

**Ad Hoc Open-Ended Inter-Sessional Working Group on
Article 8(j) and Related Provisions of the Convention
on Biological Diversity**

Eighth meeting

Montreal, 7-11 October 2013

**Agenda Item 5: Recommendations from the United Nations
Permanent Forum on Indigenous Issues**

**Recommendations in Paras. 26 and 27 of the Report of the 10th Session of the
UN Permanent Forum on Indigenous Issues: Implications for the Convention
on Biodiversity and its Parties**

Joint Submission of Grand Council of the Crees (Eeyou Istchee); Na Koa Ikaika KaLahui Hawaii; Union of British Columbia Indian Chiefs; Continental Network of Indigenous Women of the Americas-ECMIA; First Nations Summit; International Indian Treaty Council; BC Assembly of First Nations; Ogiek Welfare Council (Kenya); Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Chirapaq, Centre of Indigenous Cultures of Perú; Federation of Saskatchewan Indian Nations; Canadian Friends Service Committee (Quakers); Robert A. Williams, Jr., E. Thomas Sullivan Professor of Law and Professor of American Indian Studies, Indigenous Peoples Law and Policy Program, University of Arizona Rogers College of Law; Innu Council of Nitassinan; Haudenosaunee of Kanehsàtâ:ke; National Association of Friendship Centres; Indigenous World Association; Plenty Canada; First Peoples Human Rights Coalition; Netherlands Centre for Indigenous Peoples; Assembly of First Nations; Chiefs of Ontario; Metis National Council.

Introduction

1. We welcome the opportunity to make this Joint Submission. In Decision XI/14¹ G, paragraph 2, the Conference of the Parties (COP) noted the recommendations contained in paragraphs 26 and 27 of the Report on the 10th session of the United Nations Permanent Forum on Indigenous Issues (PFII).² These recommendations are as follows:

Affirmation of the status of indigenous peoples as “peoples” is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43 - E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology “indigenous peoples and local communities” as an accurate reflection of the distinct identities developed by

those entities since the adoption of the Convention almost 20 years ago. (para. 26, emphasis added)

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 [Nagoya] 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. (para. 27, emphasis added)

2. In regard to these recommendations, COP requested the "Ad Hoc Open-ended Intersessional Working Group on Article 8(j) and Related Provisions, taking into account submissions by Parties, other Governments, relevant stakeholders and indigenous and local communities, to consider this matter, and all its implications for the Convention on Biological Diversity and its Parties, at its next meeting, for further consideration by the Conference of the Parties at its twelfth meeting."³ The next meeting of the Working Group will be in Montreal, 7-11 October 2013.
3. In the CBD Notification 2013-007 – "Programme of Work on Article 8(j) and related provisions: Request for contributions from Parties and stakeholders",⁴ the CBD Executive Secretary invited submissions as described in Decision XI/14 G, para. 2 by 1 April 2013.
4. The CBD Notification invites submissions of views on the Permanent Forum's recommendation in paras. 26 and 27 – but then appears to only solicit views on use of the term "indigenous peoples and local communities".
5. No such limitation is found in COP Decision XI/14 or in the COP Final Report of the eleventh meeting.⁵ The Permanent Forum's recommendation in para. 27 addresses concerns other than use of the term "indigenous peoples and local communities" in para. 26.
6. This Joint Submission will address the implications of paras. 26 and 27, as requested by COP Decision XI/14. Since each of these paras. makes reference to the *Convention on Biological Diversity*⁶ and the *Nagoya Protocol*,⁷ both instruments will be included in our analysis.

Use of term "indigenous peoples and local communities" (PFII, para. 26)

7. The *Convention on Biological Diversity* was adopted in 1992, with little participation of Indigenous peoples in its formulation. Since that time, numerous international standards have emerged that are relevant to the *Convention* and influence the interpretation of its provisions – particularly those relating to Indigenous peoples' rights and related State obligations.

8. During the negotiations of the *Nagoya Protocol*, the *Convention* was not consistently interpreted in accordance with contemporary standards. In regard to Indigenous peoples, some Parties refused to accept key changes in terminology based on new international developments. Some sought to minimize Indigenous peoples' status and human rights.⁸
9. The *Protocol* uses the term "indigenous and local communities", as this is the expression used in the *Convention on Biological Diversity*. Since 1992, significant advancements have occurred in international law and "indigenous peoples" is the term most extensively used.
10. Use of the term "indigenous peoples and local communities" was discussed at the 7th meeting of the Working Group on article 8(j) in Montreal (31 October – 4 November 2011). However, the Parties did not agree by consensus on use of this term.
11. According to international law, the term "peoples" has a particular legal status and all "peoples" have the right of self-determination.⁹ This same legal status and right are not recognized in regard to "minorities" or "communities" *per se*. As Special Rapporteur on the rights of indigenous peoples, James Anaya, affirms:

The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.¹⁰

12. In 2005, the Special Rapporteur on the right to food underlined the importance of Indigenous peoples' right to self-determination, as well as the "prohibition of discrimination" in this context. In particular, he emphasized that Indigenous "control over plant and animal genetic resources" is "crucial for ... their food security":

Of special importance to the right to food of indigenous peoples is common article 1 of both human rights covenants, which recognizes the rights of all peoples to self-determination and the right to freely pursue their economic, social and cultural development. ... The prohibition of discrimination ... is also of crucial importance for indigenous peoples. ... 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.¹¹

13. The right of self-determination, as provided in the international human rights Covenants, has been confirmed repeatedly to apply to the world's Indigenous peoples.¹² States that seek to restrict or deny Indigenous peoples their status as "peoples", in order to impair or deny their rights, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹³

In this Convention, the term 'racial discrimination' shall mean any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the

recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁴

14. Such action also violates the principle of “equal rights and self-determination of peoples” under the *Charter of the United Nations*¹⁵ and as affirmed in the *UN Declaration on the Rights of Indigenous Peoples*.¹⁶ In its 2010 Report, the Permanent Forum on Indigenous Issues urged the Parties to the *Convention on Biological Diversity* to use the term “peoples” in relation to Indigenous peoples.¹⁷ This recommendation was not followed in the *Nagoya Protocol* negotiations.
15. The term “indigenous peoples” is used in both the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*¹⁸ and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.¹⁹
16. On 16 October 2012 at the COP 11 meeting in India, Canada and India opposed use of the term "Indigenous peoples and local communities". In violation of its constitutional and international obligations, Canada failed to consult with Indigenous peoples prior to taking this position. For years, government representatives have not been permitted to discuss the issue of "Indigenous peoples". Such actions violate the principles of democracy, rule of law and respect for human rights.
17. By opposing use of the term "Indigenous peoples" in a treaty, Canada and India are contradicting their own previous actions. Both States have agreed to the inclusion of such term in the 2003 Convention on intangible cultural heritage and India also in the 2005 Convention on cultural expressions.²⁰ The same is true for Australia, France, United Kingdom, and European Union – who have opposed use of such term at the CBD or other international forums.²¹
18. Indigenous peoples have strived for decades to be recognized as “peoples” under international law. With the historic adoption of the *UN Declaration on the Rights of Indigenous Peoples* in September 2007, the issue of “peoples” was resolved. Today, the term “indigenous peoples” is used consistently by the General Assembly, Office of the High Commissioner for Human Rights, Human Rights Council, treaty monitoring bodies, specialized agencies, special rapporteurs and other mechanisms within the international system.
19. Failure to use the term “Indigenous peoples” or “Indigenous peoples and local communities” in the *Convention on Biological Diversity* and *Nagoya Protocol* is not consistent with international practice.²² It diminishes respect for, and confidence in, both these instruments.

The CBD expressly refers to "indigenous and local communities" rather than "Indigenous peoples". Far from mere semantics, the latter term carries with it an extensive body of international law that is invaluable to the effective protection of Indigenous peoples, whereas the former term does not.²³

All rights based on customary use must be safeguarded (PFII, para. 27)

20. The Permanent Forum on Indigenous Issues rightfully recommends: "Consistent with the objective of 'fair and equitable' benefit sharing in the Convention and [Nagoya] Protocol, all rights based on customary use must be safeguarded and not only "established" rights." (*supra* para. 1)

21. Yet in regard to fair and equitable benefit sharing arising from the use of genetic resources, article 5(2) of the *Protocol* only provides for benefit sharing in regard to "established" rights of Indigenous and local communities:

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.

22. Similarly, 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.

23. In both articles 5(2) and 6(2), the reference 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.²⁴ 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.²⁵

24. Should the term "established" be interpreted in such a restrictive manner, most Indigenous peoples worldwide could be denied their rights to genetic resources. If so, widespread dispossession and impoverishment would result. In light of such prejudicial factors, articles 5(2) and 6(2) are incompatible with the overall objectives and duties of States in the *Convention* and *Protocol*.

25. 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".²⁶

26. The *Protocol* relies excessively on national legislation or law to achieve fair and equitable benefit-sharing, without sufficient elaboration on the supportive role that such legislation must play. Articles 5(2) and 6(2) refer to "in accordance with domestic legislation" and "in accordance with domestic law".
27. Such phrases create uncertainty. They open the door to unjust and abusive interpretations by some States, in regard to Indigenous peoples' rights to genetic resources.
28. A similar problem exists in the *Convention*. Article 8(j) provides: "Each Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ..."
29. In regard to genetic resources (GR) and traditional knowledge (TK), Special Rapporteur James Anaya recognizes the positive role national legislation can play. However, he cautions against using such phrases in a manner that is inconsistent with international human rights law:

My observation here is similar to that made with regard to genetic resources. ... National legislation must at the same time recognize indigenous peoples' right to traditional knowledge generated in accordance with international standards. ... These provisions should also affirm in clear terms that such national legislation must be respectful of indigenous peoples' rights to traditional knowledge generated by them, consistent with international human rights law.²⁷

30. National legislation *per se* is not synonymous with the rule of law. In his March 2012 report on strengthening the rule of law nationally and internationally, the UN Secretary-General affirmed: "The rule of law is a core principle of governance that ensures justice and fairness, values that are essential to humanity."²⁸
31. In regard to the rule of law, the Secretary-General's 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.²⁹

32. Good governance requires national legislation that supports Indigenous peoples' human rights and their governing institutions. For example, the International Labour Organization provides:

... ensuring good governance would imply inclusive national legislation and governance structures that provide the framework for recognition of indigenous rights – but also the recognition of indigenous and tribal peoples’ own governance structures that must be respected and strengthened in the process of development.³⁰

33. “Customary use” is a well-established basis for recognition of Indigenous peoples’ land and resource rights in international and domestic legal systems.³¹ Special Rapporteur Anaya describes:

... a rich jurisprudence from regional and domestic courts, as well as from UN treaty bodies, affirms that indigenous peoples’ traditional use of lands and resources results in property rights with the same legal status as state granted title.³²

34. In 2009, the African Commission on Human and Peoples’ Rights concluded that “traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title”.³³ Similar rulings have been made by the Inter-American Court of Human Rights.³⁴

35. In regard to Indigenous peoples and local communities, article 10(c) of the *Convention on Biological Diversity* 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 ...³⁵

36. In order for States to “protect and encourage” such customary use, the necessary conditions for Indigenous peoples and local communities are said to include: “security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures”.³⁶ Customary use entails customary laws, protocols and procedures. Yet the *Protocol* and COP Decisions do not address these conditions or implement article 10(c) in a manner that is “fair and equitable”.

37. 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. As indicated by the Executive Secretary of the Convention on Biological Diversity, the traditional purposes related to these practices should remain “paramount”:

Customary use of biological resources ... may also entail restrictions in accordance with customary laws: such restrictions must be respected as a necessary function of cultural survival. ... [I]t is the traditional purposes for such taking which should remain paramount in considering customary uses of biological resources and traditional cultural practices.³⁷

38. The traditional knowledge of Indigenous peoples and local communities has far-reaching significance for their economies and cultures and for the conservation of biological diversity. TK and GR are interrelated and “inseparable”. The preamble of the *Protocol* highlights:

... the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities ...³⁸

39. The “customary use” of biological resources and “traditional practices” in article 10(c) of the *Convention* relate to TK as well as GR, particularly in view of their “inseparable” nature. Special Rapporteur Anaya states: "Genetic resources and traditional knowledge constitute integral elements of indigenous peoples' societies and cultures and, consequently, indigenous peoples' rights to autonomy and self-governance extend to such knowledge and resources."³⁹
40. In contrast, article 12(1) of the *Protocol* understates State obligations in the *Convention*, *UN Declaration* and *Indigenous and Tribal Peoples Convention, 1989*.⁴⁰ Article 12(1) requires States to “take into consideration ... customary laws, protocols and procedures” with regard to TK associated with GR:

In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

41. In regard to the customary use of biological resources (*Convention*, art. 10(c)), there is no such phrase as “subject to national legislation and relevant international obligations”. Without authority, the Conference of the Parties added this phrase to Aichi Biodiversity Target 18 in the Strategic Plan rather than the *Convention* phrase “in accordance with traditional cultural practices”:

Target 18: By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.⁴¹

42. In the *Convention*, Indigenous peoples’ human right to traditional knowledge is not “subject to ... relevant international obligations”. If such obligations include those in trade

and other international agreements that may undermine traditional knowledge, then COP has acted without legal authority and in a manner that is inconsistent with the provisions of the *Convention*.⁴²

43. Trade and development issues do not prevail over human rights. The UN High Commissioner for Human Rights has underlined:

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. ... [T]his is an approach that involves human rights strategies of governance, namely, that we take the basic human rights as the starting point for ... the programmes of national, regional and international institutions.⁴³

Need to respect Indigenous peoples' rights to genetic resources consistent with *UN Declaration* (PFII, para. 27)

44. In para. 27, the Permanent Forum reiterates the "importance of respecting and protecting indigenous peoples' rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples". (*supra* para. 1)
45. The *UN Declaration* is the most comprehensive universal international human rights instrument explicitly addressing the rights of Indigenous peoples. The *Declaration* is currently a consensus instrument globally as no state formally opposes it. This reinforces its overall significance and diverse legal effects.
46. 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."⁴⁴
47. 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 land and resource rights.
48. Article 31(1) of the *Declaration* affirms that Indigenous peoples have, *inter alia*, the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, ... including ... genetic resources".
49. Article 31(2) provides: "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."
50. In regard to GR and TK, the vital need for conformance with the *UN Declaration* has been stressed by the UN Expert Mechanism on the Rights of Indigenous Peoples:

It is imperative that United Nations institutions and related entities take a human rights-based approach to the development of international legal standards and policies on traditional knowledge, traditional cultural expressions and genetic resources, including in relation to access and benefit sharing, to ensure that they conform to the Declaration on the Rights of Indigenous Peoples.⁴⁵

51. Special Rapporteur Anaya has concluded: "Processes within the United Nations system for the development of new multilateral treaties or other instruments ... should be consistent with international standards concerning the rights of indigenous peoples, both in relation to their participation in these processes and in terms of substantive outcomes."⁴⁶ He then added:

... the outcomes of these processes should reinforce the rights of indigenous peoples as affirmed in the Declaration. In no instance should a new international treaty or other instrument ... fall below or undermine the standards set forth in the Declaration or established in other international sources.⁴⁷

52. The *Convention's* objective of fair and equitable sharing of benefits requires that "all rights" to genetic resources be taken into account. This requirement applies to both the "utilization" of and "access" to genetic resources. As Bolivia emphasized at the time of the adoption of the *Nagoya Protocol*:

Mother Earth contains our biological heritage, our greatest wealth, for which we demand transparent actions that guarantee fair and equitable distribution of benefits and that at long last recognize the true guardians of these resources and the associated traditional knowledge: ... indigenous peoples.⁴⁸

53. Yet as addressed above, in regard to fair and equitable benefit sharing arising from the use of genetic resources, articles 5(2) and 6(2) of the *Protocol* only provides for benefit sharing in regard to "established" rights of Indigenous and local communities.
54. This raises the concern that, in disregarding the provisions of the *Convention*, the *Nagoya Protocol* is discriminatory.⁴⁹ It attempts to deprive Indigenous peoples of their rights to self-determination, culture and resources contrary to principles of equality and non-discrimination.⁵⁰ The *Protocol* is not authorized to interpret the *Convention* in a manner that runs counter to its provisions.
55. State approaches of solely taking measures in relation to "established" rights, and not all rights, over genetic resources of Indigenous and local communities is incompatible with the jurisprudence of the Committee on the Elimination of Racial Discrimination. For example, in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the discriminatory distinction between titled and untitled communities from the 2006 Amerindian Act and from any other legislation."⁵¹

56. States cannot unilaterally separate genetic resources from traditional knowledge and other cultural heritage, with a view to limiting Indigenous rights to such resources. The cultural heritage of Indigenous peoples, including genetic resources, must be addressed holistically.⁵² As Special Rapporteur Erica-Irene Daes emphasized: “All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned.”⁵³
57. The prohibition against racial discrimination is a peremptory norm.⁵⁴ Therefore, even if articles 5(2) and 6(2) have been adopted by consensus among Contracting Parties, these articles have no legitimacy or validity.
58. A principled way to resolve this serious problem is to interpret articles 5(2) and 6(2) in a manner consistent with the *UN Declaration*, regardless of the specific wording of the *Protocol*. It is only if such articles could not possibly be so interpreted that the *Protocol* would have to be amended.
59. This is the recommended approach and solution put forward by Special Rapporteur Anaya in regard to any existing treaty or other normative instrument:

As for existing treaties or other normative instruments, including agency guidelines and policies, they should be interpreted and implemented in a way that is consistent with the Declaration on the Rights of Indigenous Peoples, whether or not the specific texts of these instruments reflect language which exactly matches the terms of the Declaration, unless the wording clearly does not allow for such an interpretation. If the wording of a text is such that it cannot be applied consistently with the Declaration, it should be amended or reformed.⁵⁵

Additional implications resulting from CBD rules of procedure

60. Underlying the recommendations made by the UN Permanent Forum (paras. 26 and 27) are serious concerns that are exacerbated by out-dated rules of procedure within the CBD.
61. Such rules are heavily weighted in favour of States. Indigenous peoples remain highly vulnerable to State discretion and are not part of any consensus⁵⁶ on provisions relating to Indigenous rights and concerns.
62. When the practice is to achieve a consensus among the 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.
63. In the negotiations on the *Nagoya Protocol*, there was no legal obligation to require consensus among the Parties. Even if such a duty existed, it could not prevail over the

obligations of States to respect the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law.

64. In the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, it is recognized that the rule of law applies to all States and international organizations. In order to attain legitimacy, all actions must respect the rule of law and justice:

We [Heads of State and Government ...] recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.⁵⁷

65. As reaffirmed in this 2012 *Declaration*, States cannot use international organizations, such as the CBD, to evade their commitments in the *Charter of the United Nations* and to undermine Indigenous peoples' human rights:

We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice ... (para. 1)

We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights ... for all, without distinction of any kind. (para. 6)

66. In the event of conflict between the obligations of States under the *Charter of the United Nations* and those under any other international agreement, the *Charter* obligations would prevail. This is especially the case, since human rights "occupy a hierarchically superior position among the norms of international law".⁵⁸
67. There are compelling reasons for not establishing rigid rules requiring consensus. Crucial measures on such global issues as biodiversity, climate change, environmental security and human rights are too important to be restricted to substandard measures or paralyzed by a lack of consensus.
68. In the negotiations on the *Protocol*, Indigenous peoples were not permitted to table any proposed amendments. In order to add Indigenous proposals to the text, they had to be supported by at least one Party. This unfair practice continues to apply within the CBD. A similar process takes place under the World Intellectual Property Organization (WIPO) rules and has been criticized by Special Rapporteur Anaya:

... indigenous peoples have observer status, whereby they can make proposals during negotiations, but those proposals require the endorsement of at least one

State in order to be considered. In practical terms, this requirement at times results in textual proposals made by indigenous peoples not being included in drafts, or put forward in ways that do not reflect their original proposals.⁵⁹

69. The practice of seeking consensus solely among the Parties is especially unjust in relation to Indigenous peoples, where consensus can act as a veto. States continue to be major violators of Indigenous peoples' human rights. They should not be accorded procedural advantages that enable them to further undermine Indigenous peoples' status and rights.

70. The Expert Mechanism on the Rights of Indigenous Peoples has cautioned that consensus loses its legitimacy if used to undermine Indigenous peoples' human rights, including their right to participate in decision making:

Respect for indigenous peoples' right to participate in decision making is essential for achieving international solidarity and harmonious and cooperative relations. 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.⁶⁰

71. To date, international human rights standards continue to be largely disregarded by the Parties. Such conduct is facilitated by exploiting the "need" for consensus.

72. Positions are still repeatedly taken to excessively reinforce State sovereignty, while attempting to circumscribe Indigenous peoples' rights through national legislation. If successful, such actions could perpetuate State domination. They could impair the universality of Indigenous peoples' human rights and undermine the international system.

73. 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".⁶¹ 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.⁶²

74. 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.⁶³

75. In sharp contrast to the CBD process is the standard-setting process that led to the realization of the *UN Declaration*. The Chair of the working group made it clear 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.
76. While achieving consensus was desirable, no strict requirement was imposed. State and Indigenous representatives had equal rights to make interventions and propose text.
77. Thus, in regard to the negotiations on the *UN Declaration*, an inclusive and democratic process of participation⁶⁴ was established within the United Nations. It still constitutes today an impressive precedent and practice.

Omission of PFII recommendation by COP

78. In the revised version of the CBD report⁶⁵ that was submitted to COP 11, the following recommendation from the UN Permanent Forum's Report on the 10th session was either forgotten to be considered or simply ignored:

In regard to the rights of indigenous peoples, the Permanent Forum reiterates its long-standing position of encouraging the United Nations, its organs and specialized agencies, as well as all States, to adopt a human rights-based approach. 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. Human rights are indivisible, interdependent, and interrelated. They must be respected in any context specifically concerning indigenous peoples, from environment to development, to peace and security, and many other issues. (para. 25)

79. It is difficult to understand why COP would not at least include the PFII recommendation in para. 25 for further consideration by the Working Group on article 8(j). This recommendation reiterates that specialized agencies (such as the CBD), as well as all States, should "adopt a human rights-based approach".
80. Paragraph 25 also stresses that human rights "must be respected in any context specifically concerning indigenous peoples" – including environment and development issues. Parties in the negotiations of the *Nagoya Protocol* refused to accept that an international environmental agreement should safeguard the human rights of Indigenous peoples and

incorporate a human rights-based approach. This remains a serious concern and defect in the CBD context.

81. Article 29 of the *UN Declaration* affirms: "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." Whether the PFII recommendation in para. 25 is considered in its own right or as an elaboration of the PFII recommendation in para. 27, COP should be fully incorporating a human rights-based approach in implementing the *Convention* and *Nagoya Protocol*.
82. As illustrated in this Joint Submission, the substantive and procedural human rights of Indigenous peoples are not adequately safeguarded in the *Convention* or the *Nagoya Protocol*.⁶⁶ In both instruments, the term "right" is virtually absent when it relates to Indigenous peoples.
83. A March 2011 resolution of the Human Rights Council has reaffirmed by consensus the significance of human rights in the environmental context:

... human rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes ...⁶⁷
84. According to a December 2011 Report of the UN High Commissioner for Human Rights, examination of international human rights and environmental instruments indicates that "human rights and the environment are interrelated, as such instruments recognize that the environment plays a critical part in protecting and promoting human rights".⁶⁸
85. Further, 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".⁶⁹ Such important threats include the "loss of biodiversity".⁷⁰
86. The December 2011 Report concludes 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.⁷¹

Conclusions and recommendations

87. The recommendations in paragraphs 26 and 27 of the Report on the 10th session of the UN Permanent Forum on Indigenous Issues (PFII) should be fully and effectively implemented by the international organization known as the Convention on Biological Diversity or CBD. Such recommendations include:

- Adopting for all purposes the terminology “indigenous peoples and local communities” (not "indigenous and local communities")
 - respecting and protecting Indigenous peoples’ rights to genetic resources, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*
 - safeguarding all rights based on customary use – not only “established” rights.
88. It is unclear why COP 11 did not address the recommendations in para. 25 in the same PFII Report. Such recommendations should also be fully implemented by the CBD. They include:
- Adopting a human rights-based approach
 - Respecting the human rights of Indigenous peoples in any context specifically concerning them.
89. The recommendations in paragraphs 25, 26 and 27 of the PFII Report address crucial concerns that should be implemented in conjunction with Indigenous peoples. Such concerns are further compounded by out-dated rules of procedure within the CBD that favour Parties that undermine the status and human rights of Indigenous peoples to their severe detriment.
90. This Joint Submission has described substantive and procedural injustices relating to the recommendations in paras. 25, 26 and 27. As a consequence of such ongoing injustices, discrimination and other violations of the *Charter of the United Nations* prevail within the CBD. The principles of democracy, rule of law and respect for human rights are being violated in relation to Indigenous peoples.
91. The importance of respecting all three principles is underlined in the December 2012 *Report of the United Nations High Commissioner for Human Rights*:
- Democracy, human rights and the rule of law are interdependent and mutually reinforcing. They enjoy a sybiotic relationship within a system of governance. The weakening of one endangers the enjoyment or even the existence of the others.⁷²
92. Good governance is essential for international organizations, such as the CBD, and for States⁷³ - as well as for the European Union.⁷⁴ Respect for Indigenous peoples' human rights is a fundamental element of good governance.⁷⁵ As affirmed in the 2012 Declaration on the rule of law: "Good governance at the international level is fundamental to strengthening the rule of law."⁷⁶
93. In order for the CBD, States and the European Union to achieve good governance, their actions in relation to the *Convention on Biological Diversity* and *Nagoya Protocol* must be consistent with the *UN Declaration on the Rights of Indigenous Peoples*. In the *Declaration*, "good governance" and "respect for human rights" are two of the principles used to interpret Indigenous peoples' rights and related State obligations:

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.⁷⁷

94. The UN General Assembly has affirmed by consensus in the *2005 World Summit Outcome*: "Good governance at the international level is fundamental for achieving sustainable development."⁷⁸ The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* elaborates on the "principle of sustainable development":

The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.⁷⁹

95. In carrying out their respective mandates, the CBD and other international environmental organizations need to effectively integrate Indigenous peoples' human rights and a human rights-based approach. The relationship between human rights and the environment simply cannot be ignored.⁸⁰

... respect for human rights is broadly accepted as a precondition for sustainable development, that environmental protection constitutes a precondition for the effective enjoyment of human rights protection, and that human rights and the environment are interdependent and interrelated.⁸¹

96. In March 2012, the Human Rights Council appointed an "Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment". Thus, the relationship between human rights and the environment will be extensively elaborated.⁸²

97. It is urgent that, in conjunction with Indigenous peoples, the CBD and other international organizations undertake major procedural reforms. In this context, the Expert Mechanism on the Rights of Indigenous Peoples has identified the *Nagoya Protocol*:

Reform of international and regional processes involving indigenous peoples should be a major priority and concern. In particular, 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.⁸³

98. International environmental agreements, such as the *Nagoya Protocol*, cannot be used to legitimize or validate discriminatory actions or other human rights violations against Indigenous peoples. Consensus loses its legitimacy when it is exploited by Parties, so as to undermine Indigenous peoples' human rights or the *UN Declaration*.

99. Whether through joint or separate action, States Parties cannot evade their international human rights obligations by acting through international organizations.

100. The European Union is also bound to respect human rights and "contribute ... to the strict observance and the development of international law".⁸⁴ In relation to Indigenous peoples, the EU has highlighted the importance of the *UN Declaration* in its human rights engagements:

The European Union has made human rights a central aspect of its external relations ... in multilateral fora such as the United Nations ... The principles of the European Union engagement towards indigenous peoples are applied in the context of the United Nations Declaration on the Rights of Indigenous Peoples of 2007, which advances the rights and ensures the continued development of indigenous peoples around the world.⁸⁵

101. In its Report on the 9th session, the UN Permanent Forum had previously advised that States have an obligation to recognize and protect the rights of indigenous peoples:

... consistent with international human rights law, States have an obligation to recognize and protect the rights of indigenous peoples to control access to the genetic resources that originate in their lands and waters and any associated indigenous traditional knowledge. Such recognition must be a key element of the proposed international regime on access and benefit-sharing, consistent with the United Nations Declaration on the Rights of Indigenous Peoples.⁸⁶

102. Indigenous peoples are natural allies in the quest to conserve biodiversity and ensure sustainable use of its components and the fair and equitable sharing of benefits arising from the use of genetic resources.
103. This Joint Submission has demonstrated how key recommendations of the Permanent Forum are crucial to achieving the principal objectives of the *Convention and Protocol*, consistent with international human rights standards, democracy, rule of law and good governance. It is imperative that such recommendations be accorded full and fair consideration by the CBD – and be implemented in a timely and effective manner.

Endnotes

¹ A copy of Decision XI/14 is available at <http://www.cbd.int/cop11/doc>.

² 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.

³ Decision XI/14, *supra* note 1, G at para. 2.

⁴ The text of this Notification of 21 January 2013 is available on the CBD website at: <http://www.cbd.int/doc/notifications/2013/ntf-2013-007-article-8j-en.pdf>.

⁵ *Report of the Eleventh Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UNEP/CBD/COP/11/35 (5 December 2012), <http://www.cbd.int/cop11/doc>.

⁶ *Convention on Biological Diversity*, concluded at Rio de Janeiro (5 June 1992) (entered into force 29 December 1993), <http://www.cbd.int/convention/text/>.

⁷ *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.

⁸ For example, at the July 2010 negotiations on the draft Protocol in Montreal, the head of the delegation of one group of States indicated to the International Indigenous Forum on Biodiversity that it would have to reconsider its support on all Indigenous issues if the IIFB continued to raise such matters as “peoples”, human rights or the right of self-determination.

⁹ In regard to the right of self-determination, see identical article 1 of the *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966) (entered into force March 23, 1976); and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

S. James Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era” in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009), 184 at 185: “... indigenous peoples have the same right of self-determination enjoyed by other peoples. This follows from the principle of equality that runs throughout the text of the Declaration”.

¹⁰ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, UN Doc. A/HRC/12/34 (15 July 2009), para. 41.

¹¹ 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. [emphasis added]

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

¹³ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 (entered into force 4 January 1969), article 1.

¹⁴ *Ibid.*, art. 1. [emphasis added] See also Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7:

... the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property,

birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [emphasis added]

¹⁵ See *Charter of the United Nations*, arts. 1(2) and 55c. Rüdiger Wolfrum, “Chapter 1. Purposes and Principles” in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 49 at 53:

The term “equality of peoples” [in Art. 1(2) of the U.N. Charter] was meant to underline that no hierarchy existed between the various peoples. To this extent, the prohibition of racial discrimination was transferred from the national level to the international level of international relations. Apart from that, the principle of equality of peoples and the right to self-determination are united. With this, it is assured that no peoples can be denied the right to self-determination on the basis of any alleged inferiority. [emphasis added]

¹⁶ *United Nations 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, preambular paras. 1, 2, 4, 5, 16, 17 and arts. 1-3 and 46.

¹⁷ Permanent Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2010/43-E/C.19/2010/15, para. 112: “The Permanent Forum calls upon the parties to the Convention on Biological Diversity to adopt the terminology “indigenous peoples and local communities” as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago.”

¹⁸ Adopted at the General Conference of UNESCO, 32nd sess., Paris, 17 October 2003, *entered into force* on 20 April 2006. The objectives include protecting and ensuring respect for intangible cultural heritage of Indigenous peoples. Such heritage includes “knowledge and practices concerning nature and the universe” (art. 2(2)(d)).

¹⁹ Adopted at the General Conference of UNESCO, 33rd sess., Paris, 20 October 2005. The preamble recognizes the “importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion”.

²⁰ Canada's acceptance of the 2005 Convention on cultural expressions was on 28 November 2005; and India's ratification was on 15 December 2006. India also ratified the 2003 Convention on intangible cultural heritage on 9 September 2005.

²¹ In regard to the 2005 Convention on cultural expressions, there have been accessions by Australia (18 September 2009); France (18 December 2006); and the European Union (18 December 2006); and ratification by the United Kingdom (7 December 2007). France also approved the 2003 Convention on intangible cultural heritage on 11 July 2006.

²² See, e.g., World Conference on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, adopted 4 September 2003, Johannesburg, South Africa; *2005 World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49, Vol. I, UN Doc. A/60/49 (2006) 3; and Human Rights Council, *Expert mechanism on the rights of indigenous peoples*, Res. 6/36 (14 December 2007). All of these instruments were adopted without a vote.

See also *Abuja Declaration*, adopted by Heads of State and Government of Africa and South America, First Africa-South America Summit (ASA) in Abuja, Nigeria, 30 November 2006, where the terms “indigenous peoples” and “indigenous peoples and communities” are used.

²³ Cynthia Morel, “Conservation and Indigenous Peoples’ Rights: Must One Necessarily Come at the Expense of the Other?”, *Policy Matters*, IUCN Commission on Environment, Economic & Social Policy, Issue 17, October 2010, 174 at 175-176.

²⁴ 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]

²⁵ *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.”

²⁶ 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".

²⁷ World Intellectual Property Organization, "Indigenous Peoples' Rights to Genetic Resources and Traditional Knowledge", Statement by Professor James Anaya, Special Rapporteur on the rights of indigenous peoples, 23rd sess., Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Indigenous Panel, 4 February 2013, <http://unsr.jamesanaya.org/statements/statement-indigenous-peoples-rights-to-genetic-resources-and-traditional-knowledge>.

²⁸ 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.

²⁹ *Ibid.*, 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.

³⁰ International Labour Organization, “ILO Submission to the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance”, New York, 11-13 January 2006, www.un.org/esa/socdev/unpfii/documents/workshop_MDG_ilo.doc at 3.

³¹ 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. See also 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:

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).

³² Emphasis added. World Intellectual Property Organization, "Indigenous Peoples' Rights to Genetic Resources and Traditional Knowledge", *supra* note 27.

³³ African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, para. 209.

³⁴ See, e.g., *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 155: "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."

³⁵ 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".

³⁶ Convention on Biological Diversity, *Traditional knowledge and Biological Diversity: Note by the Executive Secretary*, UN Doc. UNEP/CBD/TKBD/1/2 (18 October 1997), para. 99 [emphasis added]. At para. 101, it is added: "Customary use of biological resources must take into account the spiritual and ceremonial dimensions of such use in addition to the more strictly economic and subsistence functions."

³⁷ *Ibid.*, para. 101. [emphasis added]

³⁸ See also Convention on Biological Diversity (Ad-Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), para. 10: "In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources."

³⁹ World Intellectual Property Organization, "Indigenous Peoples' Rights to Genetic Resources and Traditional Knowledge", Statement by Professor James Anaya, *supra* note 27.

⁴⁰ See, e.g., *UN Declaration*, arts. 31, 38 and 42; and *Indigenous and Tribal Peoples Convention, 1989*, arts. 2(2)(b) and 5.

⁴¹ "Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets", in Conference of the Parties to the Convention on Biological Diversity, *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, UN Doc. UNEP/CBD/COP/DEC/X/2 (29 October 2010), Annex, para. 13 (Target 18). [underline added]

⁴² *Convention*, art. 3. In addition, art. 4(1) of the *Nagoya Protocol* indicates that there is no intention in para. 4(1) to create a "hierarchy" between this *Protocol* and other existing international instruments.

⁴³ 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.

⁴⁴ Office of the High Commissioner for Human Rights, "Indigenous rights declaration universally endorsed", 2010, <http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx>.

⁴⁵ Human Rights Council (EMRIP), *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, UN Doc. A/HRC/21/53 (16 August 2012), Annex – "Expert Mechanism advice No. 3 (2012): Indigenous peoples' languages and cultures", para. 28. [emphasis added]

⁴⁶ General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (13 August 2012) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 89.

⁴⁷ *Ibid.*, para. 91. [emphasis added]

⁴⁸ Conference of the Parties to the Convention on Biological Diversity, *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Nagoya, Japan, 18-29 October 2010, UN Doc. UNEP/CBD/COP/10/27 (19 December 2010) at 26. [emphasis added] See also “Statement by Ahmed Djoghlaif, Executive Secretary of the Convention on Biological Diversity on the occasion of World Day for Cultural Diversity for Dialogue and Development”, 21 May 2011, <http://www.cbd.int/doc/speech/2011/sp-2011-05-21-cdd-en.pdf>:

... for the world’s indigenous peoples, “Mother Earth” is a sacred place.

... Most indigenous and local communities are situated in areas where the vast majority of the world’s plant genetic resources are found. Many such communities have cultivated and used biodiversity in a sustainable way for thousands of years. Knowledge about the use of specific plants and their healing and therapeutic attributes for treating diseases has mostly been passed down orally from generation to generation.

⁴⁹ Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37th 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.”

Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (adopted at the Committee’s 75th session, August 2009), para. 7: “Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted ... by an unjustifiable ‘distinction, exclusion or restriction’ ...” [emphasis added]

See also *Withler v. Canada (Attorney General)*, 2011 SCC 12 (Supreme Court of Canada), para. 2, where the Court describes violations of substantive equality as follows: “To determine whether the law violates this norm [of substantive equality], the matter must be considered in the full context of the case, including the law’s real impact on the claimants and members of the group to which they belong.”

⁵⁰ 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.

⁵¹ 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]

⁵² Jannie Lasimbang, “Indigenous Peoples and Customary Law in Sabah, Malaysia”, *Indigenous Affairs*, IWGIA, 1-2/2010, 38 at 39: “For the indigenous peoples of Sabah, the indigenous legal system revolves around the *adat*, which encompasses customary laws, concepts, principles and practices, and the customary institution that implements and regulates the *adat*. In short, it can be called an holistic indigenous system of governance.”

See also Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts*, *supra* note 38 **Error! Bookmark not defined.**, Annex, para. 37: "Indigenous and local communities ... perceive traditional knowledge and genetic resources/biological resources in a holistic manner. Traditional knowledge is hence generally considered as cohesive and integral to genetic resources."

⁵³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the protection of the cultural and intellectual property of indigenous peoples*, by Erica-Irene Daes, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1993/28 (28 July 1993), para. 164.

⁵⁴ Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 515: "[Peremptory norms or *jus cogens*] are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." The least controversial examples of [peremptory norms] are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy."

⁵⁵ General Assembly, *Rights of indigenous peoples: Note by the Secretary-General* [Anaya report], *supra* note 46, para. 92 (Conclusions and recommendations). [emphasis added]

⁵⁶ "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

⁵⁷ *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without vote), para. 2.

⁵⁸ 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]

⁵⁹ General Assembly, *Rights of indigenous peoples: Note by the Secretary-General* [Anaya report], *supra* note 46, para. 54. [emphasis added]

⁶⁰ 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*, A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 27. [emphasis added]

⁶¹ 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.

⁶² 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].

⁶³ 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]

⁶⁴ 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."

⁶⁵ 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/Rev.1 (19 July 2012), para. 28.

⁶⁶ For a detailed account, see 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", (June 2011), <http://www.cbd.int/icnp1/submissions/>.

⁶⁷ Human Rights Council, *Human rights and the environment*, UN Doc. A/HRC/RES/16/11 (24 March 2011) (without vote), preamble.

⁶⁸ 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. 23.

⁶⁹ *Ibid.*, para. 22.

⁷⁰ *Ibid.*, para. 20.

⁷¹ *Ibid.*, para. 78.

⁷² Human Rights Council, *Study on common challenges facing States in their efforts to secure democracy and the rule of law from a human rights perspective: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/22/29 (17 December 2012), para. 84 (Conclusions).

⁷³ See, e.g., World Summit on Sustainable Development, *Plan of Implementation*, adopted in Johannesburg, South Africa, 5 September 2002, para. 4: "Good governance within each country and at the international level is essential for sustainable development."

Declaration on Security in the Americas, adopted at the third plenary session of October 28, 2003, Special Conference on Security, Mexico City, OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, at para. 4 c: "Respect for human rights and fundamental freedoms, and good governance are essential for the stability, peace, and political, economic, social development of the states of the Hemisphere."

⁷⁴ *Cotonou Agreement* (Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part), signed in Cotonou, Benin on 23 June 2000, 2000/483/EC, Official Journal L 317, 15/12/2000 P. 0003 – 0353, para. 9(3) [emphasis added]:

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. ...

Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement.

⁷⁵ International Labour Organization, "ILO Submission to the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance", *supra* note 30 at 9: "Respect for indigenous and tribal peoples' rights, in line with the provisions of ILO Convention No. 169, is a fundamental element of good governance."

⁷⁶ *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra* note 57, para. 35.

⁷⁷ *UN Declaration*, article 46(3).

⁷⁸ General Assembly, *2005 World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49, Vol. I, UN Doc. A/60/49 (2006) 3, para. 39.

See also Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65*, UN Doc. E/CN.4/2003/90 (21 January 2003), para. 73 (Conclusions and Recommendations): "Sustainable development must be understood not only in terms of environmental management but also as respectful of human rights at all times, particularly of the human rights of indigenous peoples." [emphasis added]

⁷⁹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization, 33rd sess., Paris, 20 October 2005, article 2(6). Article 13 provides: "Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development ..."

See also Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, para. 4c (adopted at the Committee's 1235th meeting on 18 August 1997): "The Committee calls in particular upon State parties to: ... c. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics ..."

⁸⁰ General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/67/273 (8 August 2012), para. 53:

In considering Millennium Development Goal 7 on environmental sustainability, it must be noted, first of all, that indigenous peoples' relationship with the environment, including waters, lands and natural resources, underpins their social and economic well-being and is crucial to their culture, resilience and, ultimately, survival and identity, as enshrined in articles 25 to 32 of the United Nations Declaration on the Rights of Indigenous Peoples. [emphasis added]

⁸¹ Office of the High Commissioner on Human Rights/United Nations Environment Programme, *Conclusions of the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment*, 14-16 January 2002, Geneva, para. 12.

⁸² See, e.g., Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Preliminary report*, UN Doc. A/HRC/22/43 (24 December 2012).

⁸³ 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 60, Annex - Expert Mechanism Advice No. 2 (2011), para. 26.

⁸⁴ *Treaty on European Union*, as amended by the Treaty of Lisbon *signed* on 13 December 2007 by the representatives of the twenty-seven Member States and *entered into force* on 1 December 2009.

According to the *Treaty on European Union*, the Union is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (art. 2). It is also required to “contribute to ... eradication of poverty and the protection of human rights ... as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter” (art. 3).

⁸⁵ Permanent Forum on Indigenous Issues, “The EU and indigenous peoples’ issues”, information received from the European Union, ninth sess., New York (2010).

See also *Cotonou Agreement*, *supra* note 74, art. 9(2): “The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. ... The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural.”

⁸⁶ Permanent Forum on Indigenous Issues, *Report on the ninth session*, *supra* note 17, para. 113. [emphasis added]