

***United Nations Declaration on the Rights of Indigenous Peoples***  
**Provisions Relevant to "Consent"**  
**14 June 2013<sup>1</sup>**

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## **Introduction**

The *UN Declaration on the Rights of Indigenous Peoples* is a consensus international human rights instrument.<sup>2</sup> No State in the world formally opposes it. The rights elaborated in the *Declaration* are pre-existing or "inherent" (preambular para. 7). They constitute the "minimum standards" for the survival,<sup>3</sup> dignity, security and well-being of the world's indigenous peoples (arts. 7, 43).

As emphasized by Special Rapporteur James Anaya: "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."<sup>4</sup> The UN High Commissioner for Human Rights has affirmed: "The rights of indigenous peoples have remained a priority for the OHCHR and, in pursuing this priority, the Declaration on the Rights of Indigenous Peoples was the Office's key reference and framework for action."<sup>5</sup>

Similarly, the European Union (EU) has confirmed that its ongoing engagement and all aspects of its human rights policies relating to Indigenous peoples are "anchored" in the context of the *UN Declaration*:

The EU has a longstanding engagement towards indigenous peoples which is anchored in the context of the United Nations Declaration on the Rights of Indigenous Peoples. We

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<sup>1</sup> All underlining in this document has been added.

<sup>2</sup> *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. The *Declaration* is included in the list of "Universal Human Rights Instruments" on the web site of the Office of the UN High Commissioner for Human Rights (OHCHR), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

<sup>3</sup> In the context of resource development and environmental protection, "survival" has been elaborated upon in *Case of the Saramaka People v. Suriname*, (*Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*), I/A Court H.R. Series C No. 184, 12 August 2008, para. 37:

‘survival as a tribal people’ must be understood as the ability of the people to ‘preserve, protect and guarantee the special relationship that [they] have with their territory’, so that ‘they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]’. That is, the term ‘survival’ in this context signifies much more than physical survival.

<sup>4</sup> Permanent Forum on Indigenous Issues, "Statement by Professor James Anaya", Special Rapporteur on the rights of indigenous peoples, 12 sess., 22 May 2013, New York, [Statement: Twelfth Session of the United Nations Permanent Forum on Indigenous Issues, 2013](#).

<sup>5</sup> Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the rights of indigenous peoples*, UN Doc. A/HRC/21/23 (25 June 2012), para. 34 (Conclusions).

have made human rights a central aspect of EU's external action: be it in the political dialogues with partner countries, be it through action in multilateral forums such as the United Nations, or be it through development policy and assistance. Indigenous peoples' rights, as defined in the UN Declaration, form an integral part of all these aspects of the EU's human rights policy.<sup>6</sup>

In regard to implementing sustainable development strategies at every level, Heads of State and Government globally have declared the importance of the *UN Declaration*:

We stress the importance of the participation of indigenous peoples in the achievement of sustainable development. We also recognize the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies.<sup>7</sup>

It is especially critical to fully implement the *Declaration* in the context of resource development and environmental protection. This includes full respect for the right and principle of "free, prior and informed consent" (FPIC), in view of the far-reaching impacts on Indigenous peoples and related violations and conflict. As Special Rapporteur Anaya has cautioned:

... natural resource extraction and other major development projects in or near indigenous territories [are] one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.<sup>8</sup>

Both domestically and internationally, the *UN Declaration* is increasingly used to interpret Indigenous peoples' human rights and related State obligations. Anaya has concluded that 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>9</sup>

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<sup>6</sup> European Union, "Statement on behalf of the European Union", Expert Mechanism on the Rights of Indigenous Peoples Fifth Session (Geneva, 9 – 13 July 2012), 11 July 2012.

<sup>7</sup> Rio + 20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), para. 49.

<sup>8</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 82.

See also General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people) UN Doc. A/59/258 (12 August 2004), para. 20: "The principal effects of [large-scale] projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."

<sup>9</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). Anaya adds: "The standards affirmed in the Declaration share an

In light of its normative and legal<sup>10</sup> significance of the *Declaration*, it is imperative to carefully analyze its provisions. No provision should be examined in isolation. Rather each provision should be interpreted in the context of the entire *Declaration* and international law as a whole. When such an approach is adopted, the requirement of FPIC is generally strengthened.

This document examines provisions in the *UN Declaration* that are relevant to "consent" or FPIC. In some instances, such terms are explicitly used. There are also numerous provisions in the *Declaration* that include a consensual aspect, even though there is no reference to "consent". An example is the right of self-determination, which includes "consent" as an essential element.<sup>11</sup>

Also examined in this paper are phrases in the *Declaration* that preclude States from acting unilaterally. State obligations that are to be carried out "in conjunction with" Indigenous peoples include consensual aspects. Similarly, State duties that are to be fulfilled "in consultation and cooperation with" Indigenous peoples are also relevant.

Treaties, agreements and other constructive arrangements between States and Indigenous peoples are inherently consensual in nature. The related rights in article 37 of the *Declaration* will also be briefly addressed.

## 1. Application of interpretive principles in *UN Declaration*

All provisions in the *Declaration* must be interpreted in accordance with the "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith" (art. 46(3)). These are core principles in international and domestic legal systems. Each of these principles is significant in diverse ways to Indigenous peoples, particularly in their relations with States and third parties.

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essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights."

<sup>10</sup> UN 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. 85 (Conclusions): "Implementation of the Declaration should be regarded as a political, moral and legal imperative without qualification, within the framework of the human rights objectives of the Charter of the United Nations."

In regard to the legal status and effects of the *Declaration*, see 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 198-208. See also Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Not Merely 'Aspirational'", 24 May 2013, <http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf>

<sup>11</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*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20: "... the right to free, prior and informed consent is embedded in the right to self-determination. ... [T]he right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right."

The principle of democracy is especially important in relation to the right of self-determination, including self-government.<sup>12</sup> The democratic principle underpins the right of Indigenous peoples to full and effective participation, as reflected throughout the *Declaration*.

"Good governance" applies to State governments and corporate institutions, as well as entities of Indigenous peoples. Good governance is "participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law."<sup>13</sup>

Clearly, good governance "requires full protection of human rights".<sup>14</sup> The UN Office of the High Commissioner for Human Rights underlines: "The true test of 'good' governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights."<sup>15</sup>

Article 46(3) of the *Declaration* is one of the most comprehensive balancing provisions found in any international human rights instrument.<sup>16</sup> The principles it includes are generally interlinked and

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<sup>12</sup> James Crawford, "The Right of Self-Determination in International Law: Its Development and Future" in Phillip Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 7, at 26: "... democracy makes sense only as a continuing process. If it is a key component of self-determination, this in turn reinforces the idea that self-determination is a continuing right of all peoples."

*Reference re Secession of Québec*, [1998] 2 S.C.R. 217 (Supreme Court of Canada), para. 64: "... democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities ..."

<sup>13</sup> United Nations Economic and Social Commission on Asia and the Pacific (ESCAP), "What is Good Governance?", <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

See also European Commission, "A DECENT LIFE FOR ALL: Ending poverty and giving the world a sustainable future", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2013/092, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0092:FIN:EN:HTML>: "Poor governance, including a lack of democracy, rule of law and respect for human rights, is currently hampering efforts towards poverty eradication and sustainable development. ... In particular, private and public companies must be accountable and adhere to high standards of transparency and good governance."

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*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism advice No. 2 (2011), para. 14: "The participation of indigenous peoples in external decision-making is of crucial importance to good governance. One of the objectives of international standards on indigenous peoples' rights is to fill the gap between their rights on the one hand and their implementation on the other hand."

<sup>14</sup> ESCAP, *ibid.*

<sup>15</sup> Office of the High Commissioner for Human Rights, "Good Governance and Human Rights", <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>. In regard to the *Canadian Charter of Rights and Freedoms*, see *Vancouver (City) v. Ward*, 2010 SCC 27 (Supreme Court of Canada), para. 38: "Compliance with *Charter* standards is a foundational principle of good governance."

<sup>16</sup> Save for exceptions such as the right not to be subjected to torture and genocide, human rights are generally relative in nature and not absolute. In regard to Indigenous peoples, the right and principle of FPIC does not need to be absolute, in order to constitute "good practice".

mutually reinforcing, including in the context of development.<sup>17</sup> These principles are vital, in terms of achieving genuine reconciliation between Indigenous and non-Indigenous peoples. Reconciliation is not a final remedy in the usual sense. It is a process flowing from the human rights guaranteed to Indigenous peoples in international and domestic law.<sup>18</sup>

In interpreting each and every provision, one must also take into account the last preambular paragraph, which solemnly proclaims the *Declaration* as "a standard of achievement to be pursued in a spirit of partnership and mutual respect". A "partner" is "one who shares or takes part with another".<sup>19</sup> Thus, the spirit of the *Declaration* is one of joint or shared action. Such partnership or joint action also includes the element of "consent".

## 2. Right of self-determination

The right of self-determination in identical article 1 of the two international human rights Covenants has been repeatedly applied to Indigenous peoples by UN treaty bodies.<sup>20</sup> This same right is affirmed in article 3 of the *Declaration*. The right of Indigenous peoples to "maintain and develop their own indigenous decision-making institutions" (art. 18) is also relevant in the self-determination context.<sup>21</sup>

<sup>17</sup> See, e.g., General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1 (16 September 2005) (adopted without vote), para. 135: "We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. ... We stress that democracy, development and respect for all human rights ... are interdependent and mutually reinforcing."

<sup>18</sup> In regard to Indigenous peoples in Canada, see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 32: "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples ..."

<sup>19</sup> *Black's Law Dictionary*, 9th ed. (St. Paul, Minn.: Thomson Reuters, 2009), at 1229. Similarly, see *Oxford English Reference Dictionary*, 2<sup>nd</sup> ed. (1996), at 1061.

<sup>20</sup> Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/CHL/CO/5 (18 May 2007) at para. 19; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

<sup>21</sup> See also *UN Declaration*, art. 33(2): "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

The General Assembly has reaffirmed the significance of the right to self-determination in regard to the effective enjoyment of other human rights: "universal realization of the right of all peoples ... to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights".<sup>22</sup> Similarly, Special Rapporteur Anaya has stressed: "The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."<sup>23</sup>

The right of self-determination is described as the right to freely choose,<sup>24</sup> so this entails the right to give or withhold FPIC. In its 2011 Report, the Permanent Forum on Indigenous Issues emphasized: "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 ..."<sup>25</sup>

Further, the UN Expert Mechanism on the Rights of Indigenous Peoples has indicated: "Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination as defined in international human rights law."<sup>26</sup>

The first preambular paragraph of the *UN Declaration* affirms that it is: "*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter". These "purposes and principles" include the principle of "equal rights and self-determination of peoples".<sup>27</sup> This essential principle

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<sup>22</sup> General Assembly, *Universal realization of the right of peoples to self-determination*, UN Doc. A/RES/67/157, (20 December 2012) (adopted without vote), para. 1.

<sup>23</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, UN Doc. A/HRC/12/34 (15 July 2009), para. 41.

<sup>24</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 119: "Self-determination has never simply meant independence. It has meant the free choice of peoples."

Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580: "Self-determination, in its many forms, must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. It ... constitutes the exercise of free choice by indigenous peoples".

<sup>25</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. 36.

<sup>26</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. 34.

<sup>27</sup> *Charter of the United Nations*, arts. 1(2) and 55c. See also Rüdiger Wolfrum, "Chapter 1. Purposes and Principles" in B. 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."

is reflected in the provisions of the *Declaration*<sup>28</sup> and provides further guidance for their interpretation.

### 3. Right to development

In addition to the right of self-determination,<sup>29</sup> the *UN Declaration* affirms the right of Indigenous peoples to development. Article 20 affirms that Indigenous peoples have the right to "be secure in the enjoyment of their own means of ... development":

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.<sup>30</sup>

In addition, article 23 affirms: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."<sup>31</sup> This provision is similar to article 7(1) of the *Indigenous and Tribal Peoples Convention, 1989*, which stipulates:

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. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The right of Indigenous peoples to development is consistent with the 1986 *Declaration on the Right to Development*, which affirms that this right "implies full realization" of their right of self-determination:

<sup>28</sup> See, e.g., *UN Declaration*, art. 2: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

<sup>29</sup> *Ibid.*, art. 3 (self-determination): "By virtue of that right they ... freely pursue their economic, social and cultural development."

<sup>30</sup> "Redress", including "restitution", is a key element in achieving reconciliation in contexts relating to Indigenous peoples. In addition to art. 20(2) of the *UN Declaration*, see arts. 8(2) (redress for forced assimilation or destruction of their culture); art. 11(2) (redress for cultural, intellectual, religious and spiritual property taken without their FPIC); art. 12 (repatriation of ceremonial objects and human remains); art. 28 (redress for lands, territories and resources taken without FPIC); and art. 32(3) (redress for project impacts affecting their lands or territories and other resources without FPIC).

<sup>31</sup> In regard to the right to development, see also *UN Declaration*, preambular paras. 6, 10, 11, 16 and 22.

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.<sup>32</sup>

In international law, it is increasingly recognized that Indigenous peoples' right to development must be both sustainable and equitable.<sup>33</sup> For example, the *Rio Declaration on Environment and Development* affirms: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."<sup>34</sup>

Similar to the right to self-determination, the right to development raises consent-related issues.<sup>35</sup> Violations by any State or corporate entity of Indigenous peoples' right to development may have far-reaching adverse consequences – especially if the peoples affected are already vulnerable and impoverished. As described the UN Special Rapporteur on the right to food:

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<sup>32</sup> *Declaration on the Right to Development*, adopted by General Assembly resolution 41/128, 4 December 1986, art. 1, para. 2.

<sup>33</sup> UNDRIP, preambular para. 11: "Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment"; *Indigenous and Tribal Peoples Convention, 1989*, art. 23(2) ("importance of sustainable and equitable development"); *Vienna Declaration and Programme of Action*, adopted by World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), reprinted in (1993) 32 I.L.M. 1661, para. 11: "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations"; and *Inter-American Democratic Charter*, signed by the 34 countries of the Americas, 28<sup>th</sup> special session of the OAS General Assembly, Lima, Peru, 11 September 2001: "... economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing".

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para. 144 (d): "All State and international actions and legal measures in regard to indigenous lands, territories and resources must assure that all indigenous peoples have lands, territories and resources sufficient to assure their well-being and equitable development as peoples ..."

<sup>34</sup> *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (13 June 1992), Principle 3. See 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: "... 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."

<sup>35</sup> See also *UN Declaration*, preambular para. 10: "... control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs".

Dalee Sambo Dorough, "The Indigenous Human Right to Development", *Indigenous Affairs*, IWGIA, 1-2/2010, 76 at 81: "... principles that should be included in the understanding of "equitable development" are: ... development must not be imposed on Indigenous peoples without their free, prior and informed consent and must fully accommodate Indigenous values and concerns".



... inappropriate 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>36</sup>

The rights of children to development also merit emphasis. As affirmed in the *Convention on the Rights of the Child*, every child has the "right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".<sup>37</sup> While parents of children or others who take care of such children have primary responsibilities,<sup>38</sup> States have the duty to "ensure to the maximum extent possible the survival and development of the child" (art. 6(2)).

In the context of business activities, the rights of children to development are relevant. As the Committee on the Rights of the Child has highlighted, Indigenous children are "particularly at risk":

The activities and operations of business enterprises can impact on the realization of article 6 in different ways. For example, environmental degradation and contamination arising from business activities can compromise children's rights to health, food security and access to safe drinking water and sanitation. Selling or leasing land to investors can deprive local populations of access to natural resources linked to their subsistence and cultural heritage; the rights of indigenous children may be particularly at risk in this context.<sup>39</sup>

#### 4. Right to one's own means of subsistence

As indicated above, article 20(1) of the *UN Declaration* affirms the right of Indigenous peoples "to be secure in the enjoyment of their own means of subsistence". This is consistent with the right of self-determination in identical article 1(2) of the two international human rights Covenants, which

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<sup>36</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.

<sup>37</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990, art. 27(2).

<sup>38</sup> *Ibid.*, art. 27(2) and *UN Declaration*, preambular para. 13.

<sup>39</sup> Committee on the Rights of the Child, *State obligations regarding the impact of the business sector on children's rights*, General Comment No. 16, UN Doc. CRC/C/GC/16 (17 April 2013), para. 19. On this point, the Committee cites 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 (12 February 2009), para. 35.

General Assembly, *Status of the Convention on the Rights of the Child: Report of the Secretary-General*, UN Doc. A/67/225 (3 August 2012), para. 21:

Discrimination tends to be both a cause and consequence of the current situation of indigenous peoples.... Forceful removal from ancestral land, restrictions on access to other natural resources, severe impacts of climate change, lack of jobs and insecure working conditions combine to impact negatively on indigenous children. In many countries, development projects for example, construction of dams, mining, oil exploration, plantation developments and logging, including those managed by the private sector, which are often undertaken without the free, prior and informed consent of indigenous peoples and without regard to appropriate compensation — tend to impact negatively on poverty reduction efforts, which in turn directly affects the situation of indigenous children and the fulfillment of their rights.

affirms: "All peoples may, for their own ends, freely dispose of their natural wealth and resources ... . In no case may a people be deprived of its own means of subsistence."

In regard to article 1(2) of the Covenants, the "right not to be deprived of one's own means of existence" is said to be a part of the "right of peoples to existence".<sup>40</sup> As emphasized by Antonio Cassese: "[Article 1(2)] may be read to nullify even arrangements 'freely made' by the people 'for their own ends' if these arrangements deprive the people of its own means of subsistence."<sup>41</sup> Further: "No agreement or compensation [between contracting states] ... should result in depriving the people of its means of subsistence."<sup>42</sup>

See also the 1990 Report of the Secretary-General on the "Global Consultation on the Realization of the Right to Development as a Human Right":

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 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 ...<sup>43</sup>

Thus, the right of Indigenous peoples to their own means of subsistence – as part of their right of self-determination and right to development – engages FPIC issues.

## 5. Provisions that explicitly include FPIC

In regard to Indigenous peoples' lands and territories, four provisions in the *Declaration* explicitly require the "free, prior and informed consent" of the Indigenous peoples concerned. Two of these articles relate to forcible removal of Indigenous peoples (art. 10); and storage and disposal of hazardous materials on Indigenous lands and territories (art. 29(2)). The other two relate to States' duty to provide redress for cultural and other property taken without FPIC (art. 11(2)); and Indigenous peoples' right to redress for lands, territories and resources taken without FPIC (art. 28(1)).

Two other provisions have a different formulation, requiring States to "consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain" their free, prior and

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<sup>40</sup> James Crawford, "The Rights of Peoples: Some Conclusions" in J. Crawford, (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 159, at 169, 171.

<sup>41</sup> Antonio Cassese, "The Self-Determination of Peoples", in Louis Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 92 at 106.

<sup>42</sup> *Ibid.*, at 107.

<sup>43</sup> 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*, U.N. Doc. E/CN.4/1990/9/ Rev. 1 (26 September 1990), para. 104.

informed consent. These articles relate to administrative and legislative matters adopted by the State (art. 19); and to approval of projects affecting Indigenous lands, territories or resources (art. 32(2)).

Each of the four provisions cited above requires a balanced and reasonable interpretation. In relation to FPIC or, more generally, the duty to consult, it is clear that extreme or absolutist interpretations lack validity.<sup>44</sup> Rather, what is necessary is “a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence”.<sup>45</sup>

Article 32(2) provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions 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>46</sup>

The phrase "consult and cooperate" will be addressed under the next heading. However, it is clear that "cooperate" adds a further element to "consultation". It clearly does not allow for unilateral State action once consultation has taken place.

The phrase "in order to obtain" FPIC is stronger than "in order to seek" such consent. The term "obtain" suggests achieving a certain result. Like other provisions in the *Declaration*, article 32(2) should not be read in isolation. Rather, this provision should be interpreted in the context of the whole *Declaration* and other international human rights law.

In general, courts take a contextual approach in interpreting Indigenous peoples' human rights and related State obligations. Whether FPIC is required can depend on the facts and law in each case. However, in the context of resource development, the adverse impacts that may affect Indigenous peoples can be severe and far-reaching. Such situations reinforce the need to obtain the FPIC of Indigenous peoples.<sup>47</sup>

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<sup>44</sup> See, e.g., 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. 43: “It would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the indigenous peoples of the State along with the rest of the population in one way or another.”

<sup>45</sup> *Ibid.*

<sup>46</sup> See also *Indigenous and Tribal Peoples Convention, 1989*, art. 6(2): "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

<sup>47</sup> See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (21 May 2010), para. 9: "The Committee is concerned that infrastructure, development and mining mega-projects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and afro-colombian communities."

Regardless of the circumstances, consultations should always have the objective of obtaining the FPIC of Indigenous peoples. As indicated by the Inter-American Court: "... the State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement".<sup>48</sup> In the same decision, the Court made clear that FPIC would be required in regard to "large-scale development or investment projects that would have a major impact":

... 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>49</sup>

The African Commission on Human and Peoples' Rights has come to a similar conclusion, but has extended it to "any" development or investment projects that would have a major impact within Indigenous territory.<sup>50</sup> This would appear to be a more sound approach, since the severity of the impacts is a central concern. For example, a uranium project that may be smaller in size than a "large-scale" development project could have more serious and longer-lasting impacts.<sup>51</sup> Any interpretation that is inconsistent with Indigenous peoples' well-being (art. 43) or other provisions of the *Declaration* should be rejected.

Prior to considering such important questions as consultation and consent, it is important to first identify the nature and scope of Indigenous peoples' rights that may be affected by a proposed development. As Special Rapporteur Anaya describes:

Consultation and consent and related safeguards are instrumental to securing indigenous peoples' rights in the face of extractive industries that operate or seek to operate on or near their territories, but understanding the reach of those underlying substantive rights and the

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Committee on the Elimination of Racial Discrimination, Letter from Chair Anwar Kemel to H.E. M. Manuel B. Dengo, Ambassador, Permanent Representative, Permanent Mission of Costa Rica to the United Nations, Early-Warning Measures and Urgent Procedures, 27 August 2010 at 2: "The Committee ... asks that the State party provide information on the measures taken to assure the effective participation of the Térraba people and other indigenous peoples whose decision making referring to all the aspects and stages of the plan of the dam of Diquís have been affected, and to obtain its free, prior and informed consent with respect to this project." [Unofficial translation]

<sup>48</sup> *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R., Judgment of November 28, 2007, Series C No. 172, para. 17.

<sup>49</sup> *Ibid.*, para. 134.

<sup>50</sup> African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, at para. 291.

<sup>51</sup> See also *See Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24 (quoting from *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168), where the Supreme Court of Canada ruled that - at the high end - the Crown's duty to consult would require the "'full consent of [the] aboriginal nation ...' on very serious issues".

potential impacts on those rights must be a starting point for solving the many questions that arise in this context.<sup>52</sup>

According to Anaya, the "primary substantive rights" of indigenous peoples that may be implicated in natural resource development and extraction include:

rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination.<sup>53</sup>

## 6. Relevant provisions that do not explicitly refer to FPIC

Without specifically referring to FPIC, numerous provisions in the *UN Declaration* contain phrases or words that can entail a need for Indigenous peoples' "consent". Such terms include: "in conjunction with", "in consultation and cooperation with", "control" and "treaties, agreements and other constructive arrangements".

### "in conjunction with"

In the context of the *UN Declaration*, the phrase "in conjunction with" means "together with".<sup>54</sup> This would suggest that the "consent" of Indigenous peoples is required, since the State cannot act alone.<sup>55</sup> Also relevant in this context is the right of Indigenous peoples "to participate in decision-making in matters which would affect their rights" (art. 18).

Provisions in the *Declaration* that contain the phrase "in conjunction with" include:

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. (art. 11(2))

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<sup>52</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 53.

<sup>53</sup> *Ibid.*, para. 50.

<sup>54</sup> *Oxford English Reference Dictionary*, 2<sup>nd</sup> ed. (1996), at 304.

<sup>55</sup> See, e.g., Permanent Forum on Indigenous Issues, *Study on the extent of violence against indigenous women and girls in terms of article 22 (2) of the United Nations Declaration on the Rights of Indigenous Peoples: Note by the Secretariat*, UN Doc. E/C.19/2013/9 (12 February 2013), para. 8: "Article 22 (2) expresses in mandatory terms that ... there is a duty upon States to take active measures to ensure full protection and guarantees against all forms of violence and discrimination. The wording "in conjunction with indigenous peoples" reinforces the commitment of Member States through the Declaration to obtain free, prior and informed consent from, and to working in partnership with, indigenous peoples when realizing that goal."

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned. (art. 12(2))

States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language. (art. 14(3))

States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. (art. 22(2))

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. (art. 27)

In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights. (art. 31(2) – in regard to cultural heritage, traditional knowledge and traditional cultural expressions, as well as intellectual property)

"in consultation and cooperation with"

In the context of the *UN Declaration*, the term "cooperation" means "working together to the same end".<sup>56</sup> This adds a significant element to the State duty to consult and precludes unilateral State action. This duty of States to fulfil specific obligations in the *Declaration* would also have to be in accordance with the principles in article 46(3). Also relevant is the right of Indigenous peoples "to participate in decision-making in matters which would affect their rights" (art. 18).

In carrying out specific obligations, such duty of States to consult and work together with Indigenous peoples would require some form of negotiations towards mutually acceptable approaches and arrangements. Taking into account the facts and law in each particular case, the "consent" of Indigenous peoples may be required in diverse situations.

International standards relating to State-Indigenous "cooperation" are not new. The positive contribution of Indigenous peoples to cultural diversity and international cooperation is acknowledged in the preamble of the *Indigenous and Tribal Peoples Convention, 1989*:

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding ...

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<sup>56</sup> *Oxford English Reference Dictionary*, 2<sup>nd</sup> ed. (1996), at 315.

The *Convention* affirms the overall responsibility of States to work together with Indigenous peoples, in order to safeguard their rights: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity." (art. 2(1))

In addition, the *Convention* requires States to work in cooperation with Indigenous peoples to improve living conditions, carry out impact assessments and protect and preserve the environment:

The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement. (art. 7(2))

Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. (art. 7(3))

Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit. (art. 7(4))

In regard to the wide range of government programmes contemplated by the *Convention*, it is required in article 33(2) that these be carried out "in co-operation with" Indigenous peoples:

(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;

(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

In regard to the *UN Declaration*, the general rule and minimum standard to achieve its ends is stipulated in article 38: "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."<sup>57</sup>

Additional provisions in the *Declaration* that contain the phrase "in consultation and cooperation with Indigenous peoples" include:

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<sup>57</sup> In regard to military activities on Indigenous lands and territories, article 30(2) requires "effective consultations" if such activities are "justified by a relevant public interest". It is the only provision in the *UN Declaration* that does not at least require "consultations and cooperation" with Indigenous peoples. However, such consultations in article 30(2) must still be carried out by States in a manner and context that are consistent with the principles in article 46(3). Thus, in diverse situations, "effective consultations" may in their effect surpass the general requirement in article 38 of "consultation and cooperation". The requirement of FPIC in articles 10 and 29(2) are two examples.

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned (preambular para. 19)

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society. (art. 15(2) – in regard to Indigenous cultures, traditions, histories and aspirations being appropriately reflected in education and public information)

States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. (art. 17(2))

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. (art. 19)

States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. (art. 36(2) - right to maintain and develop contacts, relations and cooperation with own members and other peoples across borders)

## "control"

In the context of the *UN Declaration*, the term "control" means "to regulate or govern".<sup>58</sup> This suggests that the FPIC of Indigenous peoples would be necessary. For example, the UN Human Rights Committee has indicated:

The State party must strengthen special measures in favour of Afro-Colombian and indigenous people in order to guarantee the enjoyment of their rights and, in particular, to ensure that they exercise control over their land and that it is restituted to them, as appropriate. The State party should ... adopt the pertinent legislation for holding prior consultations with a view to guaranteeing the free, prior and informed consent of community members.<sup>59</sup>

Provisions in the *Declaration* that contain the term "control" include:

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<sup>58</sup> *Black's Law Dictionary*, 9th ed. (St. Paul, Minn.: Thomson Reuters, 2009), at 378.

<sup>59</sup> Human Rights Committee, *Concluding observations of the Human Rights Committee: Colombia*, UN Doc. CCPR/C/COL/CO/6 (4 August 2010), para. 25.



*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs (preambular para. 10)

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. (art. 12(1))

Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. (art. 14(1))

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (art. 26(2))

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, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. (art. 31(1))

### " treaties, agreements and other constructive arrangements"

In relation to Indigenous peoples, the issue of "treaties, agreements and other constructive arrangements" was the subject of an extensive United Nations study.<sup>60</sup> Treaties are "sacred",<sup>61</sup> dynamic and living agreements relating to the territories, jurisdictions, human rights and security of Indigenous peoples.<sup>62</sup>

<sup>60</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, UN Doc. E/CN.4/Sub.2/1999/20 (22 June 1999) (M. Alfonso Martínez, Special Rapporteur, Final Report).

<sup>61</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, at 793 (per Cory J.): "First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred."

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 53: "The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated."

<sup>62</sup> Paul Joffe & Willie Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms" in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 12,

As affirmed in the *UN Declaration*: "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States" (preambular para. 15). "Consent" and "good faith" are crucial principles underpinning all such agreements. Respect and protection of treaty rights are essential for good governance.

Additional provisions in the *Declaration* that address "treaties, agreements and other constructive arrangements" include:

*Recognizing also* the urgent need to respect and promote the rights of Indigenous Peoples affirmed in treaties, agreements and other constructive arrangements with States (preambular para. 8)

*Considering* that the rights affirmed in treaties, agreements and constructive arrangements between States and Indigenous Peoples are, in some situations, matters of international concern, interest, responsibility and character (preambular para. 14)

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. (art. 37(1))

## Conclusions

In regard to the *UN Declaration on the Rights of Indigenous Peoples*, it is clear that "free, prior and informed consent" (FPIC) is not limited to those provisions that expressly affirm this right and principle. Many other provisions may include a consensual dimension, without specific reference to "consent".

Examples include provisions relating to Indigenous peoples' right of self-determination, right to their own means of subsistence, and right to development. There are also other provisions that give rise to "consent" considerations, such as State obligations that are to be carried out "in conjunction with" Indigenous peoples or "in consultation and cooperation with" them.

In regard to "treaties, agreements and other constructive arrangements" between States and Indigenous peoples, "consent" and "good faith" are foundational principles. Such agreements often address or elaborate upon a wide range of human rights. Moreover, these agreements are significant for the cooperative State-Indigenous relationship that they represent.

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<http://www.justicereformcomm.sk.ca/volume2/15section12.pdf>, at 12-14: "Their treaties often entail a wide range of human rights considerations. Whether in general or specific terms, Indigenous peoples' treaties constitute an elaboration of arrangements relating to the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned. These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals."

States in different regions of the world continue to violate Indigenous peoples' human rights – both in procedural and substantive aspects. Such actions are incompatible with democracy, good governance and the other core principles in article 46(3) of the *Declaration*. This ongoing situation reinforces the urgent need for increased recognition, protection and fulfillment of FPIC at all levels.

Too often, "consultations" alone are not working.<sup>63</sup> They do not safeguard Indigenous peoples' human rights. The failure of States to cooperate genuinely with Indigenous peoples is palpable in both developed and developing countries.

In regard to resource development, business enterprises have a responsibility to respect internationally recognized human rights.<sup>64</sup> This would include Indigenous peoples' rights affirmed in the *UN Declaration*, which can be used to interpret the related obligations of States and other third parties. Companies should "[e]xercise due diligence so as to avoid becoming complicit in human rights violations committed by host governments".<sup>65</sup> As emphasized by Special Rapporteur Anaya: "Due diligence requires ... ensuring that corporate behaviour does not infringe or contribute to the infringement of the rights of indigenous peoples ... regardless of the reach of domestic laws."<sup>66</sup>

Proposed developments must not exploit the vulnerability of Indigenous peoples or marginalize them from decision-making. As underlined in the March 2013 *Report of the Special Rapporteur on extreme poverty and human rights*:

Th[e] right to take part and exert influence in decision-making processes that affect one's life is inextricably linked to the most fundamental understanding of being human and the purpose of rights: respect of dignity and the exercise of agency, autonomy and self-determination.<sup>67</sup>

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<sup>63</sup> Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/23/36 (11 March 2013), para. 72: "Currently, many participatory processes are limited to "consultation" – a higher authority giving information to or extracting information from members of the public. Participatory processes that are not designed and implemented with a human rights perspective may in fact be disempowering, and serve to exclude or reinforce existing power structures. In contrast, human rights-based participation is an important tool to empower people living in poverty by allowing them to exercise their voice to influence relevant decision-making processes."

<sup>64</sup> See, e.g., "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" in 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), Annex, Principle 12 and Commentary.

<sup>65</sup> Human Rights Council, *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu*, UN Doc. A/HRC/21/48 (2 July 2012), para. 70(d).

<sup>66</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 61.

<sup>67</sup> Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, *supra* note 63, para. 20.

FPIC of Indigenous peoples should not be viewed as an impediment to States or business enterprises. Rather Indigenous peoples' consent constitutes an integral part of their human rights, including their right to development. Respect for such human rights is essential for State and corporate good governance. Such respect fosters harmonious and cooperative relations – and the realization of common objectives. As Special Rapporteur commented in a recent interview in Darwin, Australia:

“There is a belief that consent is about saying yes or no, about who wins,” observed James Anaya, the United Nations special rapporteur on indigenous rights. But consultation with indigenous peoples is a matter of “creating open processes where they can voice their opinions and influence decisions, and where there is the necessary will to seek consensus.”<sup>68</sup>

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<sup>68</sup> Milagros Salazar, "Q&A: 'The State Does Not Lose Sovereignty If It Respects Indigenous Rights'", Inter Press News Agency, 3 June 2013, <http://www.ipsnews.net/2013/06/qa-the-state-does-not-lose-sovereignty-if-it-respects-indigenous-rights/>.