undermine the rights of Indigenous peoples.
144. Inadequate FAO rules of procedure that favour States contribute significantly to the wide range of human rights deficiencies and other injustices in the 2012 Guidelines. As a result, Indigenous peoples' right to full and effective participation continues to be impeded. The global importance of FAO and its critical objectives should compel the necessary procedural reforms.
145. Indigenous peoples are recognized as "peoples" with the right of self-determination under international human rights law. As a result, their participation through their representative institutions must be based on the distinct legal status of such peoples.
146. The right of Indigenous peoples to participate in international and domestic decision-making is itself a human right. As Special Rapporteur on the rights of indigenous peoples, James Anaya, underlines:
- The right of indigenous peoples to participate in decision-making is both rooted in other basic human rights and essential to the effective enjoyment of those rights. A number of basic human rights principles underpin the right to participate and inform its content. These include, among others, principles of self-determination, equality, cultural integrity and property.¹⁸⁰
147. As affirmed by the United Nations Development Group, "full and effective participation" and free, prior and informed consent (FPIC) are important elements of Indigenous peoples' right of self-determination.¹⁸¹ Such participation is also a crucial aspect of FPIC.¹⁸²
148. In its study on Indigenous peoples and the right to participate in decision-making, the UN Expert Mechanism on the Rights of Indigenous Peoples links the collective human right to participation to the right to self-determination:

The normative international human rights framework for the collective right to participation is the right to self-determination. Affirmed in Article 1 (2) of the Charter of the United Nations and other major international legal instruments, ... self-determination is widely acknowledged to be a principle of customary international law and even a peremptory norm.¹⁸³

149. The UN Permanent Forum on Indigenous Issues urges diverse international bodies and forums to facilitate Indigenous peoples' participation¹⁸⁴ and uses UNDRIP as the standard:

The Permanent Forum recognizes the right to participate in decision-making and the importance of mechanisms and procedures for the full and effective participation of indigenous peoples in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.¹⁸⁵

150. UNDRIP includes a wide range of interrelated or mutually reinforcing provisions that, in their effect, require the full and effective participation of Indigenous peoples.¹⁸⁶
151. The international community is widely supportive of this right and principle, including the General Assembly,¹⁸⁷ specialized agencies,¹⁸⁸ national human rights institutions¹⁸⁹ and Indigenous peoples.¹⁹⁰
152. Ensuring Indigenous peoples' right to full and effective participation is consistent with principles of democracy, as well as respect for human rights and the rule of law.¹⁹¹
153. FAO and States Parties have a responsibility to ensure a democratic and fair process. A major factor impeding the full and effective participation of Indigenous peoples is their lack of financial and other support. Adequate numbers of representatives from each region should have funding to participate fully in the current negotiations.
154. Special Rapporteur James Anaya has emphasized the need for reforms and capacity-building:

Potential reforms within international institutions and platforms of decision-making that affect indigenous peoples' lives should be closely examined ... Financial and administrative support should be maintained and expanded as necessary to ensure that indigenous peoples can participate effectively in international forums.¹⁹²

XIV. Conclusions and Recommendations

155. There continues to be a critical need to affirm and safeguard the land and resource rights of Indigenous peoples globally. Customary rights to lands and resources are affirmed as legal rights in international human rights law. However, the absence of formal legal recognition and recording of such rights within States has led to dispossession and other human rights violations.

156. In addressing these and other challenges, the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* that were negotiated in March 2012 are not a positive contribution.
157. Based on the diverse concerns elaborated in this Joint Submission, it is concluded that the FAO Committee on World Food Security (CFS) should not approve the Guidelines at the special session in Rome in mid-May 2012.
158. The 2012 Guidelines are incompatible with FAO's highly progressive policies relating to Indigenous peoples and their human rights. These Guidelines are also inconsistent with the 2004 Voluntary Guidelines on the Right to Food.
159. We respectfully request the FAO to evaluate on an urgent basis the serious concerns that have been raised. In view of its principled and independent mandate, the FAO Evaluation Service appears well-suited to carry out this vital responsibility.
160. In carrying out the requested evaluation of the 2012 Guidelines, we recommend that following issues among others be examined.
161. **Lack of a principled framework.** The inclusion of specific international norms, principles and commitments is necessary, in order to provide a principled framework for any Guidelines. Such framework must include and be consistent with international human rights law.
162. **Double standards on the rule of law.** The Guidelines' re-conception of the rule of law makes no specific reference to being "consistent with international human rights norms and standards". In the Guidelines, respect for the rule of law is discretionary for States but obligatory for Indigenous peoples and other non-State actors.
163. **Omission of inseparable link to water.** In addressing "food security", the 2012 Guidelines fail to make the essential link to water and water security. Such a serious omission detracts from the central objective of food security.
164. **Repeated use of vague terms.** A core problem is that "existing obligations" and "voluntary commitments" of States are repeatedly referred to, but there is no indication as to the meaning or scope of these terms. International instruments, such as declarations, may not be legally binding in the same manner as treaties. However, they still have diverse legal effects. If that is what this refers to, the term "voluntary commitments" would be inaccurate and inconsistent with international human rights law.
165. **State obligations described in discretionary terms.** Excessive emphasis on the "voluntary" aspects of the Guidelines could lead States to underestimate their obligations and open the door to undermining existing international standards.
166. **Objectives fail to be met.** The Objectives of the 2012 Voluntary Guidelines seek to "improve governance of tenure of land, fisheries and forests" and to do so "for the benefit of all". Yet the Guidelines, as drafted, appear to significantly lower international standards and unjustly favour States to the detriment of Indigenous peoples.

167. **Tenure rights segregated from human rights.** Indigenous peoples' land and resource tenure rights are property rights. They are considered as such in international human rights law. It is discriminatory for the Guidelines to separate tenure rights from human rights.
168. **Land and resource tenure rights not discretionary.** In regard to formal legal recognition, allocation and recording of Indigenous peoples' traditional lands, the 2012 Guidelines presume that States have the discretion to determine the nature and scope of such rights and the size of any demarcated lands. Such presumption is incompatible with Indigenous peoples' inherent rights and related States' obligations under international human rights law.
169. **Human rights principles and concepts restricted to individuals.** In the 2012 Guidelines, "human dignity" is described as "recognizing the inherent dignity and the equal and inalienable human rights of all individuals". Similarly, "equity and justice" are described as referring solely to individuals. Exclusion of Indigenous "peoples" in this context is discriminatory.
170. **Self-determination and subsistence ignored.** The Guidelines make no mention of the rights of Indigenous peoples to self-determination and "their own means of subsistence" – which rights are particularly relevant to food security and related governance matters. The collective human right of self-determination is a prerequisite for the enjoyment of all other human rights.
171. **Tenure rights subordinated to other rights.** The Guidelines also presumes that "all" tenure rights will as a rule be limited by the rights of others, as well as "by the measures taken by States necessary for public purposes". In both cases, it is inconsistent with international human rights law to adopt such a one-sided approach, in the absence of the facts and law in each case.
172. **FPIC unjustly altered.** In regard to Indigenous peoples, "free, prior and informed consent" (FPIC) is an essential international right and standard. Yet in the Guidelines, FPIC is undermined by adding "with due regard for particular positions and understandings of individual States". Such subjective factors could significantly alter the essential meaning of FPIC as an inherent human right.
173. **Effective remedies denied to Indigenous peoples.** The Guidelines appear to contemplate effective remedies solely for "persons" and not "peoples" or "groups". By in effect excluding Indigenous peoples from the human right to an effective remedy, the Guidelines are inconsistent with international human rights law.
174. **FAO rules of procedure require reform.** Within the FAO, unfair procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. While the FAO is a progressive organization, there is serious concern that States are taking unfair advantage of such procedures to negotiate new instruments that adversely affect UNDRIP and Indigenous peoples' human rights.
175. **Full and effective participation not realized.** Inadequate FAO rules of procedure that excessively favour States contribute significantly to the wide range of human rights-related

deficiencies and other injustices in the 2012 Guidelines. Indigenous peoples involved in FAO negotiations will likely continue to be precluded from exercising their right to full and effective participation, until FAO procedures are reformed.

176. **Consensus exploited by States.** In negotiating the 2012 Guidelines, States exploited the practice of seeking consensus in order to undermine Indigenous peoples' rights. As a result, it was often the lowest common denominator among States' positions that was reflected in the Guidelines. Such a substandard dynamic served to impede achieving a text consistent with the stated Objectives. The practice of seeking consensus requires reconsideration.
177. **A call for positive State action.** After achieving a global consensus on UNDRIP, it is unconscionable that States are now using international processes to prejudice this human rights instrument and Indigenous peoples' rights. Principles of justice, solidarity, international cooperation and respect for human rights must apply equally to Indigenous peoples – especially those among the most vulnerable, disadvantaged and discriminated against in the world.

ENDNOTES

¹ *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Food and Agriculture Organization, Rome, Italy, 9 March 2012, http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_en_Final_March_2012.pdf ["Voluntary Guidelines" or "Guidelines"].

² *Ibid.*, "Preface": "[The Guidelines] were developed by the open-ended working group in sessions in June, July and October 2011 and in March 2012. They are based on an inclusive process of consultations that occurred during 2009-2010." This working group was established in 2010 by the FAO Committee on World Food Security.

³ "Committee on World Food Security", Rule XXXIII in FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations*, vol. I, 2011 ed. (Working version December 2011), Rome, Italy, <http://www.fao.org/docrep/meeting/022/K8024E.pdf#page=125>, para. 7:

The Committee on World Food Security ... shall constitute the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger and ensuring food security and nutrition for all human beings.

⁴ Voluntary Guidelines, *supra* note 1, "Preface".

⁵ *Ibid.*, para. 2.2.

⁶ See, e.g., Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010) at 4, where one of the "core" principles highlighted is the right of Indigenous peoples to self-determination. While a central element of the Voluntary Guidelines is "responsible governance of tenure", consideration of governance by Indigenous peoples is sorely inadequate. The Guidelines make no reference to the right of Indigenous peoples to self-determination under international law.

⁷ Food and Agriculture Organization, "What is Land Tenure", <http://www.fao.org/DOCREP/005/Y4307E/y4307e05.htm>, para. 3.31: "Security of tenure is the certainty that a person's rights to land will be recognized by others and protected in cases of specific challenges. People with insecure tenure face the risk that their rights to land will be threatened by competing claims, and even lost as a result of eviction."

See also Alejandro Litovsky and Paulina Villalpando, *The Land Security Agenda: How investor risks in farmland create opportunities for sustainability*, (London, Earth Security Initiative, March 2012) at 27:

In sub-Saharan Africa, most vulnerable populations have lived in public lands over generations under an informal regime of customary land rights. The absence of formal legal rights and the supporting documentation puts these communities at a disadvantage. ...

But even in the cases where communities may have the formal rights to their land, a practical lack of capacity to fully understand and claim their rights – or how to best leverage those rights for an economic advantage – can be an obstacle to a fair negotiation.

⁸ *FAO Policy on Indigenous and Tribal Peoples*, *supra* note 6 at 3.

⁹ *Ibid.*, at 44.

¹⁰ Voluntary Guidelines, *supra* note 1, para. 1.1. [emphasis added]

¹¹ *Ibid.*, para. 1.2 (4).

¹² Office of the High Commissioner for Human Rights, *Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, Olivier De Schutter, United Nations Special Rapporteur on the right to food (16 May 2011), <http://www.ohchr.org/EN/Issues/Food/Pages/Standards.aspx>, at 3. [emphasis added]

¹³ "Charter for the FAO Office of Evaluation" in FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations*, vol. II, 2011 ed. (Working version December 2011), Rome, Italy, <http://www.fao.org/docrep/meeting/022/K8024E.pdf#page=125>, para. 6.

¹⁴ *Ibid.*, para. 13. [emphasis added] In regard to the relevant standards and norms, see United Nations Evaluation Group (UNEG), *Standards for Evaluation in the UN System*, April 2005 (updated 23 February 2012), http://www.uneval.org/papersandpubs/documentdetail.jsp?doc_id=22; and United Nations Evaluation Group (UNEG), *Norms for Evaluation in the UN System*, April 2005 (updated 23 February 2012), http://www.uneval.org/papersandpubs/documentdetail.jsp?doc_id=21.

¹⁵ "Charter for the FAO Office of Evaluation", *supra* note 13, para. 7: "The primary principles underpinning evaluation in FAO are: Independence, Impartiality, Credibility, Transparency and Usefulness. These are inter-related."

¹⁶ *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, Food and Agriculture Organization, November 2004, Rome, Italy, <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm> ["2004 Voluntary Guidelines on Right to Food", underline added].

¹⁷ Voluntary Guidelines, *supra* note 1, para. 2.2. [emphasis added]

¹⁸ 2004 Voluntary Guidelines on the Right to Food, *supra* note 16, Section I, para. 16. [emphasis added]

See also General Assembly, *The rule of law at the national and international levels*, UN Doc. A/RES/66/102, (9 December 2011) (adopted without vote), para. 2: "Reaffirms ... further that States shall abide by all their obligations under international law". [emphasis added]

¹⁹ The phrase "consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments " is used in paras. 2.2; 3B.7; 4.2; 4.6; 5.2; 6.2; 7.2; 8.1; 8.2; 9.3; 9.4; 9.11; 10.2; 11.1; 12.1; 12.7; 12.15; 13.1;14.1; 16.1; 22.1; 22.3; 24.2; and 25.2. If not strongly opposed, it is likely to be insisted upon by States in other international forums and instruments.

See also *infra* note 169, where it is indicated that States may attempt to later use the lower standards in the 2012 Guidelines to lessen their international obligations.

²⁰ Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples*, *supra* note 6, at 13.

See also Office of the High Commissioner for Human Rights, "The Right to Water", Fact Sheet No. 35 (August 2010): "A rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and process of development. ... The norms and principles are those contained in the wealth of international treaties and declarations." [emphasis added]

²¹ Voluntary Guidelines on the Right to Food, *supra* note 16, Section I, paras. 10-12.

²² *Ibid.*, Section I, para. 13.

²³ *Code of Conduct for Responsible Fisheries*, Food and Agriculture Organization, Rome, Italy, adopted 31 October 1995.

²⁴ *Ibid.*, 6.17, 7.44, 8.13, 8.15, 8.17, 8.1.10, 8.3.2, 8.10.1, 11.1.13, 11.2.11, 11.12.13 and 11.3.6.

²⁵ Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'" in Dinah Shelton, ed., "Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System" (Oxford/New York: Oxford University Press, 2003) 1 at 10: "Treaty mechanisms are including more 'soft' law obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of procedures may have compliance procedures that range from soft to hard. ... In fact, it is rare to find soft law standing in isolation; instead, it is used most frequently as a precursor to hard law or as a supplement to a hard law instrument. Soft law instruments often serve to allow treaty parties to authoritatively resolve ambiguities in the text or fill in gaps." [emphasis added]

²⁶ Office of the High Commissioner for Human Rights, "International Human Rights Law", available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>: "While international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels." [emphasis added]

²⁷ See text accompanying note 17 *supra*.

²⁸ For a similar provision, see UNDRIP, article 45.

²⁹ United Nations, *New Voices: National Perspectives on Rule of Law Assistance*, 2011, <http://www.unrol.org/files/FINAL%20National%20Perspectives%20Report.pdf> at 8. [emphasis added]

³⁰ *Ibid.*

³¹ Voluntary Guidelines, *supra* note 1, para. 3B.7.

³² *Ibid.*, paras. 6.9 and 15.4.

³³ *Ibid.*, para. 12.12.

³⁴ *Ibid.*: "Investments should not contribute to food insecurity and environmental degradation."

³⁵ *Ibid.*, para. 3.2. [emphasis added]

³⁶ General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 16 September 2005, adopted without vote, para. 119. [emphasis added]

³⁷ See, e.g., 2004 Voluntary Guidelines on the Right to Food, *supra* note 16, Section II, "Guideline 8c: Water".

³⁸ Office of the High Commissioner for Human Rights, "The Right to Water", Fact Sheet No. 35 (August 2010), at 12. And at 5: "Obligations related to access to safe drinking water and sanitation ... are derived from obligations pertaining to the promotion and protection of other human rights, including the rights to life, adequate housing, education, food, health, work and cultural life."

³⁹ Office of the High Commissioner for Human Rights, *Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, *supra* note 12, at 2: "The legal instruments that should be referred to in the Guidelines are related to several specific human rights that are closely related to access to land, in particular the right to adequate food, the right to water, and the right to adequate housing." And at 3: "the right to water is ... intrinsically linked to the realization of the right to food".

⁴⁰ See General Comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

⁴¹ See para. 8 (b) of General Comment No. 4 (1991). See also the report by Commission on Human Rights' Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E.CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

⁴² Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th sess., UN Doc. E/C.12/2002/11 (20 January 2002), para. 3. [emphasis added]

⁴³ See, e.g., Craig Candler, Rachel Olson, Steven DeRoy and the Firelight Group Research Cooperative, *As Long as the Rivers Flow: Athabasca River Knowledge, Use and Change* (Parkland Institute, University of Alberta, 2010), at 41-42: " In conjunction with other interview findings, instances of avoidance due to concerns regarding quality suggest that, at least amongst some [Mikisew Cree First Nation] land users, a lack of confidence regarding the quality of resources, largely related to perceived oil sands emissions, is having adverse effects on subsistence use and the practice of aboriginal and Treaty rights in and around the Athabasca River. ... [Regarding] the level of comfort participants reported with feeding their families from the Athabasca River and its shores ... 46% indicated they would not be comfortable feeding their families fish from the Athabasca ... All who were asked were uncomfortable giving Athabasca water to drink." [emphasis added]

See also Alexis Stoymenoff, "Bella Bella Community School pledges hunger strike against Enbridge's Northern Gateway pipeline", 31 March 2012, <http://www.vancouverobserver.com/sustainability/2012/03/31/bc-student-hunger-strike-opposing-enbridge-northern-gateway-pipeline-begin>: "Hunger strike participants from the Bella Bella community say they fear a potential oil spill by Enbridge's Northern Gateway pipeline will threaten their ocean and traditional food sources."

⁴⁴ General Assembly, *The right to drinking water and sanitation*, UN Doc. A/RES/64/292 (28 July 2010), para. 1: "Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights". See also Human Rights Council, *The human right to safe drinking water and sanitation*, UN Doc. A/HRC/RES/16/2 (24 March 2011) (adopted without a vote).

⁴⁵ Permanent Forum on Indigenous Issues, "Right to Water and Indigenous Peoples", Fact Sheet, http://www.un.org/esa/socdev/unpfi/documents/10Session_factsheet_water_EN.pdf:

Indigenous peoples' right to water is not limited to access to safe drinking water and sanitation but also closely linked to a range of other rights including self-determination, subsistence, health, land and resources and cultural and spiritual practices. The right to water is a human right that is protected in a wide range of international instruments ... There is a fundamental link between accessing water and living in dignity.

⁴⁶ *Safe Drinking Water for First Nations Act* (Bill S-8), 1st sess., 41st Parl., 2012, s. 3: "For greater certainty, nothing in this Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, except to the extent necessary to ensure the safety of drinking water on First Nation lands."

⁴⁷ *Ibid.*, s.6:

6. (1) Regulations made under this Act prevail over any laws or by-laws made by a first nation to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise.

(2) In respect of an aboriginal body named in column 1 of the schedule, this Act and the regulations prevail over the land claims agreement or self-government agreement to which the aboriginal body is a party, and over any Act of Parliament giving effect to it, in the event of a conflict or inconsistency between this Act and that agreement or Act.

⁴⁸ Leslie MacMillan, "A Difficult Choice on Water", 6 April 2012, <http://green.blogs.nytimes.com/2012/04/06/a-difficult-choice-on-water/>. In regard to the extensive "Waivers, Releases and Retentions of Claims" in the proposed *Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012* (S.2109), http://thomas.loc.gov/home/gpoxmlc112/s2109_is.xml#toc-IDc056e550e7584987a8125a27aa062e9d, see s. 105.

⁴⁹ *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 5(1): "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant." [emphasis added] See also UNDRIP, article 45: "Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future."

Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/1/Add.31, 10 December 1998, para. 18: "the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party". See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8:

... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). ... The Committee ... recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant. [emphasis added]

⁵⁰ Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to the World Trade Organization*, (25 June 2008), UN Doc. A/HRC/10/5/Add.2 (4 February 2009), para. 33.

⁵¹ *Ibid.*, para. 34. [emphasis added] In the same paragraph, the Special Rapporteur adds: " It also creates the risk that, faced with situations of conflict, States will opt for compliance with their obligations under trade agreements: since these agreements are commonly backed by the threat of economic sanctions - as is the case within the WTO, under the Dispute Settlement Understanding - setting aside their human rights obligations will appear to Governments less costly economically and even, often, politically."

⁵² Voluntary Guidelines, *supra* note 1, para. 9.3. [emphasis added]

The introduction of such ambiguity appears to be intentional. In FAO's earlier "Zero Draft", para. 9.3 did not include any reference to "voluntary commitments": "In the case of indigenous communities, States should meet their international obligations including, as appropriate, from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples, and the Convention on Biological Diversity."

⁵³ *Ibid.*, para. 12.7. [emphasis added]

⁵⁴ Office of the High Commissioner for Human Rights, *Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, *supra* note 12 at 2. [emphasis added]

⁵⁵ Voluntary Guidelines, *supra* note 1, para. 1.1. [emphasis added]

⁵⁶ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 62. [emphasis added]

At para. 63, the Special Rapporteur adds: "Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."

⁵⁷ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 63: "Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."

International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, para. 5: "UNDRIP is ... a declaration deserving of utmost respect. This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was [g]uided 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*"; this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." [underlining added]

⁵⁸ See, e.g., Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (29 January 2010), para.83; 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; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan*, UN Doc. CERD/C/JPN/CO/3-6 (6 April 2010), para. 20; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon*, UN Doc. CERD/C/CMR/CO/15-18 (30 March 2010), para. 15; Committee on the Elimination of Racial Discrimination (Chairperson), Letter to Lao People's Democratic Republic, 12 March 2010 (Early warning and urgent action procedure) at 1; 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 the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12 (13 March 2009), para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; Committee on Economic, Social and Cultural Rights, *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; and Committee on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc. CEDAW/C/AUS/CO/7 (30 July 2010), para. 12.

⁵⁹ *Aurukun Shire Council & Anor v. CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, Supreme Ct. Queensland, para. 33. See also *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, paras. 131-133. At 133:

... the defendants would be unwilling, or even loath to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned. Finally, **Article 46** of the Declaration requires that its provisions shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. [emphasis added]

⁶⁰ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348, per Dickson C.J. (dissenting on other grounds). See also *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 175, 178 (citing United Nations Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) (1959)).

⁶¹ International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 51: "... it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provision of UNDRIP in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future."

⁶² Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010), UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112; and International Law Association, *supra* note 61 at 43-44 and 51.

In regard to the non-discrimination, see UNDRIP, preambular paras. 5, 9, 18 and 22 and arts. 1, 2, 8(2)(e), 9, 14(2), 15(2), 16(1), 17(3), 2(1), 24(1), 29(1), and 46(2), (3); self-determination and self-government, see UNDRIP, PP 1, 16 and 17 and arts. 3 and 4; cultural integrity, see UNDRIP, arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance to culture. In regard to property, see UNDRIP, arts. 11, 25-28 and 30.

⁶³ International Law Association, *supra* note 61 at 16-17, 51 and 52. In regard to torture, genocide and right to life, see UNDRIP, art. 7; and in regard to reparation and redress, see UNDRIP, arts. 11(2), 28 and 40.

⁶⁴ *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, art. 26. See also UNDRIP, PP 8 and 14 and art. 37.

⁶⁵ *Charter of the United Nations*, arts. 1(3), 55 c and 56. See also UNDRIP, PP 1, 20-22 and arts. 1, 37, 38, 40 and 42.

⁶⁶ *Charter of the United Nations*, art. 2(2). See also UNDRIP, PP 1 and 18 and arts. 19, 32 and 46(3).

General Assembly, *The rule of law at the national and international levels*, UN Doc. A/RES/66/102, (9 December 2011) (adopted without vote), para. 3: "*Reaffirms also* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter".

⁶⁷ UN Secretary-General Ban Ki-moon, "Message on the International Day of the World's Indigenous People", 9 August 2007, at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/D35F84A98F4E2DF3C12573300052F4C4?opendocument>: "indigenous peoples ... continue to suffer discrimination, marginalization, extreme poverty and conflict; [and] face dispossession of their traditional lands and livelihoods, displacement, destruction of their belief systems, culture, language and way of life -- and even the threat of extinction."

⁶⁸ See, e.g., Secretary-General (Ban Ki-moon), “Protect, Promote, Endangered Languages, Secretary-General Urges in Message for International Day of World’s Indigenous People”, SG/SM/11715, HR/4957, OBV/711, 23 July 2008: “The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. ... [I]t provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.” [emphasis added]

⁶⁹ United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, February 2008, www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf, at 24. The UNDG unites the 32 UN funds, programmes, agencies, departments, and offices that play a role in development.

⁷⁰ African Commission on Human and Peoples’ Rights, “Resolution on the protection of indigenous peoples’ rights in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage site”, ACHPR/Res.197 (L)2011, done in Banjul, The Gambia, 5 November 2011, preamble, http://www.achpr.org/english/resolutions/Resolution197_en.htm:

Recalling the United Nations Declaration on the Rights of Indigenous Peoples, a universal international human rights instrument that has attained consensus among UN Member States, and reaffirming the African Commission’s commitment to fostering the values and implementing the principles enshrined in this Declaration ... [underlining added]

Office of the High Commissioner for Human Rights, “Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia” (27 August 2009),

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument>: “The Declaration expresses the global consensus on the rights of indigenous peoples and corresponding state obligations on the basis of universal human rights.” [emphasis added]

⁷¹ Office of the High Commissioner for Human Rights, “Indigenous rights declaration universally endorsed”, 2010, <http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx>.

⁷² UNDRIP, arts. 38, 41 and 42. See also Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples”, (2009) 58 ICLQ 957 at 983: “institutional mechanisms for the promotion and monitoring of the Declaration are in place, thus moving the relevant international setting closer to that of a hard law instrument. All this suggests that the Declaration has important legal effects ...”

⁷³ IFAD (International Fund for Agricultural Development), “Concluding Statement of the workshop establishing an indigenous peoples’ forum at IFAD, 18 February 2011”, <http://www.ifad.org/events/ip/statement.pdf>. [emphasis added]

⁷⁴ *FAO Policy on Indigenous and Tribal Peoples*, *supra* note 6 at 2. FAO bases its responsibility on art. 41 of UNDRIP: “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 through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.”

⁷⁵ Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2008/43, E/C.19/2008/13, para. 132.

At the Permanent Forum, the FAO is a member of the Inter-Agency Support Group that is working to advance Indigenous peoples’ rights and UNDRIP.

⁷⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples’ Rights, Communication No. 276/2003,

Twenty-Seventh Activity Report, 2009, Annex 5, para. 204: “The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights.”

⁷⁷ Inter-American Commission on Human Rights, “Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System”, OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009), para. 19. See *Case of the Saramaka People v. Suriname*, (Preliminary Objections, Merits, Reparations, and Costs), I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 131.

⁷⁸ See, e.g., UNDRIP, article 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (adopted at the Committee’s 75th session, August 2009), at para. 26: “The notion of inadmissible ‘separate rights’ must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.” [emphasis added]

African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Comm. No. 155/96, 15th Activity Report 2001-02, 31 at para. 68: “Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.” [emphasis added]

⁷⁹ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, Annex, heading V, Agenda and Framework for the Programme of Work, “C. Framework for the programme of work” (18 June 2007), adopted without a vote and approved by the General Assembly.

⁸⁰ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, adopted in Durban, South Africa, 8 September 2001, para. 41: “We reiterate our conviction that the full realization by indigenous peoples of their human rights and fundamental freedoms is indispensable for eliminating racism, racial discrimination, xenophobia and related intolerance.”

⁸¹ However, see text accompanying note 52 *supra*, where para. 9.3 refers to Indigenous peoples and human rights in the context of the *Indigenous and Tribal Peoples Convention, 1989, Convention on Biological Diversity* and UNDRIP. This reference to human rights is not entirely clear, especially since the Guidelines repeatedly segregate Indigenous tenure rights from human rights. In addition, principles and norms relating to human rights are generally described as applying to persons (and not peoples).

⁸² Voluntary Guidelines, *supra* note 1, para. 3B.1. [emphasis added]

⁸³ *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, judgment of 10 December 1998, para. 183.

⁸⁴ *Declaration on Race and Racial Prejudice*, E/CN.4/Sub.2/1982/2/Add.1, Annex V (1982). Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session on 27 November 1978, Art. 9, para. 1. [emphasis added]

See also *Cotonou Agreement* (Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part), signed in Cotonou on 23 June 2000, 2000/483/EC, Official Journal L 317, 15/12/2000 P. 0003 – 0353, Art. 9(2):

The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights ... [emphasis added]

⁸⁵ UNDRIP, article 43.

⁸⁶ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 53.

⁸⁷ Voluntary Guidelines, *supra* note 1, para. 3B.3. [underline added]

⁸⁸ UNDRIP, article 46(3).

⁸⁹ *Declaration on Race and Racial Prejudice*, *supra* note 84, article 1(2).

⁹⁰ UNDRIP, 2nd preambular para.: "indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such".

See also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 94, *per* L'Heureux-Dubé, cited with approval by the Supreme Court in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, para. 87:

Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society.

⁹¹ Committee on World Food Security, "The Need for Improved Governance of Tenure", <http://www.fao.org/cfs/cfs-home/cfs-land-tenure/en/>:

Tenure is the relationship among people with respect to land and other natural resources. The rules of tenure determine who can use what resources of the land for how long, and under what conditions. Tenure has significant implications for development. Where the poor and vulnerable have limited and insecure rights to land and other natural resources, it is difficult for them to overcome hunger and poverty. Conversely equitable and secure rights can support social and economic development and the sustainability of the environment. [emphasis added]

⁹² Voluntary Guidelines, *supra* note 1, para. 3.2. [emphasis added] In this paragraph alone, this distinction between tenure rights and human rights is made eight times.

⁹³ *Ibid.*, para. 4.8. [emphasis added]

⁹⁴ *Ibid.*, para. 12.6. [emphasis added]

⁹⁵ S. James Anaya & Robert A. Williams, Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System", (2001) 14 Harv. H. Rts J. 33 at 84 (Conclusion).

⁹⁶ *Ibid.* [emphasis added]

⁹⁷ *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 144: "'Property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."

⁹⁸ The right to property is affirmed in both international and regional human rights instruments: *Universal Declaration on Human Rights*, art. 17 (1); *International Convention on the Elimination of All Forms of Racial Discrimination*, art.

5(d)(v); *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 144 entered into force 18 July 1978, art. 21; *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), art. XXIII; *African Charter of Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force 21 October 1986, art. 14; UNDRIP, arts. 25-31.

⁹⁹ Food and Agriculture Organization, "What is Land Tenure", <http://www.fao.org/DOCREP/005/Y4307E/y4307e05.htm>, para. 3.6.

¹⁰⁰ *Case of the Saramaka People v. Suriname*, *supra* note 77, para. 93.

¹⁰¹ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. A/52/18 Annex V (18 August 1997), para. 3. [emphasis added] In the same para., the Committee adds: "Consequently the preservation of their culture and their historical identity has been and still is jeopardized."

¹⁰² *Ibid.*, para. 5. See also UNDRIP, article 26(2): "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

¹⁰³ 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.

¹⁰⁴ General Assembly, *The right to food*, UN Doc. A/RES/66/158 (19 December 2011), para. 16: "Notes the need to further examine various concepts such as, inter alia, "food sovereignty" and their relation with food security and the right to food, bearing in mind the need to avoid any negative impact on the enjoyment of the right to food for all people at all times".

Declaration of Atilán, Indigenous Peoples' Consultation on the Right to Food: A Global Consultation, Atilán, Sololá, Guatemala, April 17 - 19, 2002: "Food Sovereignty is the right of Peoples to define their own policies and strategies for the sustainable production, distribution, and consumption of food, with respect for their own cultures and their own systems of managing natural resources and rural areas, and is considered to be a precondition for Food Security".

¹⁰⁵ *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 1(2).

¹⁰⁶ *Ibid.*, article 1(3).

¹⁰⁷ *Bernard Ominayak and the Lubicon Lake Band v. Canada* (Communication no. 167/1984), *Official Records of the Human Rights Committee 1989/90*, Vol. II (New York: United Nations, 1995), pp. 381-391. See also Communication no. 167/1984, Decisions of the Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984 (26 March 1990), para. 13.3.

¹⁰⁸ UNDRIP, articles 3 and 4.

¹⁰⁹ UNDRIP, article 20(1). [emphasis added]

¹¹⁰ In regard to the right to food security, there are a number of relevant provisions in UNDRIP relating to self-determination, self-government, subsistence, culture, health, environment, development, treaties and land, territories and resources. These provisions should be read together with article 7, which affirms a right to individual and collective security:

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples ...

¹¹¹ UN General Assembly, *Universal realization of the right of peoples to self-determination*, Res. 66/145 (19 December 2011) (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 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. 41: “The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.” See also Human Rights Committee, *General Comment No. 12, Article 1*, 21st 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.”

¹¹² UN General Assembly, *Right to Food: Note by the Secretary-General*, A/60/350 (12 September 2005) (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 30.

¹¹³ *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), art. 2. In underlining the importance of self-determination, the Special Rapporteur on the right to food added: “The prohibition of discrimination, contained in article 2 of the International Covenant on Civil and Political Rights, is also of crucial importance for indigenous peoples.” See General Assembly, *Right to Food: Note by the Secretary-General*, *supra* note 112, para. 30.

See also 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), article 5: “States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, ... and refusal to recognize the fundamental right of peoples to self-determination.” [emphasis added]

¹¹⁴ Office of the High Commissioner for Human Rights, “Frequently Asked Questions on Economic, Social and Cultural Rights”, Fact Sheet No. 33 (2009), at 14:

The concept of progressive realization is sometimes misinterpreted as if States did not have to protect economic, social and cultural rights until they have sufficient resources. On the contrary, the treaties impose an immediate obligation to take appropriate steps towards the full realization of economic, social and cultural rights. A lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce. [emphasis added]

¹¹⁵ General Assembly, *Right to Food: Note by the Secretary-General*, UN Doc. A/60/350 (12 September 2005) (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 48.

¹¹⁶ *Ibid.*, para. 54.

¹¹⁷ It is not certain what "responsible governance" entails. The term "good governance" is widely used in international law. See, e.g., UNDRIP, article 46(3).

¹¹⁸ Voluntary Guidelines, *supra* note 1, para. 5.1, where it is left to the discretion of States to provide a framework related to tenure: "States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests."

¹¹⁹ *Ibid.*, *supra* note 1, para. 2.5.

¹²⁰ UNDRIP, article 18: "Indigenous peoples have the right ... to maintain and develop their own indigenous decision-making institutions"; and article 38: "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

¹²¹ Food and Agriculture Organization, *Zero Draft*, 2011, para. 9.4.

¹²² Voluntary Guidelines, *supra* note 1, para. 9.1.

¹²³ *Ibid.*, para. 4.3. [emphasis added]

¹²⁴ See, for example, UNDRIP, article 46(2): "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected."

¹²⁵ UNDRIP, article 46(2). [emphasis added]

¹²⁶ UNDRIP, article 46(3).

¹²⁷ See text accompanying note 123 *supra*.

¹²⁸ General Assembly, *Right to Food: Note by the Secretary-General*, UN Doc. A/60/350 (12 September 2005) (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 18. [emphasis added]

¹²⁹ UNDRIP, article 23.

¹³⁰ *Indigenous and Tribal Peoples Convention, 1989*, article 7(1). [emphasis added] The same article adds: "In addition, [indigenous and tribal peoples] shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

¹³¹ Voluntary Guidelines, *supra* note 1, para. 7.3 [emphasis added] Similarly see para. 7.1: "When States intend to recognize or allocate tenure rights to land, fisheries and forests ..."

¹³² General Assembly, *The right to food: Note by the Secretary-General*, Interim report of the Special Rapporteur on the right to food, Olivier De Schutter UN Doc. A/65/281 (11 August 2010), para. 10: "the right of [Indigenous] peoples to have their lands demarcated and protected is recognized under international law."

See also S. James Anaya & Robert A. Williams, Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System", (2001) 14 Harv. H. Rts J. 33 at 84 (Conclusion): "states are obligated to take affirmative measures to recognize and protect indigenous peoples' rights in land and natural resources on the basis of their traditional tenure."

¹³³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 209. [emphasis added]

¹³⁴ *Ibid.*, para. 196. [emphasis added]

¹³⁵ *Case of the Saramaka People v. Suriname*, *supra* note 77, para. 96. [emphasis added]

¹³⁶ UNDRIP, article 26(3).

¹³⁷ International Law Association, *supra* note 57, at 22-23. S. James Anaya & Robert A. Williams, Jr., *supra* note 132, at 55: "The relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples' rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns."

See also *Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment* and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment* *supra* note 59, para. 127: "Treaty obligations aside, ... both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources. Both are, including treaties, the principal sources of international law: see Article 38 of the International Court of Justice."

¹³⁸ See, e.g., Francesca Thornberry and Frans Viljoen, *Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries* (Geneva: International Labour Office, 2009) at 153 (Conclusions): "...major challenge lies in the lack of adequate measures for implementation of such provisions for the benefit of indigenous peoples, lack of capacity to address indigenous issues in an adequate and consultative/participatory manner, as well as in general attitudes towards indigenous peoples, among other things."

¹³⁹ 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 without vote by General Assembly, 16 December 2005). At para. 9, one of the five objectives of the Decade is: "Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent ..."

¹⁴⁰ See, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11: "In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources".

Comité des droits de l'homme, *Observations finales du Comité des droits de l'homme: Togo*, UN Doc. CCPR/C/TGO/CO/4 (28 March 2011), para. 21 (ensure Indigenous peoples can exercise their right to free, prior and informed consent); Human Rights Committee, *Poma v. Peru*, Case No. 1457/2006, *Report of the Human Rights Committee*, GAOR, 64th Sess., Supp. No. 40, Vol. I, UN Doc. A/64/40 (2008-09), para. 202: "Participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."

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. 5, indicating 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."

¹⁴¹ See, e.g., *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 226: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also *requires that consent be accorded*. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property." [emphasis added]

Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs), I/A 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."

¹⁴² General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General, Interim report of the Special Rapporteur, supra* note 57, para. 27: "... article 32 of the Declaration, with its call for the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, provides an important template for avoiding these problems in the development context."

Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter - Crisis into opportunity: reinforcing multilateralism*, UN Doc. A/HRC/12/31 (21 July 2009), para. 21: "These [core] principles are based on the right to food ... They also call for the respect of the right to self-determination of peoples and on the right to development. They may be summarized as follows: ... (j): States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

¹⁴³ See, e.g., *FAO Policy on Indigenous and Tribal Peoples, supra* note 6, at 5: "The principle and right of 'free, prior and informed consent' demands that states and organizations of all kinds and at all levels obtain indigenous peoples' authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them."

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 13 (Principles of engagement): "When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent."

Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children's Fund*, UN Doc. E/C.19/2011/7 (25 February 2011), para. 52: "While the free, prior and informed consent approach is considered by UNICEF to be inherent in its human rights-based approach to programming, it is also used as a specific methodology to conduct projects and studies."

International Finance Corporation (member of the World Bank Group), "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency", 12 May 2011, <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48525788E0071FAAA>: "For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of 'Free, Prior, and Informed Consent' informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples."

¹⁴⁴ In regard to cultural and intellectual property, see UNDRIP, art. 11(2): "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

See also Indigenous and Tribal Peoples Convention, 1989 (No. 169), 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."

¹⁴⁵ UNDRIP, arts. 10 (forced relocations); 11(2) (redress re cultural, intellectual and other property); 19 (legislative or administrative matters); 28(1) (redress re lands, territories and resources taken or damaged); 29(2) (storage or disposal

of hazardous materials on Indigenous lands or territories); and 32(2) (approval of projects affecting Indigenous lands, territories or resources).

In regard to UNDRIP and FPIC, see Andrea Carmen, “The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress” in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples*, (Saskatoon: Purich Publishing, 2010) 120 at 120.

¹⁴⁶ “Principles and Guidelines for the Protection of the Heritage of Indigenous People”, in UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people (Geneva, 28 February - 1 March 2000)*, UN Doc. E/CN.4/Sub.2/2000/26 (19 June 2000) (Chairperson-Rapporteur: Ms. Erica-Irene Daes), Annex I (Principles):

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organization.

Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, at 3: “Regarding article 8(j) and related provisions ... An essential element of sui generis systems is prior and informed consent.”

¹⁴⁷ United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, *supra* note 69, at 13: “The right to self-determination may be expressed through: ... Respect for the principle of free, prior and informed consent.” [emphasis added]

Permanent Forum on Indigenous Issues, *Report on the tenth session, (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 36: “As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is ... relevant to a wide range of circumstances ... Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law ...”

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/15/35 (23 August 2010), 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. Moreover, the principle is of fundamental importance for indigenous peoples’ participation in decision-making. This is because free, prior and informed consent establishes the framework for all consultations relating to accepting of projects that affect them, and any related negotiations pertaining to benefit-sharing and mitigation measures. [emphasis added]

¹⁴⁸ Voluntary Guidelines, *supra* note 1, para. 9.9. [emphasis added]

¹⁴⁹ General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, UN Doc. A/66/157 (19 December 2011), para. 5. [emphasis added] See also *Vienna Declaration and Programme of Action*, *supra* note 113, Part I, para. 32: “The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.”

Impartiality, objectivity and non-selectiveness are also a permanent part of the “Principles” for the Agenda and Framework for the Programme of Work for the Human Rights Council: see *Institution-building of the United Nations Human Rights Council*, HRC Res. 5/1, UN GAOR, 62 Sess., Supp. No. 53, UN Doc. A/62/53 (2007) 48 at 60 (Annex, V(A)).

¹⁵⁰ Canada (Aboriginal Affairs and Northern Development), Letter from John Duncan, Minister of Aboriginal Affairs and Northern Development, to Grand Council Chief Patrick Wedaseh Madahbee, Union of Ontario Indians/Anishinabek Nation, 10 January 2012 at 1-2:

With respect to "free, prior and informed consent", it is important to be clear that the Government of Canada does not interpret this concept to mean Aboriginal peoples are afforded a veto on legitimate government decisions that are made in the public interest. The Government of Canada views this concept as calling for a process of meaningful consultation with Aboriginal peoples on issues of concern to them. It should, in practice, focus on fostering appropriate partnerships with Aboriginal peoples to ensure they are fully involved, consulted, and where appropriate, accommodated on developments and other decisions that directly impact their interests or rights. [emphasis added]

United States, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples", 16 December 2010, online: <http://www.state.gov/documents/organization/153223.pdf>: "the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken." [emphasis added]

¹⁵¹ General Assembly, *Human Rights Council*, UN Doc. A/RES/60/251 (15 March 2006), preamble: "*Recognizing also* the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization".

¹⁵² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24. 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."

The Canadian government deals selectively with the rule of law and its constitutional obligations, at the expense of Indigenous peoples' rights. See Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), where any reference to Aboriginal "consent" has been omitted.

¹⁵³ Voluntary Guidelines, *supra* note 1, para. 4.9. [emphasis added] In section 6 on "Delivery of services", para. 6.6 refers to supportive services for "marginalized groups, "remote communities" and "mobile indigenous peoples" but does not specifically address "effective remedies":

States and other parties should consider additional measures to support vulnerable or marginalized groups who could not otherwise access administrative and judicial services. These measures should include legal support, such as affordable legal aid, and may also include the provision of services of paralegals or parasurveyors, and mobile services for remote communities and mobile indigenous peoples. [emphasis added]

¹⁵⁴ *Ibid.*, para. 21.1.

¹⁵⁵ *Ibid.*, para. 21.6: "In providing dispute resolution mechanisms, States should strive to provide legal assistance to vulnerable and marginalized persons to ensure safe access for all to justice without discrimination."

¹⁵⁶ In regard to the human right to an effective remedy, see for example: *Universal Declaration of Human Rights*, art. 8; *International Covenant on Civil and Political Rights*, art. 2, para. 3; *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 6.

¹⁵⁷ See, e.g., Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. A/52/18 Annex V (18 August 1997), para. 2: "The Committee ... reaffirms the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to

indigenous peoples." Thus, the right to an effective remedy in article 6 of the *Convention* applies to Indigenous peoples and individuals.

¹⁵⁸ UNDRIP, article 40.

¹⁵⁹ *Indigenous and Tribal Peoples Convention, 1989*, article 3(1).

¹⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 12, *Right to adequate food (Art. 11)*, U.N. Doc. E/C.12/1999/5 (1999), para. 32. See also Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security (art. 9)*, E/C.12/GC/19, 4 February 2008, para. 77: "Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels." [emphasis added]

¹⁶¹ Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2002/11 (20 January 2002), para. 55.

¹⁶² *Maya Indigenous Communities of the Toledo District, Belize*, I/A Comm. H.R., Case No. 12.053, Report No. 96/03, 24 October 2003, at para. 6.

In regard to the right to property in article 21 of the *American Convention [on Human Rights]*, see *Case of Sawhoyamaya v. Paraguay*, Inter-Am. Ct. H.R. Ser. C.No. 146 (Judgment) Mar. 29, 2006, para. 120: "this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community." This notion of ownership and possession of land ... deserves equal protection under Article 21 of the American Convention." [emphasis added]

¹⁶³ See, e.g., Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", Expert Mechanism on the Rights of Indigenous Peoples, 4th sess., Geneva (July 2011), <http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf>.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Indigenous Peoples' Right to Participate in Decision-Making: International and Regional Processes", Joint Statement of Indigenous and civil society organizations, Expert Mechanism on the Rights of Indigenous Peoples, 3rd sess., Geneva (13 July 2010), <http://quakerservice.ca/wp-content/uploads/2012/01/EMRIP-Study-re-IPs-Rt-to-Participate-Joint-Statement.pdf>.

¹⁶⁴ World Intellectual Property Organization (Traditional Knowledge Division), "Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Comments submitted by the Grand Council of the Crees (Eeyou Istchee)", 30 November 2011, http://www.wipo.int/tk/en/observer_participation.html.

See also Catherine Saez, "Indigenous Peoples Walk Out Of WIPO Committee On Genetic Resources", Intellectual Property Watch, 22 February 2012, <http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources/>.

¹⁶⁵ See also Forest Peoples Programme (Marcus Colchester, Director), "FPP E-Newsletter", April 2012, <http://www.forestpeoples.org/topics/environmental-governance/publication/2012/fpp-e-newsletter-april-2012-pdf-version>: "The continuous, sometimes subtle, violence of conservation and development against indigenous peoples continues, unchecked even at the highest levels by the most worthy-sounding agencies of the United Nations."

¹⁶⁶ Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 26.

¹⁶⁷ *Report of the International Law Commission*, 53rd sess. (23 April-1 June and 2 July-10 August 2001) in UN GAOR, 56th sess., Supp. No. 10 (A/56/10), at 208, para. (5): "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."

¹⁶⁸ The obligations of international organizations include, *inter alia*, those arising from customary international law and peremptory norms. See *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20), at 88-89, para. 37: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."

¹⁶⁹ International agreements have been or are currently being negotiated in regard to such key matters as biodiversity, climate change and intellectual property. It is not clear whether the 2012 Guidelines, if agreed to by States and the FAO, would qualify as an "international agreement". Such agreements are not limited to treaties. See *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331 (entered into force 27 January 1980), article 3:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

In any event, States may attempt to use the lower standards in the 2012 Guidelines to interpret their obligations under a wide range of treaties or other agreements that may relate to food, food security or governance of Tenure of Land, Fisheries and Forests. **Para. 2.2 of the Guidelines provides no legal assurance that they will not be used by States to lessen or undermine their international or national obligations:** "Nothing in these Guidelines should be read as limiting or undermining any legal obligations to which a State may be subject under international law." See text accompanying notes 17-19 *supra*.

¹⁷⁰ Article 103 of the *Charter of the United Nations* provides for the paramountcy of the *Charter*, in the event of a conflict relating to State obligations: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." [emphasis added]

Namibia Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia) (Advisory Opinion), [1971] I.C.J. Rep. 16, at p. 57: "To establish ... and to enforce, distinctions, exclusions, restrictions and limitations, exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

¹⁷¹ Olivier De Schutter, "Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of Responsibility" in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp/Oxford/Portland: Intersentia, 2010) 51 at 96:

Human rights ... occupy a hierarchically superior position among the norms of international law. First, since of the purposes of international economic and social cooperation under the UN Charter is to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 55 c)), and since Article 56 of the UN Charter clearly imposes obligations both on the organisation itself and on its Members States to contribute to this objective, it would follow from Article 103 of the UN Charter that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority. Second, *jus cogens* norms are

hierarchically superior to any other rules of international law, including but not limited to, international treaties. [emphasis added]

¹⁷² *Report of the International Law Commission*, 58th sess. (1 May-9 June and 3 July-11 August 2006) in UN GAOR, 61st sess., Supp. No. 10 (A/61/10), at 423, para. 41:

(a) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(b) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict.

Vienna Convention on the Law of Treaties, *supra* note 169, article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

¹⁷³ See also *Vienna Convention on the Law of Treaties*, article 71: "1. In the case of a treaty which is void under article 53 the parties shall: (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law".

¹⁷⁴ Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, *supra* note 166, Annex (Expert Mechanism advice No. 2 (2011)), para. 27.

¹⁷⁵ Secretary-General, "Secretary-General Calls on Delegates to End Stagnation in Disarmament Conference, Seize 'Collective Opportunity to Build a Safer World', at Headquarters Meeting", Opening statement to the High-level Meeting on Revitalizing the Work of the Conference on Disarmament and Taking Forward Multilateral Disarmament Negotiations, Dept. of Public Information, News and Media Division, New York, 24 September 2010.

¹⁷⁶ 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].

¹⁷⁷ 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. [emphasis added]

¹⁷⁸ Daphné Cameron, « Accord modeste à Cancún », *La Presse* (13 December 2010), <http://www.cyberpresse.ca/environnement/dossiers/changements-climatiques/201012/13/01-4351806-accord-modeste-a-cancun.php>, at A12: « Après 12 jours d'intenses négociations, la ... présidente de la conférence ... a présenté un texte de compromis qui a recueilli le soutien de la majorité des pays représentés, à l'exception de la Bolivie, qui l'a jugé insuffisant. ... Les décisions sont habituellement prises par consensus, mais le consensus 'ne signifie pas qu'un pays a le droit de veto', a déclaré la présidente. »

See also Phil Lee, "The betrayal at Cancun", Friends of the Earth International, 3 January 2011, <http://www.foei.org/en/blog/the-betrayal-at-cancun/?searchterm=cancun>.

¹⁷⁹ At the last round of negotiations on the 2012 Guidelines in Rome last March, there were only three Indigenous representatives.

¹⁸⁰ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 39. [emphasis added]

¹⁸¹ United Nations Development Group (UNDG), "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 69, at 13: "The right to self-determination may be expressed through: ... Respect for the principle of free, prior and informed consent ... Full and effective participation of indigenous peoples at every stage of any action that may affect them direct or indirectly."

¹⁸² *Ibid.* at 28: “Consultation and participation are crucial components of a consent process.”

¹⁸³ 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/15/35 (23 August 2010), para. 30. [emphasis added]

¹⁸⁴ Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 31:

The Forum reiterates that the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the Convention on Biological Diversity, the World Intellectual Property Organization and the International Maritime Organization should facilitate indigenous peoples’ participation in their processes.

¹⁸⁵ *Ibid.* [emphasis added] UNDRIP, article 18: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures ...”

¹⁸⁶ See *e.g.*, preambular para. 24 and arts. 3, 4, 5, 10, 18, 19, 22, 23, 26, 27, 29, 30, 31, 32, 34, 38, 41, 42, 43, 45 and 46.

¹⁸⁷ UN 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 without vote by General Assembly, 16 December 2005), at para. 9, where two of the five objectives of the Decade relate to “full and effective participation”:

(i) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;

(ii) Promoting *full and effective participation* of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent ... [emphasis added]

¹⁸⁸ IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 7: “The Declaration addresses both individual and collective rights. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them.”

¹⁸⁹ New Zealand Human Rights Commission, “United Nations Declaration on the Rights of Indigenous Peoples”, <<http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/unitednationsdeclarationontherightsofindigenouspeoples.php>>: “The Declaration ... declares discrimination against indigenous peoples unlawful and promotes their full and effective participation in all matters that concern them.”

¹⁹⁰ International Indigenous Peoples’ Forum on Climate Change (IIPFCC), “Indigenous Groups Announce Grave Concern on Possible Cancun Outcome”, Press release, 10 December 2010:

As members of the IIPFCC, ... we want to reiterate our determination to ensure protection of our rights, as laid out in the UN Declaration on the Rights of Indigenous Peoples, our right to free, prior, and informed, consent, the recognition and protection of our traditional knowledge, and ensure the *full and effective participation* of Indigenous Peoples in all climate change processes. [emphasis added]

¹⁹¹ 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*,

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):

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.

¹⁹² General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra* note 180, para. 52.