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**Agenda Item 4: Human rights: (a) Implementation of the United Nations Declaration on the Rights of Indigenous Peoples**

**Undermining Indigenous Peoples' Rights and *UN Declaration*: Urgent Need for Procedural Reforms in International Organizations**

**Joint Submission of Grand Council of the Crees (Eeyou Istchee); Inuit Circumpolar Council; Assembly of First Nations; Canadian Friends Service Committee (Quakers); Amnesty International; Continental Network of Indigenous Women of the Americas-ECMIA; Jharkhand Mines Area Coordination Committee; CHIRAPAQ, Centro de Culturas Indígenas del Perú; First Nations Summit; International Indian Treaty Council (IITC); Union of British Columbia Indian Chiefs (UBCIC); Na Koa Ikaika KaLahui Hawaii; Ogiek Welfare Council; Network of the Indigenous Peoples-Solomons (NIPS); Chiefs of Ontario; Bindrai Institute for Research Study and Action (BIRSA); Nishnawbe Aski Nation; Native Women's Association of Canada; Ogiek Council of Elders; Treaty Four First Nations; Confederacy of Treaty No. 6 First Nations; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Indigenous World Association; TARA-Ping Pu (Taiwan); Hul'qumi'num Treaty Group; Atlantic Policy Congress of First Nations Chiefs Secretariat; The Nature Conservancy; Maritime Aboriginal Peoples Council; Khan Kaneej Aur ADHIKAR (Mines minerals & RIGHTS); First Peoples Human Rights Coalition; Ikanawtiket; Center for World Indigenous Studies; Jharkhandis Organisation for Human Rights (JOHAR); Haudenosaunee of Kanehsatake; Plenty Canada; KAIROS: Canadian Ecumenical Justice Initiatives; Takao Indigenous Makatao Council (TIMC, Taiwan); Netherlands Centre for Indigenous Peoples (NCIV)**

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## EXECUTIVE SUMMARY

At the international level, new instruments are increasingly being negotiated or implemented that significantly affect Indigenous peoples and their human rights. Indigenous concerns relating to issues such as biodiversity, food security, climate change, development, free trade and intellectual property, are being addressed to the detriment of Indigenous peoples.

Under existing procedures of international organizations, Indigenous peoples have no effective means of safeguarding their rights. When Indigenous representatives raise concerns that State positions are inconsistent with the *Charter of the United Nations* and international human rights law, such concerns are generally not addressed by the Parties.

Within international bodies and processes, consensus-driven procedures are being exploited by States to the detriment of Indigenous peoples. The lowest common denominator among State positions often prevails. Such procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law.

**The procedures within international organizations require redress. The extent to which States are prejudicing Indigenous peoples' human rights and disrespecting related State obligations is critical.**

In calling for strengthening the rule of law nationally and internationally, the UN Secretary-General recently affirmed: "The rule of law is a core principle of governance that ensures justice and fairness, values that are essential to humanity."

The rules of procedure in international organizations are generally out-dated. In its August 2011 report to the Human Rights Council, the UN Expert Mechanism on the Rights of Indigenous Peoples highlighted: "Reform of international and regional processes involving indigenous peoples should be a major priority and concern."

It is unacceptable that procedural rules in international organizations should be anything less than clear and explicit in affirming the rule of law, consistent with international human rights standards including the *UN Declaration on the Rights of Indigenous Peoples*.

In this context, it would be beneficial to examine the practices that governed the negotiations on the *UN Declaration*. An inclusive and democratic process of Indigenous participation was established within the United Nations. It constitutes today an impressive precedent and best practice.

A central recommendation of this Submission is that the Permanent Forum on Indigenous Issues:

Undertake on an urgent basis, an in-depth study of existing rules of procedure in diverse international organizations that have real or potential impacts of major consequence on Indigenous peoples' human rights and related interests. The study should identify serious inadequacies and impacts affecting Indigenous peoples, as well as propose effective remedies and possible compliance mechanisms, with a view to ensuring fair and balanced procedural rules.

## **Undermining Indigenous Peoples' Rights and *UN Declaration*: Urgent Need for Procedural Reforms in International Organizations**

### **I. Introduction**

1. Indigenous peoples and civil society organizations welcome this opportunity to address the Permanent Forum's Agenda Item 4: "Implementation of the United Nations Declaration on the Rights of Indigenous Peoples" in a human rights context.
2. Since its adoption in September 2007, the *UN Declaration*<sup>1</sup> has attained a global consensus. As we approach the five-year anniversary of the adoption of the *Declaration* by the General Assembly, we join in its celebration.
3. The *Declaration* is both "a beacon and catalyst for achievement, well-being and renewed hope."<sup>2</sup> Its real and potential value as a normative human rights instrument is continually reaffirmed.
4. During the past five years, implementation of the *Declaration* has taken place in many positive ways. Collaboration among States, Indigenous peoples and specialized agencies can prove highly beneficial. Ongoing efforts necessarily include initiatives at the international, regional<sup>3</sup> and domestic levels.
5. This Joint Submission focuses primarily on the serious challenges Indigenous peoples face in ensuring full and effective implementation of the *Declaration* at the international level. This includes Indigenous peoples' human rights and related State obligations. It also involves the obligations of the United Nations, its bodies and specialized agencies.
6. In negotiating new instruments or implementing existing ones, Indigenous peoples have strived in a diverse range of international forums to achieve principled and culturally-sensitive outcomes.<sup>4</sup> To a large extent, States have not affirmed Indigenous rights in a "spirit of partnership and mutual respect".<sup>5</sup>
7. Some international organizations, such as the Food and Agriculture Organization (FAO), have progressive policies relating to Indigenous peoples. Yet when negotiating or implementing new instruments, the rules of such organizations allow States to propose and agree to any proposal – even if it violates their most solemn obligations.
8. **Within international bodies and processes, consensus-driven procedures are being exploited by States to the detriment of Indigenous peoples. The lowest common denominator among State positions most often prevails.** Such unfair procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law.

9. In his March 2012 report on strengthening the rule of law nationally and internationally, the UN Secretary-General affirms: "The rule of law is a core principle of governance that ensures justice and fairness, values that are essential to humanity."<sup>6</sup>
10. The report refers to "vulnerable groups",<sup>7</sup> but there is no explicit reference to "Indigenous peoples" or any "peoples" at all. Such serious omission must be corrected.<sup>8</sup>
11. In regard to the rule of law, the report emphasizes:

The United Nations defines the rule of law as 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.<sup>9</sup>

12. Under existing procedures of international organizations, Indigenous peoples have no effective means of safeguarding their human rights. When Indigenous representatives raise concerns that State positions are inconsistent with the *Charter of the United Nations* and international human rights law, such concerns are generally not addressed by the Parties.
13. Such a prejudicial and ongoing dynamic is neither honourable nor valid. It serves to weaken the United Nations system. The human rights standards in the *UN Declaration* are too often undermined or ignored.
14. **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 critical levels.** Indigenous concerns relating to such crucial global issues, such as biodiversity,<sup>10</sup> food security,<sup>11</sup> climate change,<sup>12</sup> development,<sup>13</sup> free trade<sup>14</sup> and intellectual property,<sup>15</sup> are being addressed to the detriment of Indigenous peoples.<sup>16</sup>
15. In this important context, the rules of procedure in international organizations are generally out-dated. Calls for significant reforms are increasing. As highlighted by 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.<sup>17</sup>

16. Similarly, Special Rapporteur on the rights of indigenous peoples, James Anaya, has emphasized the need for reforms: "Potential reforms within international institutions and platforms of decision-making that affect indigenous peoples' lives should be closely examined".<sup>18</sup>

## II. Significance of *UN Declaration* in Human Rights Context

17. The global consensus in support of the *UN Declaration* reinforces its weight as a universal human rights instrument. The consensus by States represents a very strong commitment to implementing the *Declaration*.<sup>19</sup>
18. 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.
19. The *UN Declaration* was adopted as an Annex to a General Assembly resolution. Under international and domestic law, the *Declaration* has diverse legal effects.<sup>20</sup>
20. The International Law Association underscores that the *Declaration* is much more than a simple General Assembly resolution and deserves "utmost respect":

In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that “in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”.<sup>21</sup> UNDRIP is such a declaration deserving of utmost respect.<sup>22</sup>

21. UN Special Rapporteur on the rights of indigenous peoples, James Anaya, describes the *Declaration* as “a political, moral and legal imperative ... within the framework of the human rights objectives of the Charter of the United Nations”.<sup>23</sup> Anaya further concludes:

... the *Declaration* builds upon fundamental human rights and principles, such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties. In addition, core principles of the *Declaration* can be seen to be generally accepted within international and State practice, and hence to that extent the *Declaration* reflects customary international law.<sup>24</sup>

22. 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.”<sup>25</sup>
23. Indigenous peoples' rights in the *Declaration* should be read in the context of the whole instrument and other international human rights law<sup>26</sup> – and States have a duty to “respect, protect and fulfill” such rights.<sup>27</sup> Such duty includes diverse aspects that are important to Indigenous peoples.<sup>28</sup>

24. At the same time, the *Declaration* provides "a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples".<sup>29</sup>

25. The *UN Declaration* includes several compliance provisions that many treaties do not have.<sup>30</sup> In particular, article 42 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.<sup>31</sup>

26. UN treaty bodies are increasingly using the *Declaration* to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging its implementation.<sup>32</sup>

27. 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 [the UN Declaration], inclusiveness, pluralism, reciprocity, accountability and solidarity."<sup>33</sup>

28. In 2010, the FAO indicated that it has a "responsibility to observe and implement [*the UN Declaration*]"<sup>34</sup> 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.<sup>35</sup>

29. At the regional level, the African Commission on the Human and Peoples' Rights has officially sanctioned and used the *UN Declaration* to interpret Indigenous peoples' rights.<sup>36</sup> Also, the Inter-American Commission on Human Rights (IACHR) has highlighted the legal "relevance and importance" of the *Declaration* 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.<sup>37</sup>

30. States cannot avoid Indigenous peoples' human rights and related State obligations in the *UN Declaration* by attempting to diminish or disregard the legal significance of this human rights instrument when addressing a wide range of international issues.

### III. Universal Application of a Human Rights-Based Approach

31. Under a 'human rights-based approach', Indigenous peoples' issues are addressed within a framework of international human rights law and standards. Indigenous rights are included as an integral part of both policy and law.
32. In the November 2007 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, it is concluded that the "rights and principles enshrined in the Declaration mesh with the general principles of the [human] rights-based approach".<sup>38</sup>
33. In regard to the United Nations, its organs and specialized agencies and States, the Permanent Forum on Indigenous Issues has underlined the importance of incorporating a "human rights-based approach". In this regard, the Forum explained:
 

At the international, regional and national level, the human rights of indigenous peoples are always relevant if such rights are at risk of being undermined. ... They must be respected in any context specifically concerning indigenous peoples, from environment to development, to peace and security, and many other issues.<sup>39</sup>
34. A human rights-based approach is critical to ensuring at least minimum standards for the survival, dignity, security and well-being of Indigenous peoples. It is especially crucial in the context of Indigenous land and resource rights and environment and development issues.
35. 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 the *UN Declaration on the Rights of Indigenous Peoples*:
 

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.<sup>40</sup>
36. In negotiating multilateral environmental agreements, international organizations have resisted incorporating a human rights-based approach. Such a regressive approach was taken by the Parties in regard to the *Nagoya Protocol*<sup>41</sup> on access and benefit sharing arising from the use of genetic resources. This resulted in prejudicial consequences for Indigenous peoples' human rights.

37. In its August 2011 Report, the Expert Mechanism on the Rights of Indigenous Peoples underlined:

... multilateral environmental processes and forums should ensure full respect for the rights of indigenous peoples and their effective participation including, for example, in relation to the negotiation of the Nagoya Protocol.<sup>42</sup> (, Annex, para. 26)

38. A 2011 Report of the Office of the High Commissioner for Human Rights affirms: "a number of environmental threats have, or will have, an adverse impact on all aspects of human rights and well-being, and environmental protection must be ensured to protect human rights and sustain and improve human well-being".<sup>43</sup> Such important threats include the "loss of biodiversity".<sup>44</sup>
39. The Report concluded that there is a general need to determine how to include a human rights-based approach in the "negotiation and implementation" of multilateral environmental agreements.<sup>45</sup>

#### **IV. Human Rights Must Prevail Over Consensus**

40. Participation in international forums or processes is especially challenging for Indigenous peoples, since the rules are heavily weighted in favour of States. Indigenous peoples remain highly vulnerable to State discretion and are not part of any consensus<sup>46</sup> on provisions relating to Indigenous rights and concerns.
41. When the practice is to achieve a consensus among States parties, it is often the lowest common denominator among their positions that is reflected in the final text. Such a substandard dynamic does not serve to fulfill key objectives of international processes. In the Indigenous context, consensus has led to widespread abuses by the parties and unfair results.
42. International human rights standards are too often ignored or cast aside, in the interests of obtaining consensus. Such actions are not compatible with State obligations in the *Charter of the United Nations* and contemporary rule of law.
43. There is a tendency to excessively reinforce State sovereignty, which exacerbates the subjugation, domination and exploitation of Indigenous peoples.<sup>47</sup> This dynamic is reminiscent of earlier eras of colonialism<sup>48</sup> and is inconsistent with the *UN Declaration*.<sup>49</sup> Indigenous peoples' self-determination and other rights are being severely undermined.
44. Such unjust actions are impairing the universality of Indigenous peoples' inherent human rights. Whether alone or through international organizations, States have no justification for committing such harmful acts.

45. In the rules of procedure of international organizations – such as the Food and Agriculture Organization (FAO), Convention on Biological Diversity (CBD) and World Intellectual Property Organization (WIPO) – there appear to be no explicit rules that effectively prevent member States from making and approving proposals that run counter to the *Charter of the United Nations* and international human rights standards.
46. In relation to Indigenous peoples, States are approving proposals by consensus that violate principles of justice, democracy, non-discrimination, respect for human rights and rule of law. Indigenous representatives in such processes are left powerless to prevent widespread violations – even if they include peremptory norms.
47. Such a substandard dynamic serves to impede achieving a text consistent with stated objectives. 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. Where beneficial or necessary, alternative negotiation frameworks should be considered, consistent with States' obligations in the Charter of the United Nations and other international human rights law.<sup>50</sup>

48. **Within international organizations, there is no absolute 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.**
49. 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”.<sup>51</sup> 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.<sup>52</sup>

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

In the process of negotiation, however, the goal of consensus should not be used to impede progress on a progressive text. Consensus does not imply a veto power of every participant at every step ... Consensus does not mean

perfect unanimity of opinion nor bowing to the lowest common denominator. It means coming together in a spirit [of] mutual understanding and common purpose to build and settle upon common ground.<sup>53</sup>

51. 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.<sup>54</sup>

## V. Right to Full and Effective Participation Impeded

52. In international organizations, States parties generally are not prevented from undermining Indigenous peoples' human rights and the *UN Declaration*. Thus, related rules of procedure are defective. They are failing to respect and protect such peoples' right to "full and effective" participation.
53. 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.
54. 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.<sup>55</sup>

55. The United Nations Development Group affirms that "full and effective participation" and free, prior and informed consent (FPIC) are important elements of Indigenous peoples' right of self-determination.<sup>56</sup> Such participation is also a crucial aspect of FPIC.<sup>57</sup>
56. 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.<sup>58</sup>

57. The UN Permanent Forum on Indigenous Issues urges all UN forums and multilateral and bilateral negotiations to ensure Indigenous peoples' "full, effective and direct" representation and participation, consistent with the *UN Declaration* as "minimum human rights standards":

... the full, effective and direct representation and participation of indigenous peoples, including their indigenous governments, councils, parliaments and other political institutions, should be ensured at all United Nations forums and multilateral, bilateral negotiations, as well as in the drafting processes of the corresponding emerging instruments. Such instruments must be harmonized with the Declaration, which is regarded as a reflection of the minimum human rights standards necessary for the promotion and protection of indigenous peoples, nations and communities.<sup>59</sup>

58. The *UN Declaration* includes a wide range of interrelated or mutually reinforcing provisions that, in their effect, require the full and effective participation of Indigenous peoples.<sup>60</sup>
59. The international community is widely supportive of this right and principle, including the General Assembly,<sup>61</sup> specialized agencies,<sup>62</sup> national human rights institutions<sup>63</sup> and Indigenous peoples.<sup>64</sup>
60. 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. As international standard-setting continues to expand, it is increasingly important for international organizations to safeguard Indigenous participatory rights.<sup>65</sup>
61. **Such full and effective participation is not achieved in international negotiations, when Indigenous representatives with technical expertise are funded but there is not sufficient access to legal counsel. Nor is such participation realized, if fundamental legal objections of Indigenous peoples are dismissed or ignored.**<sup>66</sup>
62. Such inequitable situations are exploitive. They have led to international agreements that favour States and others, at the expense of Indigenous peoples and their rights.

## VI. States Cannot Evade Human Rights Obligations

63. At the international level, States are required to implement their obligations under the *Charter of the United Nations* and international human rights law. To do otherwise, would have far-reaching global and domestic consequences. As described by the UN Secretary-General:

At the international level, the rule of law accords predictability and legitimacy to the actions of States ... Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including

the international human rights framework, is central to collective efforts to maintain international peace and security ...<sup>67</sup>

64. When acting through international organizations, States continue to propose and agree to provisions in international instruments that run counter to their commitments under the *Charter of the United Nations*. In this global context, States are undermining Indigenous peoples' human rights and downplaying related State obligations; devaluing the *UN Declaration*; and repeatedly engaging in racial discrimination.
65. Since the prohibition against racial discrimination is a peremptory norm or *jus cogens*,<sup>68</sup> all States and international organizations are bound to respect this norm. The obligations of international organizations include, *inter alia*, those arising from customary international law and peremptory norms.
66. As indicated in a 1980 Advisory Opinion by the International Court of Justice:
- 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.<sup>69</sup>
67. **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,<sup>70</sup> the *Charter* obligations would prevail. This is especially the case, since human rights "occupy a hierarchically superior position among the norms of international law".<sup>71</sup>
68. 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.<sup>72</sup>
69. Even where discriminatory provisions in any international agreement were adopted by consensus among the Parties, such texts lack validity.<sup>73</sup> 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.<sup>74</sup>

## VII. Procedural Injustices Invite Substantive Injustices

70. In international organizations, out-dated rules of procedure are inviting unlimited abuses against Indigenous peoples by member States. With virtually no checks and balances within such rules, States may propose and agree to discriminatory or other substandard provisions affecting present and future generations.
71. In relation to Indigenous peoples, most substantive injustices could be avoided in international organizations if their rules of procedure were effectively revised. Participating States within such organizations would need to be prohibited from making or agreeing to proposals that were not consistent with the *Charter of the United Nations* and international human rights law. Effective compliance mechanisms would be required.<sup>75</sup>
72. Developed States, such as Canada, New Zealand, Australia and the United States, are failing to play a leadership role in promoting and safeguarding Indigenous peoples' human rights in international processes. In the case of Canada and the United States, neither State has acknowledged that the collective rights of Indigenous peoples constitute human rights.<sup>76</sup>
73. International organizations must be aware that some States engaging in global processes have little or no regard for international human rights law – or for safeguarding the human rights of Indigenous peoples and individuals. Thus, ensuring adequate rules is all the more compelling.
74. For example, the Special Rapporteur on the right to food, Olivier De Schutter, recently carried out his official mission to Canada (6-16 May 2012). No arrangements were made by the government for the Special Rapporteur to meet with cabinet ministers, since he was told his mission "would be focusing on technical issues."<sup>77</sup>
75. On 16 May 2012, the Special Rapporteur shared his preliminary reflections with the government, highlighting the "very significant" problems of food insecurity in Canada, including in regard to Indigenous peoples. Government ministers refused to address such issues, saying he was "ill-informed" and "patronizing" and had no business "lecturing" Canada about hunger and poverty. It was added that the "UN should ... not get into political exercises in developed democracies like Canada".<sup>78</sup>
76. The Special Rapporteur "blasted Canada for its 'appallingly poor' record of taking recommendations from UN human-rights bodies seriously."<sup>79</sup> While the Health Minister claimed it was "activist groups" from outside Canada that were the problem, Inuit and First Nations leaders supported the Special Rapporteur's concerns and his call for a national food strategy.<sup>80</sup>
77. To illustrate the far-reaching consequences of perpetuating unfair procedural rules, we provide two examples below.

## 7.1 Convention on Biological Diversity<sup>81</sup>

78. The *Nagoya Protocol* on access and benefit sharing was negotiated under the rules of the Convention on Biological Diversity (CBD).
79. The *Protocol* has been repeatedly criticized by Indigenous and human rights organizations in different regions of the world. Such criticisms relate to severe shortcomings in CBD rules of procedures. They also relate to substantive provisions that undermine Indigenous peoples' human rights and the *UN Declaration*.
80. In regard to the *Nagoya Protocol*, **procedural injustices** include *inter alia* the following:
- The procedural dimensions of Indigenous peoples' right to "full and effective participation" were not respected during the negotiations of the *Protocol* and in its final text;
  - in relation to the formulation and adoption of national legislation and other measures, the democratic requirement of "full and effective participation" of Indigenous peoples and local communities is virtually unaddressed;
  - key provisions relating to the *UN Declaration* and "established" rights to genetic resources were negotiated in closed meetings, where representatives of Indigenous peoples and local communities were explicitly excluded; and
  - some States exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and local communities and applying the lowest common denominator among the Parties' positions.<sup>82</sup>
81. In regard to the *Nagoya Protocol*, **substantive injustices** include *inter alia* the following:
- Indigenous peoples' human rights concerns were largely disregarded, contrary to the Parties' obligations in the *Charter of the United Nations*, *Convention* and other international law;
  - progressive international standards, such as the *UN Declaration on the Rights of Indigenous Peoples* were not fully respected – despite the obligation in the *Protocol* that it be implemented "in a mutually supportive manner with other international instruments";
  - repeated use of ambiguous and questionable phrases, such as "subject to national legislation" and "in accordance with national legislation" is not consistent with the requirement that national legislation be *supportive* of the "fair and equitable" objective of benefit sharing;

- excessive reliance on national legislation is likely to lead to serious abuses, in light of the history of violations and the *Protocol*'s lack of a balanced framework;
- the phrase “indigenous and local communities” is used throughout the *Protocol*, even though “indigenous peoples” is the term now used for such peoples in the international human rights system. Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;
- in regard to access and benefit sharing of genetic resources, only “established” rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination;
- “prior and informed consent” of Indigenous peoples was included in the *Protocol*, along with questionable and ambiguous terms that some States are likely to use to circumvent the obligation of consent;
- lack of Parties’ commitment to ethical conduct is exemplified by the Tkarihwaié:ri Ethical Code of Conduct, adopted by the Conference of the Parties – which Code stipulates that it “should not be construed as altering or interpreting the obligations of Parties to the Convention ... or any other international instrument” or altering domestic laws and agreements.<sup>83</sup>

## 7.2 FAO 2012 Guidelines

82. 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.
83. These and other related challenges are being addressed within the Food and Agriculture Organization. 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.
84. In regard to the 2012 Guidelines, **procedural injustices** include *inter alia* the following:
  - The procedural dimensions of Indigenous peoples’ right to “full and effective participation” were not respected during the negotiations of the *Protocol* and in its final text;

- some States exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and local communities and applying the lowest common denominator among the Parties' positions.<sup>84</sup>

85. 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 approved, appear to significantly lower international standards and unjustly favour States to the detriment of Indigenous peoples.

86. In regard to the Guidelines, **substantive injustices** include *inter alia* the following:

- **Ignoring** Indigenous peoples' rights to self-determination and subsistence – which rights are particularly relevant to food security and related governance matters
- **Devaluing** the legal status of the *UN Declaration on the Rights of Indigenous Peoples* and undermining Indigenous rights and related State obligations
- **Unjustly altering** the legal concept of "free, prior and informed consent" so as to give "due regard for particular positions and understandings of individual States".
- **Segregating** Indigenous land and resource tenure rights from human rights, contrary to international law
- **Subjugating** Indigenous peoples and rights, in a manner that may increase State domination and control
- **Presuming** 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"
- **Failing** to make the essential link to water and water security, in addressing "food security".<sup>85</sup>

87. According to the Guidelines, 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.

88. The 2012 Guidelines do not constitute a principled and balanced instrument. They are incompatible with FAO's own progressive policies relating to Indigenous peoples and their human rights.<sup>86</sup>

## VIII. Use of International Processes to Circumvent Domestic Law

89. States are not only using international organizations to evade their international human rights obligations. Some States, such as Canada, are exploiting lax procedural rules within international organizations to lower legal standards under domestic law.
90. Canada is undermining Indigenous peoples' human rights and the *UN Declaration*<sup>87</sup> – as well as contributing to increased environmental insecurity and climate change.<sup>88</sup> Existing rules within international organizations should not provide States with additional opportunities to adversely affect Indigenous peoples at home and abroad.

### 8.1 Derogating from "free, prior and informed consent"

91. 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,<sup>89</sup> international treaty bodies,<sup>90</sup> regional human rights bodies,<sup>91</sup> UN special rapporteurs<sup>92</sup> and specialized agencies.<sup>93</sup> FPIC is also the standard under the *UN Declaration* and the *Indigenous and Tribal Peoples Convention, 1989*.<sup>94</sup>
92. The *UN Declaration* consistently uses the standard of FPIC.<sup>95</sup> This is the standard relating to Indigenous cultural heritage, including traditional knowledge and genetic resources.<sup>96</sup> FPIC is a "crucial dimension", "requirement" and "manifestation" of Indigenous peoples' right of self-determination.<sup>97</sup>
93. In the negotiations on FAO's 2012 Guidelines on governance of tenure,<sup>98</sup> Canada exploited the practice of consensus with a view to significantly lower international standards. It insisted that FPIC be altered 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.<sup>99</sup>
94. The additional 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.
95. According to Canada's highest court, "full consent" is required on "very serious issues".<sup>100</sup> 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.

96. Canada should not be seeking to circumvent rulings of its highest court, in order to undermine the constitutionally-protected rights of Indigenous peoples. Such actions are incompatible with its constitutional duty to uphold the honour of the Crown "in all its dealings" with Aboriginal peoples<sup>101</sup> and its international human rights obligations.
97. *Black's Law Dictionary* defines "consent" as "agreement, approval, or permission as to some act or purpose".<sup>102</sup> "Informed consent" is described as "agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives."<sup>103</sup>
98. For Canada and other States to suggest that, in relation to Indigenous peoples, the legal concept of "free, prior and informed consent" might be varied according to the "positions and understandings of individual States" constitutes a discriminatory double standard.
99. In the non-Indigenous context, there is no such arbitrary and subjective qualification on consent or FPIC.
100. As emphasized by the Permanent Forum:

... the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of "consultation".<sup>104</sup>

### 8.1 Subjugation of Indigenous peoples' rights

101. In regard to the FAO 2012 Guidelines, Canada joined with other States appears to create a hierarchy that favours the rights of third parties over Indigenous peoples' tenure rights. This would be discriminatory and contrary to international and Canadian law.
- 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.<sup>105</sup>
102. 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.<sup>106</sup> A fair and balanced outcome would require a contextual<sup>107</sup> approach based on the facts and law in each case. Tenure rights are not subservient to the rights of others.
103. The 2012 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.

104. During the negotiations on the *UN Declaration*, limitations based on "general welfare" were flatly rejected as being too vague and far-reaching. Instead, the *Declaration* 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.<sup>108</sup>

105. In addition, Indigenous rights and State obligations in the *Declaration* 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.<sup>109</sup>

#### Takings for public purposes

106. The above-quoted paragraph<sup>110</sup> 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 and Canadian law<sup>111</sup> to adopt such a one-sided approach, in the absence of the facts and law in each case. There is no indication in the Guidelines as to what "public purposes" entail.

107. 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.<sup>112</sup>

108. Consistent with the right of self-determination, the *UN Declaration* affirms: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."<sup>113</sup> 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.<sup>114</sup>

Formal legal recognition, allocation and recording of traditional lands

109. 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.
110. 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.<sup>115</sup>

111. **Such a discretionary 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, as well as Canadian law.**
112. Any such process of formal legal recognition and recording must 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.<sup>116</sup>
113. 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".<sup>117</sup>

... 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.<sup>118</sup>

114. 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.<sup>119</sup>

115. The *UN Declaration* 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."<sup>120</sup>
116. This State duty to demarcate and protect traditional lands and resources is now considered to be customary international law.<sup>121</sup> 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.
117. 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.<sup>122</sup>
118. National legislation is being used more to retain State control over Indigenous peoples than to ensure that their human rights are respected, protected and fulfilled. According to the "Declaration on Human Rights Defenders", domestic law should be consistent with the *Charter of the United Nations* and State obligations in the international human rights context:

Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed ...<sup>123</sup>

## **IX. Standard-Setting Process on *UN Declaration* – A Best Practice**

119. A major impediment faced by Indigenous peoples and local communities has been the rules of procedure in international processes and forums. For example, in regard to the WIPO General Rules of Procedure,<sup>124</sup> the rules were devised decades ago and are not reflective of the right of Indigenous peoples to "full and effective participation".<sup>125</sup>
120. An existing best practice at the international level relates to the former UN Commission on Human Rights' open-ended, intersessional working group that considered the draft UN

Declaration on the Rights of Indigenous Peoples from 1995-2006. In order to avoid stringent rules of procedure and ensure full and effective participation by Indigenous peoples, the meetings of the working group were declared to be informal.

121. In this way, democratic Indigenous participation and discussion was consistently ensured. State and Indigenous representatives had equal rights to table proposals, without pre-conditions. When key decisions had to be taken, the formal meeting of the working group was resumed.
122. In relation to this standard-setting process on the *UN Declaration*, it was agreed that any consensus on the draft text would need to include both States and Indigenous peoples. Otherwise, it would not have been possible to reach a compromise and achieve a just and balanced human rights instrument.
123. The Chair of the working group on the *Declaration* made it clear that any consensus would include both States and Indigenous peoples. While achieving consensus was desirable, no strict requirement was imposed. State and Indigenous representatives had equal rights to make interventions and propose text.
124. Since there was no practice of consensus, there was no lowest-common-denominator dynamic that undermined Indigenous peoples' human rights. Thus, a strong and principled Declaration was achieved that both States and Indigenous peoples could support.
125. When a draft text was sent by the working group Chair to the newly-created Human Rights Council in 2006, an overwhelming number of States supported the text. Subsequently, the African Group of States negotiated nine amendments to the text, and the Indigenous Caucus supported the revised text. State and Indigenous support continued up to and including the adoption of the *Declaration* at the General Assembly in September 2007.
126. Thus, in regard to the negotiations on the *UN Declaration*, an inclusive and democratic process of participation<sup>126</sup> was established within the United Nations. It still constitutes today an impressive precedent and best practice.<sup>127</sup>

## **X. Conclusions and Recommendations**

127. In international organizations, out-dated rules of procedure are inviting unlimited abuses against Indigenous peoples by member States. With virtually no checks and balances within such rules, States appear free to propose and agree to discriminatory or other substandard provisions affecting present and future generations.
128. In relation to Indigenous peoples, international organizations show a deep reluctance to be accountable on rule of law issues.<sup>128</sup> This is especially evident, when questions arise as to whether such entities and participating States are making and approving proposals that are consistent with international human rights standards.

129. Indigenous peoples are among the most vulnerable and disadvantaged in the world and, therefore, merit special protections.<sup>129</sup> Yet, in regard to Indigenous peoples' human rights and the *United Nations Declaration on the Rights of Indigenous Peoples*, prejudicial proposals continue to be approved in the negotiation and implementation of new instruments.
130. In such crucial international contexts, the practice is generally consensus-driven so that the lowest common denominator in States positions prevails. Regardless of the prejudicial consequences for Indigenous peoples, other participating States have not formally objected.
131. From an Indigenous perspective, such processes are unjust and undemocratic. They often generate discriminatory and other substandard outcomes. The international human rights system and rule of law are weakened as a result.
132. Under the procedural rules of international organizations, Indigenous peoples generally have no effective recourse against illicit State actions. It is unconscionable that both the States and international organizations concerned show an ongoing lack of determination and political will to prevent or redress such injustices.
133. Indigenous peoples' right to full and effective participation is not achieved in international negotiations, when Indigenous representatives with technical expertise are funded but there is not sufficient access to legal counsel. Nor is such participation realized, if fundamental<sup>130</sup> legal objections of Indigenous peoples are dismissed or ignored.
134. It is unacceptable that procedural rules in international organizations, as well as participating States, should be anything less than clear and explicit in affirming the rule of law, consistent with international human rights standards including the *UN Declaration*.
135. International cooperation and solidarity require no less.

International solidarity ... encompasses the values of social justice and equity ... and integrity of the international community ... International ... solidarity ... includes ... refraining from doing harm or posing obstacles to the greater well-being of others, including ... to our common ecological habitat, for which all are responsible. ... Special attention must be given to the human rights of vulnerable groups, including ... indigenous peoples ....<sup>131</sup>

136. **In order to safeguard the rights of Indigenous peoples and the international human rights system, it is imperative that procedural rules within international organizations be reformed. Where Indigenous rights are at stake, a process of consensus among States has repeatedly proven detrimental. Alternatives are urgently needed.**
137. In this regard, it would be beneficial to examine the practices that governed the negotiations on the *UN Declaration*. An inclusive and democratic process of Indigenous participation was established within the United Nations. It still constitutes today an impressive precedent and best practice.

138. **We recommend** that the Permanent Forum on Indigenous Issues:

- i) Undertake on an urgent basis, an in-depth study of existing rules of procedure in diverse international organizations that have real or potential impacts of major consequence on Indigenous peoples' human rights and related interests. The study should identify serious inadequacies and impacts affecting Indigenous peoples, as well as propose effective remedies and possible compliance mechanisms, with a view to ensuring fair and balanced procedural rules; and
- ii) in the Indigenous context, urge States to fully respect and implement, in conjunction with Indigenous peoples, the rule of law at international and national levels consistent with international human rights standards. Without limiting the foregoing, this would necessarily include State obligations under the *Charter of the United Nations* and international human rights law, including the *UN Declaration on the Rights of Indigenous Peoples*.

139. **We also recommend** that the Permanent Forum on Indigenous Issues:

- i) Review the March 2012 Report of the UN Secretary-General entitled *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*,<sup>132</sup> with a view to proposing timely revisions to the Report and ensuring that the challenges facing Indigenous peoples are incorporated;
- ii) participate directly in the sixty-seventh session of the General Assembly at the high-level meeting on the topic "The rule of law at the national and international levels"; and
- iii) include, at the 2013 annual meeting of the Permanent Forum, under the agenda item of "Human Rights: UN Declaration on the Rights of Indigenous Peoples", a discussion on the "Need for urgent reforms in the procedural rules of international organizations".

### Annex: CBD Secretariat Must Act Impartially

1. In the reports on its 9<sup>th</sup> and 10<sup>th</sup> sessions,<sup>133</sup> the Permanent Forum on Indigenous Issues made a number of recommendations relevant to Convention on Biological Diversity (CBD) processes.
2. Key recommendations include, *inter alia*, the need to refer to Indigenous peoples as "peoples";<sup>134</sup> relevance of human rights to environment and development processes;<sup>135</sup> and concerns of discrimination in addressing Indigenous peoples' genetic resource rights.<sup>136</sup>
3. Under the procedural rules of the CBD,<sup>137</sup> there are no specific safeguards for human rights concerns. At a November 2011 meeting, the Parties recommended that the Conference of the Parties (COP) "note" all such Permanent Forum recommendations.<sup>138</sup> To simply "note" does not *per se* require any positive action.<sup>139</sup>
4. In response to detailed concerns with regard to the *Nagoya Protocol*, the Secretariat of the CBD is criticizing those voices that are defending Indigenous peoples' human rights.<sup>140</sup> In so doing, the Secretariat is:
  - taking erroneous positions that undermine the rights of Indigenous peoples and defending discriminatory actions by States
  - attempting to diminish the voices of Indigenous peoples, human rights organizations and educational institutions that have provided detailed analyses on major problems in the *Protocol*
  - criticizing the expert members of the Permanent Forum for expressing discrimination concerns.
5. Such actions exceed the mandate of the Secretariat and provide misleading rationales for ongoing discriminatory conduct by the Parties to the *Protocol*.
6. In view of such missteps, it is especially inappropriate for the Secretariat to criticize the PFII expert members for highlighting problems of discrimination in the *Protocol*.
7. To our knowledge, the Secretariat has not engaged in challenging State positions – and certainly not in such a prejudicial manner. There must be no double standard in this regard.
8. The Secretariat has agreed to report on how PFII recommendations are being considered or addressed in relation to CBD-related instruments or processes. We expect the Secretariat to fulfill this role, in a fair and equal manner and with full respect to all those concerned.

## 1.1 Responses of Secretariat to PFII recommendation

9. In relation to the *Nagoya Protocol*, the Permanent Forum made the following recommendation in its May 2011 Report:

The Permanent Forum reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples' rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the objective of "fair and equitable" benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only "established" rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.<sup>141</sup>

10. In its 2012 response to the Permanent Forum, the Secretariat provides:

Rights to genetic resources are recognized in the protocol however the matter of access is deferred to the national level (in accordance with domestic legislation). This should not be surprising given the diversity of political and legal situations under which indigenous and local communities live and the non-exclusivity of rights over genetic resources which occur across boundaries and landscapes. The Nagoya Protocol is fully consistent with the equitable sharing provisions of the Convention and safeguards customary use and exchange of both genetic resources and associated traditional knowledge in article 12, paragraph 4.<sup>142</sup>

11. This response is misleading. In particular, the *Protocol* is not consistent with genetic resource rights and related State obligations in the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>143</sup>
12. In the operative paragraphs of the *Protocol*, specific references are made to the "rights" of Indigenous peoples and local communities solely when the apparent intent is to severely limit or dispossess them of their rights to genetic resources. In view of existing CBD procedures, representatives of Indigenous peoples could not prevent a Party's proposal from being adopted – even if it were discriminatory.
13. The *UN Declaration* affirms a diverse range of land and resource rights – without "deferring" to national law or legislation. The jurisprudence of international and regional human rights bodies elaborate standards, consistent with a human rights-based approach.
14. In regard to Indigenous peoples and local communities, article 10(c) of the *Convention on Biological Diversity*<sup>144</sup> affirms:

The Contracting Parties shall as far as possible and as appropriate:

...

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable development ...<sup>145</sup>

15. In article 10(c), the phrase “customary use of biological resources in accordance with traditional cultural practices” signifies that States have a positive obligation to safeguard and promote these practices. There is no such phrase as “in accordance with domestic law” or “in accordance with national legislation”.
16. Indigenous peoples’ rights are inherent<sup>146</sup> or pre-existing rights, which urgently require protection. Their existence is not dependent on national laws.<sup>147</sup>
17. It would be unconscionable for the *Protocol* to attempt to convert Indigenous peoples’ inherent rights to traditional knowledge or genetic resources into rights that only exist in accordance with national laws. Such an approach would run directly counter to international human rights law.<sup>148</sup>
18. Further, article 6(2) of the *Protocol* refers solely to situations where Indigenous peoples and local communities have the “established” right to grant access to genetic resources:

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

19. References to “established” rights could prove highly limiting. The term “established” might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling.<sup>149</sup> If such rights are not so proved, they might not receive any protection under the *Nagoya Protocol* – regardless of how strong the evidence that such rights exist.<sup>150</sup>
20. The Secretariat inaccurately suggests that solely “access” to genetic resources is “deferred to the national level”. However, article 5(2) of the *Protocol* only provides for benefit sharing in regard to “established” rights of Indigenous and local communities “in accordance with domestic legislation”:

Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

21. Thus, it is inaccurate for the Secretariat to conclude that the *Protocol* "is fully consistent with the equitable sharing provisions of the Convention". Both the *Convention* and the *Protocol* have an identical objective – namely, “fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources ... taking into account all rights over those resources”.<sup>151</sup> This objective calls for a rights-based approach.<sup>152</sup>

22. In its response to the Permanent Forum, the Secretariat added:

The protocol also contains seven paragraphs directly relevant to indigenous and local communities which include a final paragraph which affirms: *that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities*. In regards to the comment above that, *all rights based on customary use must be safeguarded and not only “established” rights, it is clear by the results of the negotiations, that Parties were unwilling or unable to address issues concerning future non-established claims to rights*.<sup>153</sup>

23. In 2010, the Secretariat indicated to the Permanent Forum that rights to genetic resources have limited recognition and protection in the *Protocol*:

The Protocol ... contains significant provisions relating to ... genetic resources held by indigenous and local communities where the rights of these communities over these resources have been recognized.<sup>154</sup>

... where they retain rights to genetic resources in accordance with domestic legislation, prior and informed consent is ... required for access to genetic resources.<sup>155</sup>

24. Presently, in regard to the recommendation in the PFII report that "all rights based on customary use must be safeguarded and not only “established” rights" – the response of the Secretariat is deficient and undermines the customary resource rights of Indigenous peoples.

25. It is not sufficient for the Secretariat to reply: "it is clear by the results of the negotiations, that Parties were unwilling or unable to address issues concerning future non-established claims to rights". Such response ignores the international obligations of States Parties and the CBD and/or its Conference of the Parties (COP) as an international organization.

The evasion by Member States of their obligations by acting (in one way or another) through international organisations constitutes an abuse of the legal personality of an international organisation.<sup>156</sup>

26. The "established" rights approach is both dishonourable<sup>157</sup> and discriminatory.<sup>158</sup> Such an approach is incompatible with States' obligations in the *Charter of the United Nations*,<sup>159</sup> *Convention on Biological Diversity*<sup>160</sup> and international human rights law.<sup>161</sup> It could

deprive Indigenous peoples of their rights to self-determination, culture and resources contrary to principles of equality and non-discrimination.<sup>162</sup>

27. Canada is already exploiting the "established" rights approach in the *Nagoya Protocol*. The government of Canada issued a draft domestic policy and related documents in September 2011. Among the many injustices, the government indicated that "established" rights to genetic resources would only include those Aboriginal peoples with "completed comprehensive land-claim and self-government agreements".<sup>163</sup>
28. **It is incorrect for the Secretariat to characterize Indigenous peoples' resource rights as "future non-established claims to rights"**. At the international and national levels, Indigenous peoples' rights are most often determined on the basis of traditional occupation or other use of their traditional lands, territories and resources. As Special Rapporteur James Anaya affirms:

The strengthening of legislative and administrative protections for indigenous peoples' rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples. Of note is ... the Declaration ... affirming simply that rights exist by virtue of "traditional ownership or other traditional occupation or use" (art. 26).<sup>164</sup>

## 1.2 Comments of Secretariat in IASG Report

29. The 2011 report of the Inter-Agency Support Group (IASG) includes the following by the Secretariat of the Convention on Biological Diversity:

On the topic of indigenous peoples and the environment, the Secretariat of the Convention on Biological Diversity presented information on the Nagoya Protocol and recommended that the Permanent Forum seek the views of indigenous peoples from all regions regarding the Convention on Biological Diversity and the Nagoya Protocol processes, particularly when formulating recommendations.<sup>165</sup>

30. In the same paragraph, the Secretariat encouraged the Permanent Forum to not support "minority" views:

Related to this issue was the propensity of a minority of indigenous participants in the Convention on Biological Diversity processes to seek redress at the Permanent Forum when their views were not supported by the indigenous caucus (International Indigenous Forum on Biodiversity). Such practices should be actively discouraged by the Permanent Forum. Also highlighted was the need for recommendations to be within the mandate of the intended United Nations agency in order to ensure that they would be actionable.

31. In making such comments, the Secretariat is politicizing its role. Since its inception, the Permanent Forum has invited Indigenous peoples and individuals from every region of the world to participate in its annual sessions.
32. The Secretariat is also exceeding its authority in suggesting to the PFII expert members which views or concerns should be embraced by them. Such interference by the Secretariat is outrageous.
33. The Secretariat mischaracterizes the role of the International Indigenous Forum on Biodiversity (IIFB). The IIFB does not control what positions are put forward by one or more Indigenous organizations – on their own behalf – in any international forum, including *inter alia* the Permanent Forum. In cases where the IIFB puts forward its position at the CBD, it is adopted by consensus by participating peoples or organizations at such meeting.
34. At the fall 2011 meeting of the Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, concerns were expressed that the Secretariat had omitted from its own Report<sup>166</sup> two key recommendations from the 2011 Report of the Permanent Forum.
35. One of these omissions related to the PFII recommendation on the discriminatory nature of the "established" rights approach in the *Nagoya Protocol*. The other related to the need for the UN, its organs and specialized agencies and States to adopt a human rights-based approach whenever human rights may be at risk. This would include environment, development and a wide range of other issues.<sup>167</sup>
36. As a result, the IIFB made the following "imperative" request:

There are two additional recommendations of the Permanent Forum that we feel were left out of document UNEP/CBD/WG8J/7/7 and the IIFB feels that it is imperative that they are included in the report transmitted to the COP [Conference of the Parties] because of its relevance to the work of the Convention. These recommendations are from the 10<sup>th</sup> Session of the UNPFII  
 ...<sup>168</sup>

37. Even if the views put forward had been by a "minority", it would be undemocratic for the Secretariat to suggest that the Permanent Forum members not support such concerns regardless of their merit.
38. Although the IIFB's request was not initially accommodated, the Executive Secretary of the CBD later agreed to revise his report following an exchange of correspondence with the Grand Council of the Crees (Eeyou Istchee):

... given the interest of the International Indigenous Forum on Biodiversity in having this reiteration brought once again to the attention of the Parties, I am

pleased to inform you that the Secretariat will revise document UNEP/CBD/WG8J/7/7 concerning recommendations arising from the PFII's ninth and tenth sessions, to include this recommendation, and will make the revised document available to the eleventh meeting of the Conference of the Parties.<sup>169</sup>

39. For over two years, joint submissions have been made in regard to the *Protocol* involving Indigenous peoples, human rights organizations and educational institutions from different regions of the world.<sup>170</sup> We have provided detailed analyses on major defects and other injustices in the *Protocol*.
40. It is inappropriate for the Secretariat to attempt to discredit such voices. Many Indigenous people in different parts of the world have applied to the Secretariat to attend CBD meetings, but their applications have been rejected. Indigenous peoples globally rely on written submissions, in order to have their concerns democratically considered by the CBD.
41. It is troubling that the Secretariat has provided over 30 specialized agencies that comprise the IASG with erroneous and prejudicial information on the diverse peoples, organizations and institutions that have endorsed joint submissions – and on their fundamental concerns. Such bias within the Secretariat is in need of immediate redress.

## Endnotes

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<sup>1</sup> *UN Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15. Since the adoption of the *Declaration* in 2007 by the General Assembly, the sole opposing States – Australia, Canada, New Zealand and the United States – have all reversed their positions. Currently, no State in the world officially opposes this international human rights instrument.

<sup>2</sup> Paul Joffe, “*UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*”, (2010) 26 N.J.C.L. 121, <http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf> at 145.

<sup>3</sup> In regard to the Inter-American human rights system, see, e.g., *Mary and Carrie Dann v. United States*, I/A Comm. H.R., Case N° 11.140, Report No. 113/01, para. 97: "Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments." In relation to the African regional human rights system, see *infra* note 36 and accompanying text.

<sup>4</sup> Indigenous peoples' cultural rights are human rights and their existence is “a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples”: see Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), para. 10. And at para. 9:

... cultural rights relate to a broad range of issues, such as ... language; identity ... the conduct of cultural practices and access to tangible and intangible cultural heritage. ... They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place. [emphasis added]

See also Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38 (21 March 2011), para. 78 (Conclusions): "The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life ... and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage."

<sup>5</sup> *UN Declaration*, last preambular para.: "*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect".

<sup>6</sup> General Assembly, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary-General*, UN Doc. A/66/749 (16 March 2012), para. 1.

<sup>7</sup> See, e.g., *ibid.*, at para. 4: "Strengthening the rule of law fosters an environment that facilitates sustainable human development and the protection and empowerment of women, children and vulnerable groups, such as internally displaced persons, stateless persons, refugees and migrants." [emphasis added]

<sup>8</sup> OHCHR, "Opinion Piece by Navi Pillay United Nations High Commissioner for Human Rights: Defending Rights in Mexico", 16 July 2011, <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11251&LangID=E>: "Vulnerability is a condition that affects both indigenous peoples and their advocates." See also United Nations, "Human Rights Protection a Must, UN Independent Experts Affirm on Human Rights Day", Press Release, 9 December 2004, <http://www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>: "Over the years, we have witnessed the immense obstacles certain persons and groups face in enjoying their human rights fully. Among the groups most at risk and in need of protection are indigenous peoples, who have suffered perennial prejudice and discrimination."

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General Assembly, *Right to Food: Note by the Secretary-General*, UN Doc. A/60/350, September 2005 (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 19: "It has long been understood that due to long historical processes of colonization, exploitation and political and economic exclusion, indigenous peoples are among the most vulnerable to poverty, hunger and malnutrition."

<sup>9</sup> General Assembly, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, *supra* note 6, para. 2. [emphasis added] For a similar definition, see United Nations, *New Voices: National Perspectives on Rule of Law Assistance*, 2011, <http://www.unrol.org/files/FINAL%20National%20Perspectives%20Report.pdf> at 8.

<sup>10</sup> 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, 3<sup>rd</sup> sess., Geneva (13 July 2010), <http://quakerservice.ca/wp-content/uploads/2012/01/EMRIP-Study-re-IPs-Rt-to-Participate-Joint-Statement.pdf>.

<sup>11</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "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", Food and Agriculture Organization (Committee on World Food Security), Rome, Italy (April 2012), <http://quakerservice.ca/wp-content/uploads/2012/05/FAO-Natl-Food-Security-Guidelines-Governance-of-Indigenous-Tenure-Rights-GCCEI-Joint-Submission-Apr-12.pdf>.

<sup>12</sup> 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've come here to offer a number of proposals, but we feel as if we have been ignored. ... 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." [quoting Janeth Cuji of Ecuador, emphasis added]

<sup>13</sup> General Assembly, "Statement of Special Rapporteur to UN General Assembly, 2011", Third Committee, New York (17 October 2011), <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2011>:

I have observed throughout my work that the issue of extractive industries is a major and immediate concern of indigenous peoples all over the world. ...

I have observed the negative, even catastrophic, impact of extractive industries on the social, cultural and economic rights of indigenous peoples. I have seen examples of negligent projects implemented in indigenous territories without proper guarantees and without the involvement of the peoples concerned. I have also examined in my work several cases in which disputes related to extractive industries have escalated and erupted into violence.

Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, UN Doc. E/CN.4/1990/9/ Rev. 1 (26 September 1990), para. 104:

The experience of indigenous peoples and development clearly demonstrated that human rights and development are inseparable, for the abuse of the rights of indigenous peoples is principally a development issue. Forced development has deprived them of their human rights, in particular the

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right to life and the right to their own means of subsistence, two of the most fundamental of all rights. Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources ... [emphasis added]

Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), para. 6:

The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures ... [emphasis added]

<sup>14</sup> In regard to in regard to the World Trade Organization (WTO), see 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: "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." [emphasis added]

<sup>15</sup> 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](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/>.

<sup>16</sup> 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."

<sup>17</sup> 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.

<sup>18</sup> 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. 52.

<sup>19</sup> In regard to the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* ["Declaration on Human Rights Defenders"], UNGA Res. 53/144, UN Doc. A/RES/53/144 (8 March 1999), Annex, see the Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>: where it is emphasized that "the Declaration was adopted by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation." [emphasis added]

<sup>20</sup> Paul Joffe, “Canada’s Opposition to the *UN Declaration: Legitimate Concerns or Ideological Bias?*” in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 70 at 87-89.

<sup>21</sup> Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. 1), para. 105, 18th session, 19 March – 14 April 1962. [emphasis added]

<sup>22</sup> International Law Association, “Rights of Indigenous Peoples”, Interim Report, The Hague Conference (2010) at 5. ILA explains: “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.” [emphasis added]

<sup>23</sup> 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 18, para. 85 (Conclusions). In the same paragraph, Anaya concludes: “The significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character.”

<sup>24</sup> *Ibid.*, para. 87 (Conclusions). [emphasis added]

<sup>25</sup> Office of the High Commissioner for Human Rights, “Indigenous rights declaration universally endorsed”, 2010, <http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx>.

<sup>26</sup> *Vienna Declaration and Programme of Action*, adopted by World Conference on Human Rights, June 25, 1993, UN Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5:

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.

<sup>27</sup> *UN Declaration*, especially arts. 38 (legislative and other measures), 40 (effective remedies) and 42 (full application and follow-up). See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, UN Doc. E/C.12/GC/17 (12 January 2006), para. 28: “The right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which he or she is the author, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil.” [emphasis added]

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. 31:

... the right to food of indigenous peoples can be understood within the framework laid out by the Committee on Economic, Social and Cultural Rights that requires States to respect, protect and fulfil the right to food of all members of their population. This implies that the right to food is not only a positive right, it is also a negative right that aims to prevent violations of indigenous people’s existing access to food. [emphasis added]

*Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96, 15<sup>th</sup> Activity Report 2001-02, 31 at para. 44:

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights ... [emphasis added]

<sup>28</sup> Office of the High Commissioner for Human Rights, "International Human Rights Law", available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>:

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), para. 30: "It is the responsibility of States ... to create an environment favourable to cultural diversity and the enjoyment of cultural rights, by meeting their obligations to respect, protect and fulfil those rights. This entails taking a wide range of positive measures, including financial measures."

<sup>29</sup> General Assembly, *Second International Decade of the World's Indigenous People: Note by the Secretary-General*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, in accordance with paragraph 1 of General Assembly resolution 63/161, UN Doc. A/64/338 (4 September 2009), para. 69 (Conclusions and recommendations).

<sup>30</sup> *UN Declaration*, 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 ..."

<sup>31</sup> Office of the High Commissioner for Human Rights, "Statement by Ivan Šimonović, Assistant Secretary-General for Human Rights, on 5th anniversary of UN Declaration on Rights of Indigenous Peoples", High-level commemoration of the fifth anniversary of the adoption of the UN Declaration on the Rights of Indigenous Peoples, New York, 17 May 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12161&LangID=E> :

The Office of the High Commissioner for Human Rights accompanied and supported the process of drafting the Declaration. We are now equally committed, together with the mechanisms established by the Human Rights Council ... to accompanying and supporting efforts to fill the implementation gaps that remain wide and frequent. This is not only our intention but an obligation under Article 42 of the Declaration. [emphasis added]

<sup>32</sup> 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) (advance unedited edition), para. 12.

<sup>33</sup> 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]

<sup>34</sup> *FAO Policy on Indigenous and Tribal Peoples*, (Rome, Italy: FAO, 2010), 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."

<sup>35</sup> 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.

<sup>36</sup> *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."

<sup>37</sup> 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.

<sup>38</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, A/HRC/6/15 (15 November 2007) at para. 64. At para. 17, the Report makes clear that it is advocating a "human rights-based approach".

<sup>39</sup> 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. 25.

<sup>40</sup> United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", February 2008, [www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf](http://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.

<sup>41</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010.

<sup>42</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, *supra* note 17, Annex (Expert Mechanism advice No. 2 (2011)), para. 26.

<sup>43</sup> Human Rights Council, *Analytical study on the relationship between human rights and the environment: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/19/34 (11 December 2011), para. 22.

<sup>44</sup> *Ibid.*, para. 20.

<sup>45</sup> *Ibid.*, para. 78.

<sup>46</sup> “Consensus”, as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

<sup>47</sup> 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, *supra* note 10, paras. 49 *et seq.* See also Grand Council of the Crees (Eeyou Istchee) *et al.*, “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”, *supra* note 11, paras. 94 *et seq.*

<sup>48</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble: “the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist”.

Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations Univ. Press, 1990) at 118: “The subordination of indigenous peoples to the nation-state, their discrimination and marginalization, has historically, in most cases, been the result of colonization and colonialism.” [emphasis added]

General Assembly, *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 2621 (XXV), October 12, 1970, para. 1: “... continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law ...”

*Declaration on the Granting of Independence to Colonial Countries and Peoples*, (1960), G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960), art. 1: “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.”

<sup>49</sup> *UN Declaration*, preamble: “Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”.

<sup>50</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, *supra* note 17, Annex (Expert Mechanism advice No. 2 (2011)), para. 27. [emphasis added]

<sup>51</sup> 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.

<sup>52</sup> General Assembly, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), para. 159 [emphasis added].

<sup>53</sup> S. James Anaya, Presentation, April 14, 2008, in Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, “Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)”, OEA/Ser.K/XVI, GT/DADIN/doc. 339/08 (14 May 2008), Appendix III, 23 at 27. [emphasis added]

<sup>54</sup> 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>.

<sup>55</sup> 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 18, para. 39. [emphasis added]

<sup>56</sup> United Nations Development Group (UNDG), “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, *supra* note 40, 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.”

<sup>57</sup> *Ibid.* at 28: “Consultation and participation are crucial components of a consent process.”

<sup>58</sup> Human Rights Council, “Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples”, UN Doc. A/HRC/15/35 (23 August 2010), para. 30. [emphasis added]

<sup>59</sup> Permanent Forum on Indigenous Issues, *Recommendations of the Permanent Forum*, UN Doc. E/C.19/2012/L.9 (17 May 2012), para. 12. [emphasis added] See also *UN Declaration*, 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 ...”

Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, 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.”

<sup>60</sup> 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.

<sup>61</sup> 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]

<sup>62</sup> E.g., 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."

<sup>63</sup> New Zealand Human Rights Commission, "United Nations Declaration on the Rights of Indigenous Peoples", <http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/unitednationsdeclarationontherightsofindigenoupeoples.php>: "The Declaration ... declares discrimination against indigenous peoples unlawful and promotes their full and effective participation in all matters that concern them."

<sup>64</sup> 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]

<sup>65</sup> UN Commission on Human Rights, *Continuing dialogue on measures to promote and consolidate democracy: Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41*, 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.

<sup>66</sup> Examples of "fundamental" legal objections include those relating to violations of the *Charter of the United Nations* and rule of law, including international human rights standards.

<sup>67</sup> See, e.g., General Assembly, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, *supra* note 6, para. 3.

<sup>68</sup> *Report of the International Law Commission*, 53<sup>rd</sup> sess. (23 April-1 June and 2 July-10 August 2001) in UN GAOR, 56<sup>th</sup> 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."

<sup>69</sup> *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.

<sup>70</sup> International agreements have been or are currently being negotiated in regard to such key matters as biodiversity, climate change and intellectual property. In regard to the Food and Agriculture Organization's *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, Italy, endorsed by Committee on World Food Security 11 May 2012, [http://www.fao.org/fileadmin/user\\_upload/nr/land\\_tenure/pdf/VG\\_Final\\_May\\_2012.pdf](http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf), it is not clear whether these 2012 Guidelines, that were agreed to by participating 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."

<sup>71</sup> 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]

<sup>72</sup> Emphasis added. See also *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."

<sup>73</sup> *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 70, article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

<sup>74</sup> 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".

<sup>75</sup> 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. 55 (Conclusions and Recommendations):

The Special Rapporteur would make the following recommendations:

...

(g) International organizations, such as the World Bank, IMF [International Monetary Fund] and WTO should recognize that they do have binding responsibilities towards human rights, including the right to food. With power must come responsibility.

Effective mechanisms should be developed for different international organizations, which each have their own serious shortcomings. See, e.g., United Nations Development Programme (UNDP), "Proposal for Environmental and Social Compliance Review and Grievance Processes", Discussion Paper, April 2012, <http://social.un.org/index/IndigenousPeoples/tabid/70/articleType/ArticleView/articleId/106/Consultation-on-UNDPs-Environmental-and-Social-Compliance-Review-and-Grievance-Processes-Accountability-Mechanism.aspx> at 29 (Annex 1 - International Accountability Mechanism Benchmarking), where an analysis is provided of the accountability mechanisms of the following seven international financial institutions (IFIs) and one export credit agency:

1. The African Development Bank's Independent Review Mechanism ("AFDB"),
2. The Asian Development Bank's proposed accountability mechanism ("ADB"),
3. The European Bank for Reconstruction and Development's Project Complaint Mechanism ("EBRD"),
4. The European Investment Bank's Complaints Mechanism ("EIB"),
5. The Inter-American Development Bank's Independent Consultation and Investigation Mechanism ("IADB"),
6. The Overseas Private Investment Corporation's Office of Accountability ("OPIC"),
7. The World Bank's Inspection Panel ("WB IP"), and
8. The International Finance Corporation's / the Multilateral Investment Guarantee Agency's Compliance Advisor Ombudsman ("CAO").

<sup>76</sup> 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 ..." See 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 vote and approved by the General Assembly.

*UN Declaration*, art. 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." [emphasis added]

The United States explicitly segregates Indigenous peoples' collective rights from human rights. See 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>:

Moreover, the United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals. The United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights.

<sup>77</sup> Ally Foster, "Canada's human rights reputation under fire", *Embassy*, Canada's Foreign Policy Weekly, May 16, 2012, p. 1.

<sup>78</sup> Sarah Schmidt, "Kenney blasts UN food envoy", *The StarPhoenix* (17 May 2012), <http://www.thestarphoenix.com/news/Kenney+blasts+food+envoy/6635011/story.html>. The Canadian government is well aware that human rights are an international concern and responsibility. Violations of human rights are not overlooked or exempted by UN treaty bodies or special procedures, simply because Canada is considered to be a wealthy developed State.

In regard to the right to food, see the following treaties that Canada has ratified: *International Covenant on Economic, Social and Cultural Rights*, art. 11; *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 U.N.T.S. 13; Can. T.S. 1982 No. 31, adopted by the General Assembly in resolution 34/180 of 18 December 1979 and entered into force 3 September 1981, art. 12(2); *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990, arts.24(2)(c) and (e); and *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, UN Doc. A/61/49 (2006), entered into force 3 May 2008, arts. 25(f) and 28(1).

<sup>79</sup> Sarah Schmidt, "UN food envoy decries 'shocking' conditions in Canada", *Ottawa Citizen* (15 May 2012), <http://www.ottawacitizen.com/business/food+envoy+decries+shocking+conditions+Canada/6626850/story.html>.

Permanent Forum on Indigenous Issues, *Recommendations of the Permanent Forum*, UN Doc. E/C.19/2012/L.9 (17 May 2012), para. 10: "The Permanent Forum urges States to prepare reports on the actions taken to address the recommendations of all United Nations special rapporteurs ... especially the recommendations made at the conclusion of country visits, and encourages States to monitor their progress in this regard, in collaboration with indigenous peoples, United Nations country teams and all other relevant parties." [emphasis added]

<sup>80</sup> Laura Payton, "Aglukkaq says activists hurt Inuit ability to feed families", CBC News, <http://www.cbc.ca/news/canada/north/story/2012/05/16/pol-aglukkaq-arctic-activists-environmentalists.html?cmp=rss>: "Mary Simon, head of Inuit Tapiriit Kanatami, the national organization representing the Inuit, agreed with De Schutter's call for a national food strategy at a press conference Wednesday. ... Almost 70 per cent of Inuit households were found to be food insecure in a recent population health survey, Simon said, six times more than Canadian national average." See also Mia Rabson, "Ottawa turning blind eye to hunger, poverty: Grand Chief", *Winnipeg Free Press* (16 May 2012), online edition, <http://www.winnipegfreepress.com/breakingnews/Ottawa-turning-blind-eye-to-hunger-poverty-Grand-Chief-151771155.html> (referring to Grand Chief Derek Nepinak, Assembly of Manitoba Chiefs).

Grace M. Egeland *et al.*, "Food insecurity among Inuit preschoolers: Nunavut Inuit Child Health Survey, 2007–2008", *Canadian Medical Association Journal*, January 25, 2010, <http://www.cmaj.ca/cgi/rapidpdf/cmaj.091297v1?ijkey=03030e3a1fae0cfc307142cfa474fefa2572cf8d>:

**Results:** Nearly 70% of Inuit preschoolers resided in households rated as food insecure ... Overall, 31.0% of children were moderately food insecure, and 25.1% were severely food insecure, with a weighted prevalence of child food insecurity of 56.1% ... Primary caregivers in households in which children were severely food insecure reported experiencing times in the past year when their children skipped meals (75.8%), went hungry (90.4%) or did not eat for a whole day (60.1%). Primary caregivers in households in which children were moderately food insecure reported experiencing times in the past year when they worried food would run out (85.1%), when they fed their children less expensive food (95.1%) and when their children did not eat enough because there was no money for food (64.3%).

<sup>81</sup> See also *infra* Annex: CBD Secretariat Must Act Impartially.

<sup>82</sup> 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", *supra* note 10.

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<sup>83</sup> *Ibid.*

<sup>84</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "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", *supra* note 11.

<sup>85</sup> *Ibid.* In regard to this Joint Submission, the Secretariat of the FAO's Committee on World Food Security (CFS) did not respond to the diverse concerns raised. It only indicated there had been an open, inclusive and collaborative process and Indigenous peoples "were well represented at all sessions of the Open Ended Working Group": see email, dated 10 May 2012, from Kostas Stamoulis, Secretary, CFS to Paul Joffe, Legal Counsel, Grand Council of the Crees (Eeyou Istchee).

<sup>86</sup> Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010).

<sup>87</sup> See generally Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation", *supra* note 2.

<sup>88</sup> Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development – Spring 2012* (Ottawa: Minister of Public Works and Government Services, 2012), ch. 1 ("Kyoto Protocol Implementation Act") at 22, para. 1.16 (Conclusion): "In substance, the 2011 plan of [Environment Canada] does not contain measures with greenhouse gas (GHG) emission reductions sufficient to achieve the level required to meet the obligations of the Kyoto Protocol or the *Kyoto Protocol Implementation Act*. According to the 2011 plan, actual reductions in 2008 and 2009 totalled 6 million tonnes. To meet the target, GHG emissions would have to be reduced by an additional 805 million tonnes by 2012. [emphasis added]

On 15 December 2011, Canada officially withdrew from the *Kyoto Protocol*. Presently, the Canadian government is badly failing to meet its own inadequate targets set for 2020. See Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development – Spring 2012* (Ottawa: Minister of Public Works and Government Services, 2012), Ch. 2 ("Meeting Canada's 2020 Climate Change Commitments") at 53, para. 2.38 (Conclusion):

In July 2011, Environment Canada released Canada's Emissions Trends, a report that outlines expected GHG emission reductions up to 2020, under varying scenarios. ... [T]he forecast shows that in 2020, Canada's GHG emissions will be 7.4 percent above the 2005 level instead of 17 percent below, which indicates that the 2020 target will not be met with existing measures. [emphasis added]

<sup>89</sup> General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted 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 ..."

<sup>90</sup> 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, 64<sup>th</sup> 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.”

<sup>91</sup> 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.”

<sup>92</sup> 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 18, 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”.

<sup>93</sup> See, e.g., Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010), 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.”

<sup>94</sup> 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."

<sup>95</sup> 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.

<sup>96</sup> "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.”

<sup>97</sup> United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, February 2008, [www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf](http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf), 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

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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]

<sup>98</sup> Food and Agriculture Organization, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, Italy, endorsed by Committee on World Food Security 11 May 2012, [http://www.fao.org/fileadmin/user\\_upload/nr/land\\_tenure/pdf/VG\\_Final\\_May\\_2012.pdf](http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf). ["2012 Guidelines"]

<sup>99</sup> *Ibid.*, para. 9.9. [emphasis added]

<sup>100</sup> *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.

<sup>101</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 17: "The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required ..."

<sup>102</sup> *Black's Law Dictionary*, 9th ed. (St. Paul, Minn.: Thomson Reuters, 2009).

<sup>103</sup> *Ibid.* See also Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, *supra* note 17, Annex (Expert Mechanism advice No. 2 (2011)), para. 28: "Free, prior and informed consent implies that States have a duty to obtain indigenous peoples' consent in relation to decisions that are of fundamental importance for their rights, survival, dignity and well-being."

<sup>104</sup> Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, para. 36. [emphasis added]

<sup>105</sup> FAO 2012 Guidelines, *supra* note 98, para. 4.3. [emphasis added]

<sup>106</sup> See, for example, *UN Declaration*, article 46(2): "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected."

<sup>107</sup> 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 75<sup>th</sup> session, August 2009), para. 5:

The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context for the present recommendation includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards on the principles of non-discrimination and special measures.

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*Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 54 (L'Heureux-Dubé J.): "the contextual approach to s. 15 [of the *Canadian Charter of Rights and Freedoms*] requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history."

<sup>108</sup> *UN Declaration*, article 46(2). [emphasis added]

<sup>109</sup> *UN Declaration*, article 46(3).

<sup>110</sup> See text accompanying note 105 *supra*.

<sup>111</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 165: "Whether a particular measure or government act can be explained by reference to one of those objectives [e.g. development, environment, etc.], however, is ultimately a question of fact that will have to be examined on a case-by-case basis."

See also *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, at 1111: "We wish to emphasize the importance of context and a case-by-case approach to s. 35(1) [of the *Constitution Act, 1982*]. Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case." [emphasis added]

<sup>112</sup> 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]

<sup>113</sup> *UN Declaration*, article 23.

<sup>114</sup> *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."

<sup>115</sup> FAO 2012 Guidelines, *supra* note 98, para. 7.3 [emphasis added] Similarly see para. 7.1: "When States intend to recognize or allocate tenure rights to land, fisheries and forests ..."

<sup>116</sup> 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."

<sup>117</sup> *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]

<sup>118</sup> *Ibid.*, para. 196. [emphasis added]

<sup>119</sup> *Case of the Saramaka People v. Suriname*, *supra* note 37, para. 96. [emphasis added]

<sup>120</sup> *UN Declaration*, article 26(3).

<sup>121</sup> International Law Association, *supra* note 22, at 22-23. S. James Anaya & Robert A. Williams, Jr., *supra* note 116, 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*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, 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."

<sup>122</sup> 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."

<sup>123</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* ["Declaration on Human Rights Defenders"], *supra* note 19, Annex, art. 3.

See also Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>: "[The Declaration] contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding – such as the International Covenant on Civil and Political Rights."

<sup>124</sup> *WIPO General Rules of Procedure*, adopted September 28, 1970 and as amended, [http://www.wipo.int/freepublications/en/general/399/wipo\\_pub\\_399.html](http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.html).

<sup>125</sup> Permanent Forum on Indigenous Issues, Recommendations of the Permanent Forum: Comprehensive dialogue with the World Intellectual Property Organization, UN Doc. E/C.19/2012/L.4 (14 May 2012), para. 10: "Consistent with article 18 of the United Nations Declaration on the Rights of Indigenous Peoples, the Permanent Forum requests Member States to explore and establish modalities to ensure the equal, full and direct participation of indigenous peoples in all negotiations of the Intergovernmental Committee [on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore]." [emphasis added]

World Intellectual Property Organization, "TK Update: WIPO Engages in Comprehensive Dialogue with Top UN body on Indigenous Issues", News release, Geneva, 11 May 2012, [http://www.wipo.int/tk/en/news/2012/news\\_0012.html](http://www.wipo.int/tk/en/news/2012/news_0012.html): "indigenous organizations made constructive proposals for improving the ability of indigenous peoples to participate in the IGC. Many requests were made for WIPO Member States to amend the IGC's rules of procedure to enable all indigenous peoples the right to participate in the negotiations on an equal footing with States." [emphasis added]

<sup>126</sup> General Assembly, UN GAOR, 61st Sess, 107th plen. mtg., UN Doc. A/61/PV.107 (2007) at 10 (Mr. Chávez (Peru), original in Spanish): "... in 1995, the draft was submitted for consideration to a working group of the Commission .... [F]or the first time in the history of the United Nations, representatives of indigenous peoples, who would enjoy the rights cited in the Declaration, actively participated in such a working group, lending unquestionable legitimacy to the document."

<sup>127</sup> Office of the High Commissioner for Human Rights, "Statement by Ivan Šimonović, Assistant Secretary-General for Human Rights, on 5th anniversary of UN Declaration on Rights of Indigenous Peoples", *supra* note 31: "We must [fill the implementation gaps] in the same spirit of partnership that gave birth to the Declaration, ensuring that indigenous peoples have not only a voice but true influence in the decision-making. We need to live up to the motto

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‘nothing about us without us’. This must be the case at the national level but also in international processes ... This spirit of partnership must also be built into the preparation and content of the forthcoming World Conference on Indigenous Peoples in 2014.” [emphasis added]

<sup>128</sup> Currently, the United Nations Development Programme (UNDP) is undertaking a "Consultation" on its "Proposal for Environmental and Social Compliance Review and Grievance Processes", Discussion Paper, April 2012, <http://social.un.org/index/IndigenousPeoples/tabid/70/articleType/ArticleView/articleId/106/Consultation-on-UNDPs-Environmental-and-Social-Compliance-Review-and-Grievance-Processes-Accountability-Mechanism.aspx>. Comments are invited to be sent to: [jennifer.laughlin@undp.org](mailto:jennifer.laughlin@undp.org) by 18 June 2012.

At 4, it is indicated that the Proposal is to establish:

- a **compliance review** process to respond to claims that UNDP is not in compliance with applicable environmental and social policies, including its environmental and social screening procedure; and
- a **grievance process** that ensures individuals and communities affected by UNDP projects have access to appropriate dispute resolution procedures for hearing and addressing project-related disputes.

While there are no specific references to "human rights", the Proposal indicates that one of the reasons for UNDP to adopt new compliance review and grievance processes is to: "Provide access to processes that would empower and protect the rights and interests of local communities and vulnerable groups and afford them greater voice and a fair hearing in the development process, particularly in light of UN agency immunities".

At 18, it is specified that the proposed compliance review procedure does not affect the "privileges and immunities of the UNDP" and is an "internal" process where no "specific recourse" is required:

Note that in all cases the ultimate remedy is decided by the UNDP Administrator; no decision is legally required. The compliance review function is not a court of law nor does any finding change any underlying legal responsibility, immunity or liability of the UNDP. Nothing in the proposed compliance review process should be construed as a waiver, express or implied, of the privileges and immunities of UNDP. The process is internal and does not create any expectation that a specific recourse is required nor permit any legal cause of action against the organization. [emphasis added]

<sup>129</sup> *UN Declaration*, art. 21(2): "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities." See also *UN Declaration*, arts. 38, 41 and 42 (positive measures required by the United Nations, its bodies and specialized agencies and States in regard to all the provisions of the *Declaration*).

*Indigenous and Tribal Peoples Convention, 1989*, 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."

See also 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 75<sup>th</sup> session, August 2009). Human Rights Committee, *General Comment No. 23, Article 27*, 50th sess., 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), para. 7 (positive legal measures in regard to Indigenous peoples' way of life and traditional activities). Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20 (2 July 2009), para. 9 (special measures to attenuate or suppress conditions that perpetuate discrimination).

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<sup>130</sup> See *supra* note 66.

<sup>131</sup> Human Rights Council, *Report of the independent expert on human rights and international solidarity, Rudi Muhammad Rizki*, UN Doc. A/HRC/15/32 (5 July 2010), para. 58 (Conclusions). [emphasis added]

Office of the High Commissioner for Human Rights, "Statement by Ivan Šimonović, Assistant Secretary-General for Human Rights, on 5th anniversary of UN Declaration on Rights of Indigenous Peoples", *supra* note 31: "overall indigenous peoples in all regions of the world remain amongst the most marginalized and impoverished, frequently victims of discrimination and excluded from decision-making. Land grabs and ever-increasing dispossession of ancestral lands, territories and resources threatens their cultural and physical integrity, with indigenous women often the first ones to suffer."

<sup>132</sup> *Supra* note 6.

<sup>133</sup> Permanent Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2010/43-E/C.19/2010/15; and Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39.

<sup>134</sup> Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, *supra*, note 133, para. 122; and Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, para. 26

<sup>135</sup> Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, para. 25.

<sup>136</sup> Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, para. 27. See also 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. 30: "Control over and preservation of plant and animal genetic resources is today crucial for the economic interests of indigenous peoples and their long-term food security."

<sup>137</sup> Convention on Biological Diversity, *Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity*, adopted at Nassau, Bahamas, 28 November – 9 December 1994, COP Decision I/1 Annex (with the exception of paragraph 1 of rule 40, which relates to voting on matters of substance), <http://www.cbd.int/doc/legal/cbd-rules-procedure.pdf>.

<sup>138</sup> Conference of the Parties to the Convention on Biological Diversity, *Report of the Seventh Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, Hyderabad, India, October 2012, UN Doc. UNEP/CBD/COP/11/7 (24 November 2011), Annex I, Recommendation 7/8, para. 2.

<sup>139</sup> Annex to General Assembly Decision 55/488 of 7 September 2001 provides: "The General Assembly ... reiterates that the terms 'takes note of' and 'notes' are neutral terms that constitute neither approval nor disapproval."

<sup>140</sup> *UN Declaration*, art. 40: "Indigenous peoples have the right ... to effective remedies for all infringements of their individual and collective rights."

*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, *supra* note 19, Annex, art. 1: "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

<sup>141</sup> Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 39, para. 27. [emphasis added]

<sup>142</sup> Permanent Forum on Indigenous Issues, "Recommendations Arising from the Ninth and Tenth Sessions of the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity - A Concise Summary of Actions Taken: *Note by the Executive Secretary*", 2012, para. 33. The Permanent Forum makes reference here to Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15. [emphasis added]

Article 12(4) of the *Protocol* provides: "Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention."

<sup>143</sup> GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15. Section 31 of the *UN Declaration* affirms:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. [emphasis added]

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

<sup>144</sup> *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

<sup>145</sup> Emphasis added. For the purposes of the *Convention on Biological Diversity*, "biological resources" includes, *inter alia*, genetic resources (art. 2).

Indigenous peoples' cultural well-being is an integral part of sustainable development: see, e.g., *Declaration on the Establishment of the Arctic Council*, Ottawa, 19 September 1996, (1996) 35 I.L.M. 1387, preamble: "Affirming our commitment to sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being".

<sup>146</sup> Louis Henkin, "Introduction" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 1 at 13: "International human rights are inherent". *UN Declaration*, preambular para. 7: "Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (27-28 October 2005), para. 8: "The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights."

<sup>147</sup> United States, *Initial reports of States parties due in 1993: United States of America*, UN Doc. CCPR/C/81/Add.4 (24 August 1994) (State Party Report), para. 62: "Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title". In Canada, see *Calder v. A.G. British Columbia*, [1973] S.C.R. 313 (Supreme Court of Canada) at 390, per Hall J.: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment."

<sup>148</sup> See also *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report, 1998-1999, Annex V, 52 at 58, para. 66: "To allow national law to have precedent over the international law of the [African] Charter

would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law.”

<sup>149</sup> In Canada, see for example *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, where the Supreme Court of Canada made the distinction between “established” rights and “unproven” rights. The Court indicated at para. 41 that, in the face of proposed government action, both types of “existing” rights require prior consultation to protect such rights from harm: “The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to *protect unproven or established rights from irreversible harm* as the settlement negotiations proceed ...” [emphasis added]

<sup>150</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 37: “The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims.”

<sup>151</sup> Article 1 of the *Convention on Biological Diversity* and the *Nagoya Protocol* [emphasis added]. Indigenous peoples’ human rights must be an integral part of any “fair and equitable” benefit sharing regime.

<sup>152</sup> United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, February 2008, [www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf](http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf), at 24: “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.” [emphasis added]

See also Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, UN Doc. E/CN.4/2003/14 (26 February 2003), para. 53: “The rights-based approach must be the starting point for all our endeavours, whatever our spheres of operation: trade, finance, development, security, in both the public and private sectors. In a sense, this is an approach that involves human rights strategies of governance, namely, that we take the basic human rights as the starting point for governmental programmes and the programmes of national, regional and international institutions.” [emphasis added]

<sup>153</sup> Permanent Forum on Indigenous Issues, “Recommendations Arising from the Ninth and Tenth Sessions of the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity - A Concise Summary of Actions Taken: *Note by the Executive Secretary*”, 2012, para. 33. The Permanent Forum makes reference here to Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 33. [italics in original, underlining added]

<sup>154</sup> 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. [emphasis added]

<sup>155</sup> *Ibid.*, at 19. [emphasis added]

<sup>156</sup> Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt, “Accountability for Human Rights Violations by International Organisations: Introductory Remarks” in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp/Oxford/Portland: Intersentia, 2010) 1 at 10.

<sup>157</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It must respect these potential, but yet unproven, interests. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be

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to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. [para. 27, emphasis added]

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of ... "meaningful content" ... It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable. [para. 33, emphasis added]

<sup>158</sup> 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>, paras. 65-75, 83-94.

<sup>159</sup> *Charter of the United Nations*, arts. 1(3), 2(2), 55 c and 56.

<sup>160</sup> *Convention*, art. 1 (central objective of "fair and equitable benefit sharing) and art. 3: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources".

<sup>161</sup> See, e.g., *International Covenant on Civil and Political Rights*, arts. 1 and 27; *International Covenant on Economic, Social and Cultural Rights*, arts. 1, 2, 6, 11, 12 and 15(1)(a); ICERD, arts. 2(1), 2(2), and 5(d)(v) and (e); UNDRIP, preambular paras. 1, 6-8, 10, 11, 14, 15, 22 and 24 and arts. 1-4, 7, 8, 11-15, 18, 19, 26-34, 37-43 and 46.

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):

States parties should take measures to *guarantee* ... the exercise of th[at] right ... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ... (para. 36)

... the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant. (para. 48)

... in accordance with the Covenant and other international instruments dealing with human rights and the protection of cultural diversity, ... article 15, paragraph 1 (a) ... of the Covenant ... includes the following core obligations applicable with immediate effect:

To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life ... (para. 55) [emphasis added]

See also Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), para. 9, where it is indicated that the right to "take part in cultural life" - as affirmed in the *International Covenant on Economic, Social and Cultural Rights* - includes "protecting access to cultural heritage and resources".

Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38 (21 March 2011), para. 45: "The right of peoples to self-determination protects the right of peoples to freely pursue their cultural development, and dispose of their natural wealth and resources, which has a clear link with cultural heritage."

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 27: "The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."

<sup>162</sup> Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37<sup>th</sup> sess., (1989), para. 1: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."

See, e.g., *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. 93, where the Inter-American Court interpreted the Indigenous peoples' right to property under Article 21 of the *American Convention on Human Rights* in a manner consistent with international human rights law: "... 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."

<sup>163</sup> Most First Nations in Canada do not have such "completed" agreements. For an analysis of Canada's draft position, see Grand Council of the Crees (Eeyou Istchee) *et al.*, "*Nagoya Protocol: Comments on Canada's Possible Signature and Draft Domestic Policy*", Joint Submission to the government of Canada (October 2011), <http://quakerservice.ca/wp-content/uploads/2011/12/Nagoya-Protocol-GCCEI-Joint-Submission-on-Canadas-possible-signature-Oct-28-11.pdf>, paras. 50-68. See also para. 15, where it is indicated by First Nations across Canada that the "proposed policy perpetuates the discriminatory approach on genetic resource rights that the Canadian government insisted upon during the negotiations".

<sup>164</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, UN Doc. A/HRC/15/37/Add.4 (1 June 2010), para. 29. [emphasis added]

See also *Case of the Mayagna (Sumo) Awas Tingni Community*, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 151: "As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."

*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. 196: "...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."

<sup>165</sup> Permanent Forum on Indigenous Issues, "Report of the Inter-Agency Support Group on Indigenous Peoples' Issues on its 2011 annual meeting", 8 March 2012, para. 20. [emphasis added]

<sup>166</sup> Convention on Biological Diversity, (Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, Seventh meeting, Montreal, 31 October - 4 November 2011), *Recommendations Arising from the Ninth and Tenth Sessions of the United Nations Permanent Forum on Indigenous Issues to the Convention on Biological Diversity: Note by the Executive Secretary*, UNEP/CBD/WG8J/7/7 (12 September 2011).

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<sup>167</sup> Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 39, para. 25.

<sup>168</sup> See Statement of the International Indigenous Forum on Biodiversity, Item 7- Recommendations Arising From The Ninth And Tenth Sessions Of The United Nations Permanent Forum On Indigenous Issues To The Convention On Biological Diversity, Seventh meeting of the Working Group on Article 8(j) and related provisions (WG8j-7), Montreal, Canada, November 2, 2011.

<sup>169</sup> Letter of 28 November 2011 from the Executive Secretary, Ahmed Djoghlaif, Convention on Biological Diversity, to Paul Joffe, Legal Counsel, Grand Council of the Crees (Eeyou Istchee). [emphasis added]

In regard to the "established" rights approach, it is erroneous for the Secretariat or Executive Secretary to suggest that the PFII members' discrimination concerns were previously raised. In this regard, see Email of 8 December 2011 from Paul Joffe, Legal Counsel, Grand Council of the Crees (Eeyou Istchee) to the Executive Secretary, Ahmed Djoghlaif, Convention on Biological Diversity:

In paragraph 27, the Permanent Forum members highlight concerns of discrimination relating specifically to the Nagoya Protocol that have not been raised previously in their reports. There can be no question as to the relevance of the paragraph to the Conference of the Parties (COP). The prohibition against racial discrimination is a peremptory norm, which binds all Parties to the *Protocol*, as well as the CBD as a UN specialized agency. [emphasis added]

<sup>170</sup> 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>.