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Indigenous Peoples are "Peoples"

Draft COP Decision Violates Treaty Interpretation Rules

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Executive Summary

Indigenous peoples constitute "peoples" under international law. This has been reaffirmed repeatedly in treaties and other international instruments and the jurisprudence of UN treaty bodies and mechanisms, as well as the UN General Assembly, High Commissioner for Human Rights and specialized agencies.

The CBD is the only specialized agency that continues to use the term "indigenous and local communities" (not Indigenous "peoples"). In 2010, the Permanent Forum on Indigenous Issues called upon the parties to the *Convention on Biological Diversity*, and especially including the *Nagoya Protocol*, to adopt the terminology "indigenous peoples and local communities".

In response to the Forum's recommendation, the Conference of the Parties (COP) to the CBD decided to further consider this matter through an internal process.

In June, the CBD Executive Secretary prepared a draft decision and a related "analysis" for COP's 12th meeting in October 2014 in Korea. The CBD posed three Questions to the UN Office of Legal Affairs and relied almost totally on the advice received from the Office on an "informal" basis. Yet the Office had cautioned: "Our response should not in any way be construed as the only or definitive view … the points we raise may be subject to adjustments depending on the circumstances of each case."

It is clear that a whole range of "adjustments" would be necessary. The central conclusion of this Joint Submission is that **the draft COP decision prepared by the CBD is flawed and should not be adopted**.

While it purports to be based upon the rules of interpretation in the *Vienna Convention on the Law of Treaties*, the draft decision fails to apply such rules appropriately. Submissions prepared during the process by the Parties, other Governments, Indigenous peoples and others were compiled by the CBD. However, there is no indication that such information had been considered by the Office of Legal Affairs or used to prepare the draft decision.

The CBD omitted any reference to the *Nagoya Protocol* in its Questions to the Office. The *Protocol* is relevant in interpreting the *Convention* and makes specific reference to the *UN Declaration on the Rights of Indigenous Peoples*.

The *Convention* and *Protocol* can only be reasonably interpreted as accommodating the rights that Indigenous peoples enjoy as distinct "peoples" (not "communities"). Therefore, the use of the term "indigenous peoples and local communities" within the CBD would not constitute an amendment. This term could not be construed as amending either of these two treaties.

According to the draft decision, the term "indigenous peoples and local communities" would be used in future COP decisions and documents that would be prepared under processes of the

Convention on Biological Diversity and its protocols. However, the term would not be taken into account when interpreting or applying the *Convention*. The decision to use the term is not intended to "clarify" its meaning, as used in the *Convention* and its protocols. Such action would be regressive and violate the rule of law.

In other words, should COP adopt the draft decision, use of the term "indigenous peoples" would have no legal effect on the *Convention* and its protocols – now or in the future. This could serve to undermine the current status and rights of Indigenous peoples globally – especially in the crucial context of biodiversity, sustainable development and traditional knowledge within the CBD.

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.

Indigenous Peoples are "Peoples"

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I. Introduction

1. We welcome the opportunity to share this Joint Submission with the CBD and the Conference of the Parties (COP) for its twelfth session. In Decision XI/14[1] G, paragraph 2, 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 Inter-sessional 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 COP at its twelfth meeting.[3]

3. In the CBD Notification 2013-007 – "Programme of Work on Article 8(j) and related provisions: Request for contributions from Parties and stakeholders", the CBD Executive Secretary invited submissions as described in Decision XI/14 G, para. 2 by 1 April 2013.

4. In inviting submissions of views on the Permanent Forum's recommendations in paras. 26 and 27, the CBD Notification solicited views solely on use of the term "indigenous peoples and local communities". The Notification did not address the discrimination and other concerns raised by the Forum in para. 27 relating to Indigenous peoples' rights to genetic resources.

5. This Joint Submission focuses on the proposed use of the term "indigenous peoples and local communities" in future COP decisions and secondary documents prepared under processes of the Convention and its protocols. In this regard, the CBD has submitted to COP 12 a draft decision and related "analysis".[4]

6. Regretfully, the draft decision is defective and cannot be relied upon. While it purports to be based upon the rules of interpretation in the *Vienna Convention on the Law of Treaties*,[5] the draft decision fails to apply such rules appropriately. Key interpretive rules are not considered.

7. The draft decision relies upon the advice that the CBD Executive Secretary solicited from the Office of Legal Affairs. However, it appears that the CBD did not provide the Office with sufficient factual and legal information on which to base such advice.

8. The Permanent Forum's recommendation in para. 26 of its report on the tenth session (quoted above) explicitly highlighted the *Nagoya Protocol*.[6] Yet the CBD failed to include the *Protocol* in the three Questions posed to the UN Office of Legal Affairs or in the CBD's own analysis. The *Protocol* is a key element in determining all the "implications" for the *Convention* and the Parties, as requested in COP Decision XI/14.

9. Submissions were prepared for the Working Group on Article 8(j) by the Parties, other Governments, Indigenous peoples and others were compiled by the CBD. However, there is no indication that these were shared with the Office of Legal Affairs.

10. The response from the Office does not show evidence of considering such relevant information. The Office appears to have based its "informal"[7] response on the narrow questions drafted by the CBD.

11. For the reasons elaborated in this Joint Submission, the draft decision proposed to COP 12 should be rejected. It is incomplete and highly prejudicial to Indigenous peoples. It is also inconsistent with essential principles and other criteria in the *Convention on Biological Diversity* and the *Nagoya Protocol*.

12. It is worth noting that the Inter-Agency Support Group on Indigenous Peoples' "Survey on the use of the term 'Indigenous peoples' in United Nations Agencies, Programmes and Funds, June, 2013" indicates that all of the 16 agencies, etc. surveyed use the term "Indigenous peoples", save for the CBD.[8]

II. Adverse Impacts of Draft COP Decision

13. In essence, the draft decision proposes that COP:

> 1. *Decides:*
>
> (a) To use the term "indigenous peoples and local communities" in future decisions and secondary documents under the Convention;
> (b) That the use of the term "indigenous peoples and local communities" in future decisions and secondary documents is without prejudice to the terminology used in Article 8(j) of the Convention and should not be taken into account for purposes of interpreting or applying the Convention;
>
> 2. *Notes* that the decision in paragraph 1 above is not intended to clarify the meaning of the term "indigenous and local communities" as used in Article 8(j) of the Convention and the relevant provisions of its protocols and, therefore, shall not constitute a subsequent agreement among Parties to the Convention on Biological Diversity …[9]

14. If adopted by COP, the above draft decision would have a number of adverse effects.

15. The term "indigenous peoples and local communities" would be used in future COP decisions and documents that would be prepared under processes of the *Convention on Biological Diversity* and its protocols.[10] However, the term would not be taken into account when interpreting or applying the *Convention*. The decision to use the term is not intended to "clarify" its meaning, as used in the *Convention* and its protocols.

16. In other words, the use of the term "indigenous peoples" would have no legal effect on the *Convention* and its protocols – now or in the future. This could serve to undermine the current status and rights of Indigenous peoples globally – especially in the crucial context of biodiversity, sustainable development and traditional knowledge within the CBD.

17. 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.

18. The draft COP decision is inconsistent with the current use of the term "indigenous peoples" by the UN General Assembly,[11] Office of the High Commissioner for Human Rights,[12] Human Rights Council,[13] treaty monitoring bodies, specialized agencies, special rapporteurs[14] and other mechanisms.[15]

19. CBD Protocols, such as the *Nagoya Protocol*, would also be adversely affected by the draft COP decision. This *Protocol* refers in its preamble to the *United Nations Declaration on the Rights of Indigenous Peoples*, a consensus international human rights

instrument applying to all Indigenous peoples worldwide.[16] No State in the world formally opposes it.

20. According to the Committee on Economic, Social and Cultural Rights, the right to "take part in cultural life", as affirmed in the *International Covenant on Economic, Social and Cultural Rights*,[17] applies to "indigenous peoples" (not "indigenous communities"). Moreover, this cultural right generates specific State obligations:

> States parties should take measures to guarantee ... the exercise of th[at] right ... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".[18]

21. The jurisprudence of human rights treaty bodies, including their General Comments, have been ascribed "great weight" by the International Court of Justice (ICJ).[19] It would be discriminatory for COP to decide that, in regard to the *Convention on Biological Diversity* and its Protocols, use of the term "indigenous peoples" or "indigenous peoples and local communities" would have no legal weight within the CBD.

22. UN treaty bodies have confirmed repeatedly that the right of self-determination, as provided in the international human rights Covenants, applies to the world's "indigenous peoples".[20] States that seek to restrict or deny Indigenous peoples' 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*[21] and the *International Covenant on Civil and Political Rights*.[22]

23. The prohibition against racial discrimination is recognized as customary international law,[23] as well as a peremptory norm (*jus cogens*).[24] In relation to Indigenous peoples, such discrimination should have factored into any analysis as to implications of the term "indigenous and local communities" and the proposed "indigenous peoples and local communities".

24. As a supplementary means of treaty interpretation, it is "legitimate to assume that the parties to a treaty did not intend that it would be incompatible with customary international law."[25] Therefore, the draft decision, if adopted, would have far-reaching consequences that run counter to existing international principles and obligations in conventional and customary law.

25. An overwhelming majority of States have ratified at least one of the two human rights Covenants that include identical article 1 on the right of all peoples to self-determination. Such right is widely accepted as customary international law, if not also a peremptory norm.[26] Thus, all States have an affirmative obligation to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations."[27]

26. Both the *Convention* and *Protocol* are "living" treaties and call for an "evolutionary" approach to treaty interpretation – including the contemporary meaning of "indigenous and local communities". It would be regressive for COP to adopt the draft decision which would serve to deny the significance of the term "indigenous peoples and local communities" within the CBD.

27. These two CBD treaties are environmental in nature, but a central aspect in both are the human rights of Indigenous peoples. The "more dynamic approach to interpretation is … evident in the context of human rights treaties" which are described as "living" instruments.[28]

28. In 1971, the International Court of Justice concluded that "'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned-were not static, but were by definition evolutionary"[29] and then added:

> … the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[30]

29. Similarly, the *Convention on Biological Diversity* calls for a dynamic approach to interpretation. In the preamble of the *Convention*, States Parties expressed their determination "to conserve and sustainably use biological diversity for the benefit of present and future generations". Biological diversity – which includes genetic resources – is critical now and in the future for ensuring environmental security, food security, human well-being, sustainable and equitable development, and for addressing climate change.

30. In regard to the *Vienna Convention on the Law of Treaties*, the August 2013 *Report of the International Law Commission* concluded:

> Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.[31]

31. A further problem with the draft COP decision relates to accuracy.

32. The draft COP decision emphasizes that "the subject matter of Article 8(j) and related provisions is traditional knowledge and customary use relevant to the conservation and sustainable use of biological diversity within the scope of the Convention, and that each Contracting Party is expected to implement these provisions as far as possible, as appropriate, and subject to national legislation".[32] This statement incorrectly diminishes the rights of Indigenous peoples.

33. The "related provisions" to Article 8(j) are not "subject to national legislation". For example, Article 10(c) of the *Convention* stipulates: "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".

34. The phrase "subject to national legislation" in article 8(j) must be interpreted in a manner compatible with the customary use of biological resources by Indigenous peoples and communities in article 10(c) of the *Convention*. This view is affirmed by the Executive Secretary of the *Convention*:

> Article 10(c) provides for the protection and encouragement of customary uses of biological resources in accordance with traditional cultural practices and thus forms a critical link with Article 8 ...[33]

35. While the CBD refers to the "**Legal opinion of the Office of Legal affairs**",[34] the Office emphasized that its advice was an "informal" response.[35] The Office further cautioned:

> … our response should not in any way be construed as the only or definitive view … Furthermore, the points we raise may be subject to adjustments depending on the circumstances of each case.[36]

36. The CBD analysis relies almost totally on the informal advice of the Office of Legal Affairs. Based on the lack of factual and legal information provided to the Office, it is clear that a whole range of "adjustments" would be necessary.

III. *Vienna Convention* – Rules of Treaty Interpretation

37. Prior to assessing the analysis of the CBD in regard to use of the term "indigenous peoples and local communities", it is beneficial to highlight the relevant rules of treaty interpretation in the *Vienna Convention on the Law of Treaties*.

38. Such rules include Article 31 (1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31 (2) affirms that the "context" for treaty interpretation comprises its full text, which includes its preamble and annexes.[37]

39. As indicated in the August 2013 *Report of the International Law Commission*, the general rule in Article 31 (1) does not mean that "this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31 are part of a single integrated rule."[38]

40. Article 31 (3) of the *Vienna Convention* adds: "There shall be taken into account, together with the context:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation …"

41. The *Nagoya Protocol* constitutes a "subsequent agreement" as indicated in Article 31 (3)(a). Consensus instruments, such as the *UN Declaration* and the Rio+20 outcome document *The future we want*,[39] are important examples of "subsequent practices" referred to in Article 31 (3)(b).

42. Article 31 (1) of the *UN Declaration* affirms that it is Indigenous "peoples" that "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".[40] It is an internal matter of each Indigenous "people" how its communities or institutions exercise rights in this regard.

43. Article 32 of the *Vienna Convention* provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

44. It is important to note: "Article 32 gives only examples of the principal supplementary means of interpretation. One may also look at other treaties on the same subject matter adopted either before or after the one in question that use the same or similar terms."[41]

III. Concerns with Analysis by CBD

45. In its Recommendation 8/6, the Working Group on Article 8(j) and related provisions requested the CBD "Executive Secretary to prepare an independent analysis, as referred to in paragraph 3 … including by obtaining advice from the United Nations Office of Legal Affairs".[42] Paragraph 3 of the Recommendation noted:

> many Parties expressed a willingness to use the terminology "indigenous peoples and local communities" in future decisions and secondary documents under the

> Convention and some Parties needed <u>further information and analysis</u> on the legal implications of the use of the term "indigenous peoples and local communities" <u>for the Convention and its Protocols</u> in order to take a decision.

46. The <u>Executive Secretary did not prepare an analysis</u>, aside from posing three Questions to the UN Office of Legal Affairs and recounting its responses.

47. Indigenous representatives were not afforded prior opportunity to assess whether these Questions were adequate or whether additional information should be provided to the Office. Without knowledge of the Questions posed to the Office, Indigenous peoples were in effect precluded from providing the Office with essential and timely information and legal analysis. The principle of full and effective participation that the CBD supports was not applied in this critical process directly affecting Indigenous peoples.

48. In relation to Article 31 (1) of the *Vienna Convention*, there are key questions relating to the current term "indigenous and local communities". These include: what was the meaning of the term at the time of the adoption of the *Convention on Biological Diversity*? Was there a single understanding among the Parties at that time? Or were there different understandings? Without convincing evidence as to a common understanding among the Parties, how can one know if the term "indigenous peoples and local communities" may be changing the meaning of the existing term?

49. In the absence of such relevant information and circumstances, the three Questions did not allow for a full response from the Office that would first consider the "context" in light of the object and purpose of the *Convention on Biological Diversity*.

50. Even if there had been a common understanding among the Parties at the time of adoption of the *Convention*, there does not appear to be consideration of the "subsequent agreement" on the *Nagoya Protocol* included in the Questions to the Office?

51. Both the *Convention* and the *Nagoya Protocol* have an identical objective – namely, "fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources ... <u>taking into account all rights over those resources</u>".[43]

52. In relation to Indigenous peoples, such rights are reinforced by States' obligations under "existing international agreements". Article 22 (1) of the *Convention* relates to the "scope" of this treaty and affirms that the *Convention* does not affect States Parties' obligations deriving from existing international agreements.[44] A similar provision exists in the *Nagoya Protocol*.[45]

53. Thus, the provisions of the *Convention* and *Protocol* do not affect the ongoing affirmative obligation under identical Article 1 (3) of the two international human rights Covenants to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations." This right has been repeatedly affirmed in relation to Indigenous "peoples".

54. The *Convention* affirms important limits on the sovereignty and rights of States, when it indicates: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies" (art. 3). The resource rights of others must still be respected and protected.[46] In international law, the rights of Indigenous peoples as "peoples" are repeatedly affirmed.

55. As required by the *Charter of the United Nations*, the UN and its member States have a duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".[47] Such duty includes universal respect for the human rights of Indigenous peoples affirmed in the *UN Declaration*.

56. Moreover, the "principle of equal rights and self-determination of peoples" is affirmed in the *Charter of the United Nations* and in the *UN Declaration*.[48] This principle of international law must be taken into account in assessing the object, purpose and scope of the *Convention* and *Nagoya Protocol*, in accordance with Article 31 of the *Vienna Convention*.

57. The *Protocol* notes the *United Nations Declaration on the Rights of Indigenous Peoples* in its preamble and then affirms: "nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".[49] The *Protocol* repeatedly uses the term "indigenous and local communities" and it cannot be interpreted so as to diminish the existing rights of Indigenous peoples as "peoples".

58. The *UN Declaration* affirms core international principles that are used to interpret Indigenous peoples' rights and related State obligations.[50] Such principles include: the "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith".[51] These all constitute "principles of international law", as highlighted in Article 3 of the *Convention on Biological Diversity*.

59. The explicit intention of the *Convention* is "to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components" (preamble). Such "international arrangements" include the *UN Declaration*, which affirms Indigenous peoples' status as "peoples" and their rights to genetic resources, traditional knowledge, cultural diversity and biological diversity,[52] as well as environmental,[53] food[54] and human security.[55]

60. The *UN Declaration* constitutes "subsequent practice" in the application of the *Convention* and *Protocol* which establishes the agreement of the parties regarding their interpretation. Such practice should have been taken into account, in accordance with Article 31 (3)(b) of the *Vienna Convention*, especially since the *Declaration* is a consensus international human rights instrument.

61. Similarly, the Rio+20 outcome document *The future we want* constitutes "subsequent practice" and has been endorsed by the General Assembly by consensus. States

recognized 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."[56] Sustainable development and biodiversity are core elements in the *Convention* and *Nagoya Protocol*.

62. In the context of sustainable development and biodiversity, States also emphasized in the *The future we want* the "responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction".[57] Within the CBD, States have a duty to safeguard not only Indigenous peoples' status as "peoples" but also their human rights.

63. In a June 2013 joint statement, Nordic environment ministers on Indigenous peoples and the Convention on Biological Diversity urged COP 12:

> The Rio +20 conference agreed that the final document "The Future We Want" should use the term "indigenous peoples and local communities". … The Nordic environment ministers look forward with confidence to the Convention on Biological Diversity's COP12 in 2014, at which a final decision will be made on the change of terminology from "indigenous and local communities" to "indigenous peoples and local communities".[58]

64. Hypothetically, let us assume that, after applying all the rules in Article 31 of the *Vienna Convention*, one were to conclude that the term "indigenous and local communities" has a different meaning than "indigenous peoples and local communities". Would that mean that when one was addressing such issues as "traditional knowledge", "biodiversity" and "sustainable development" under the *Convention on Biological Diversity* and *Nagoya Protocol*, the related status and rights of Indigenous peoples would possibly have one meaning?

65. Yet when these same issues are considered under subsequent international instruments that use the term "indigenous peoples" – such as the *UN Declaration*, *The future we want*, the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*,[59] the the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,[60] and the *2005 World Summit Outcome*[61] - the related status and rights of Indigenous peoples would possibly have a different meaning? If so, such a result would be <u>manifestly absurd and unreasonable</u>.

66. Even if the words of a treaty in question are clear, "if applying them would lead to a result that would be manifestly absurd or unreasonable (to adopt the phrase in Article 32(b)), the parties <u>must</u> seek another interpretation."[62]

67. As the above analysis demonstrates, the *Convention* and *Protocol* can only be reasonably interpreted as accommodating the rights that Indigenous peoples enjoy as distinct "peoples" (not "communities"). Therefore, the use of the term "indigenous peoples and local communities" would not constitute an amendment. It could not be construed as amending either of these two treaties.

68. Such conclusions are reached by applying the interpretive rules in Articles 31 (1), 31 (2) and 31 (3) (a) and (b). These elements were not adequately included in the analysis of the CBD.

69. The first Question[63] posed by the Executive Secretary to the Office of Legal Affairs was the following:

> **Question 1**
> *Article 8(j) of the Convention on Biological Diversity uses the terminology "indigenous and local communities". Would the use of the terminology "indigenous peoples and local communities" in future decisions of the Conference of the Parties and documents under the Convention alter the scope of the Convention? And/or would a change in terminology in future decisions of the Conference of the Parties have the same legal implications or effects as an amendment to Article 8(j) of the Convention or the relevant provisions of its Protocols?*

70. In its response to Question 1, the Office did not address whether use of the term "indigenous peoples and local communities" in future COP decisions and documents under the *Convention* "would alter the scope of the Convention". In the absence of adequate information, the Office was not in a position to assess the scope of the *Convention*.

71. According to the Office of Legal Affairs, decisions of the Conference of the Parties that use the term "indigenous peoples and local communities" would not constitute an amendment to Article 8(j) unless the amendment procedures outlined in Article 29 of the *Convention* were followed or unless it is by the unanimous agreement of the Parties.[64]

72. As further illustrated below, the responses to all three Questions are affected by the *Nagoya Protocol*.

73. The *Protocol* notes the *United Nations Declaration on the Rights of Indigenous Peoples* in its preamble and then affirms: "nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".

74. The second Question posed by the CBD to the Office of Legal Affairs was the following:

> **Question 2**
> *Would a change of terminology in decisions of the Conference of the Parties and documents under the CBD constitute a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties and therefore have legally binding effect?*

75. In response, the Office of Legal Affairs cited Article 31 (3) (a) of the *Vienna Convention*, which indicates that "any subsequent agreement between the parties regarding the

interpretation of the treaty or the application of its provisions", and Article 31 (3) (b) which indicates that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account in interpreting a treaty.[65]

76. The Office added: "…a change of terminology in decisions of the Conference of the Parties that represent one or more single common acts of the Parties, could constitute a subsequent agreement regarding the interpretation of the Convention or the application of its provisions within the meaning of Article 31 (3) (a). As the [International Law] Commission points out such decisions would not have legally binding effect unless it was clear that the Parties wished to reach a binding agreement on the interpretation of a treaty."[66]

77. However, the Office only considered Article 31 (3) (a) and (b) in relation to the term "indigenous peoples and local communities". For the reasons provided throughout this Joint Submission, such an approach is inadequate and fails to fairly apply Articles 31 and 32 of the *Vienna Convention*.

78. "Subsequent practice" is "a most important element in the interpretation of a treaty, and reference to practice is well established in the jurisprudence of international tribunals".[67] This element should have been considered.

79. It was inadequate for the CBD to steer the Office of Legal Affairs to respond solely to Article 31 (3) of the *Vienna Convention*. As concluded by the International Law Commission (ILC): "The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32."[68]

80. The ILC further elaborated: "First, article 31 of the Vienna Convention, as a whole, is *the* "general rule" of treaty interpretation. Second, articles 31 and 32 of the Vienna Convention together list a number of "means of interpretation" which must (article 31) or may (article 32) be taken into account in the interpretation of treaties."[69]

81. The CBD should have first considered Article 31(1) and (2) of this *Convention* and then systematically considered other relevant elements:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …

82. The third Question posed by the CBD to the Office of Legal Affairs was the following:

Question 3
Is it possible, in decisions and documents under the Convention, to adopt a terminology that is different to the terminology used in the Convention text (e.g. Article 8(j), in this case) without this being a subsequent agreement on interpretation or application within the context of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties? If the answer to this question is 'yes', how could this be achieved?

83. The Office of Legal Affairs indicated that, in regard to Convention documents such as reports and proposals by the Secretariat or individual Parties that may be circulated amongst the Parties, "the use of different terminology would not constitute an agreement within the context of Article 31".[70]

84. The Office added: "In the case of … COP decisions …, in order for the Parties to ensure that the use of different terminology in a decision would not be construed as a "subsequent agreement", they should make clear in their decision that the use of different terminology was on an exceptional basis and without prejudice to the terminology used in the Convention and should not be taken into account for purposes of interpreting or applying the Convention."[71]

85. In regard to future COP decisions, the response of the Office of Legal Affairs to Question 3 is inappropriate to the current situation for numerous reasons. In crafting all three Questions, the CBD did not follow the rules of treaty interpretation in the *Vienna Convention*. As a result, Question 3 posed a question to the Office that exists in a factual and legal vacuum. In such an inaccurate and distorted context, it would not be possible to draw any fair and reasonable conclusions.

86. There is no valid basis for COP to adopt an ill-conceived and unsubstantiated draft decision, so that use of the term Indigenous "peoples" could be denied any interpretive value within the CBD – both now and in the future.

IV. Abuse of Consensus Practice

87. Underlying the recommendations made by the UN Permanent Forum (paras. 26 and 27) are serious concerns that are exacerbated by outdated rules of procedure within the CBD that fail to safeguard the status and rights of Indigenous peoples globally.

88. 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 dynamic does not serve to fulfill key objectives of international processes. In the Indigenous context, consensus has led to widespread abuses and unfair results.

89. Within the CBD, there is 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.

90. At the October 2013 meeting of the Working Group on Article 8(j) and related provisions, 98% of States agreed to use the term "indigenous peoples and local communities". Canada, India and France would not agree. They were among the 2% that insisted an analysis must first be done to assess the implications. Such analysis had to include seeking advice from the UN Office of Legal Affairs.

91. In Canada, the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada (s. 35). These "peoples" include Indians (First Nations), Inuit and Métis. Canada's highest court uses the term "Aboriginal peoples" and "Indigenous peoples" interchangeably.[72]

92. In contrast to its present position, Canada declared in 1996 to the UN Commission on Human Rights a principled and non-discriminatory position on use of the term "peoples" and the right to self-determination:

> [The right of self-determination] ... is fundamental to the international community, and its inclusion in the UN Charter, and in the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* bears witness to the important role that it plays in the protection of human rights of all peoples. ... Canada is therefore legally and morally committed to the observance and protection of this right. We recognize that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law.[73]

93. In addition to Canada, India opposed use of the term "indigenous peoples and local communities" at the COP11 meeting. India has endorsed the *UN Declaration* and other international instruments that use this term. The Supreme Court of India has indicated that "Adivasis are the original inhabitants of India".[74]

94. France has also opposed use of the term "indigenous peoples and local communities". It appears to take the position that, in the context of France, everyone is a part of the French people. In a seminal decision in 1998, the Supreme Court of Canada ruled: "It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right".[75]

95. All States, including Canada, India and France, have agreed to or ratified international instruments that address Indigenous peoples as "peoples" in the text of such instruments and/or in their application by UN human rights bodies. Examples of the latter include the two international human rights Covenants and the *International Convention on the Elimination of All Forms of Racial Discrimination*.

96. 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.[76]

97. 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)

98. In its 2014 report to the Human Rights Council on access to justice, the Expert Mechanism on the Rights of Indigenous Peoples has affirmed: "The United Nations and its bodies and specialized agencies have an essential role in the promotion and protection of indigenous peoples' human rights".[77]

99. The Expert Mechanism has also cautioned that consensus loses its legitimacy if used to undermine Indigenous peoples' human rights, including their right to participate in decision making:

> 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.[78]

100. There are compelling reasons for not establishing rigid practices within the CBD that in effect demand 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.

101. 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.

V. Conclusions and Recommendations

102. Indigenous peoples constitute "peoples" under international law. This has been reaffirmed repeatedly in treaties and other international instruments and the jurisprudence of UN treaty bodies and mechanisms, as well as the UN General Assembly, High Commissioner for Human Rights and specialized agencies.

103. The CBD is the only specialized agency that is entrenched in using the term "indigenous and local communities" (not Indigenous "peoples").[79] In 2010, the Permanent Forum on Indigenous Issues called upon the parties to the *Convention on Biological Diversity*, and especially including the *Nagoya Protocol*, to adopt the terminology "indigenous peoples and local communities".[80]

104. Further to the Conference of the Parties (COP) Decision XI/14[81] and consideration of this matter by the Working Group on Article 8(j) and Related Provisions, the CBD Executive Secretary prepared a draft decision and a related "analysis" for COP's 12th meeting in October 2014 in Korea.

105. For such purposes, the CBD Executive Secretary posed three Questions to the UN Office of Legal Affairs and relied almost totally on the advice he received from the Office on an "informal"[82] basis. Yet the Office had cautioned:

> Our response should <u>not in any way be construed</u> as the only or definitive view … Furthermore, the <u>points we raise may be subject to adjustments depending on the circumstances of each case</u>.[83]

106. It is clear that a whole range of "adjustments" would be necessary. The central conclusion of this Joint Submission is that **the draft COP decision is flawed and should not be adopted**.

107. While it purports to be based upon the rules of interpretation in the *Vienna Convention on the Law of Treaties*, the draft decision fails to apply such rules appropriately. All means of interpretation in article 31 are part of "a single integrated rule".[84] Yet key interpretive rules were not considered by the CBD in the manner required by this *Convention*.

108. According to the *Vienna Convention*, a treaty shall be interpreted in good faith in accordance with the <u>ordinary meaning</u> to be given to the terms of the treaty in their <u>context</u> and in the light of its <u>object and purpose</u>.

109. Submissions prepared for the Working Group on Article 8(j) by the Parties, other Governments, Indigenous peoples and others were compiled by the CBD. However, there is no indication that such information had been considered by the Office of Legal Affairs or used to prepare the draft decision.

110. In the Permanent Forum's recommendation on use of the term "indigenous peoples and local communities", the Forum emphasized the need to consider both the *Convention on Biological Diversity* and the *Nagoya Protocol*. Yet the CBD omitted any reference to the *Protocol* in its three Questions to the Office. The *Protocol* is relevant in interpreting the *Convention* and makes specific reference to the *UN Declaration on the Rights of Indigenous Peoples*.

111. In regard to the current term "indigenous and local communities", the CBD did not examine whether, at the time of the adoption of the *Convention*, there was a single understanding among the Parties or different understandings. Without such evidence, one cannot determine if or how the term "indigenous peoples and local communities" is presently changing the meaning of the existing term.

112. Even if there had been a common understanding among the Parties at the time of adoption of the *Convention*, there was no consideration by the CBD or the Office of the effect of the "subsequent agreement" by States on the *Nagoya Protocol* or "subsequent practices" of States and the UN General Assembly endorsing by consensus such instruments as the *UN Declaration* and the Rio+20 outcome document *The future we want*.

113. The current meaning of the term "indigenous and local communities" can only be "indigenous peoples and local communities", in accordance with the *Vienna Convention* and other international law.

114. To conclude that the term "indigenous and local communities" currently has a different meaning than "indigenous peoples and local communities" would lead to absurd conclusions. It would mean that when one was addressing such issues as "biodiversity", "sustainable development" and "traditional knowledge" under the *Convention on Biological Diversity* and *Nagoya Protocol*, the related status and rights of Indigenous peoples would possibly have one meaning.

115. Yet when these same issues are considered under subsequent international instruments that use the term "indigenous peoples" – such as the *UN Declaration*, *The future we want*, 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, and *2005 World Summit Outcome* – the related status and rights of Indigenous peoples would possibly have a different meaning. If so, such a result would be manifestly absurd and unreasonable.

116. Even if the words of a treaty in question are clear, if applying them would lead to a result that would be manifestly absurd or unreasonable, the parties must seek another interpretation.[85]

117. The *Convention* and *Protocol* can only be reasonably interpreted as accommodating the rights that Indigenous peoples enjoy as distinct "peoples" (not "communities").[86] Therefore, the use of the term "indigenous peoples and local communities" within the CBD would not constitute an amendment. This term could not be construed as amending either of these two treaties.

118. Thus, in accordance with international law, the Conference of the Parties should agree to use the term "indigenous peoples and local communities" without conditions. This would be consistent with the recommendation of the Permanent Forum on Indigenous Issues.[87]

119. According to the draft decision, the term "indigenous peoples and local communities" would be used in future COP decisions and documents that would be prepared under processes of the *Convention on Biological Diversity* and its protocols.

120. However, the term would not be taken into account when interpreting or applying the *Convention*. The decision to use the term is not intended to "clarify" its meaning, as used in the *Convention* and its protocols. Such action would be regressive and violate the rule of law.

121. In other words, should COP adopt the draft decision, use of the term "indigenous peoples" would have no legal effect on the *Convention* and its protocols – now or in the future. This could serve to undermine the current status and rights of Indigenous peoples globally – especially in the crucial context of biodiversity, sustainable development and traditional knowledge within the CBD.

122. 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. The draft COP decision, if adopted, would be regressive and unjust.

123. **The draft decision proposed to COP 12 should be rejected**. It is incomplete and highly prejudicial to Indigenous peoples. It is incompatible with the rules of treaty interpretation in the *Vienna Convention* and other international law. It is also inconsistent with essential principles and other criteria in the *Convention on Biological Diversity* and the *Nagoya Protocol*.

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. [emphasis added]

[4] Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/5/Add.1 (25 June 2014). The draft decision is reproduced at para. 18.

[5] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

[6] *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.

[7] Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, *supra* note 4, para. 8. The full copy of the response of the Office of Legal Affairs appears as an annex to this document.

[8] Conference of the Parties to the Convention on Biological Diversity, *Additional Information Received on Use of the Term "Indigenous Peoples And Local Communities": Note by the Executive Secretary*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/INF/1/Add.1 (26 June 2014) at pp. 8-12, where the Inter-Agency Support Group on Indigenous Peoples' "Survey on the use of the term 'Indigenous peoples' in United Nations Agencies, Programmes and Funds, June, 2013" is reproduced. The World Intellectual Property Organization includes "Indigenous Peoples and Local Communities / Indigenous and Local Communities" in the most recent texts being negotiated at the Intergovernmental Committee (IGC).

[9] The full text of this draft decision is set out in Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, *supra* note 4, para. 18.

[10] Protocols include the *Nagoya Protocol* and *Cartagena Protocol on Biosafety*, adopted 29 January 2000 and *entered into force* on 11 September 2003. This latter *Protocol*, which was not negotiated with any significant Indigenous participation, includes two weak references to "indigenous and local communities".

[11] *E.g.*, General Assembly, *The right to food*, UN Doc. A/RES/68/177 (18 December 2013) (adopted without vote), where reference is made to the *Convention on Biological Diversity* (para. 17) and "indigenous peoples" and the *UN Declaration on the Rights of Indigenous Peoples* (para. 18). Both the *Convention* and the *Nagoya Protocol* make references to "food" or "food security" and the essential links to genetic resources.

[12] Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the rights of indigenous peoples*, UN Doc. A/HRC/27/30 (30 June 2014), para. 86 (Conclusion): "The rights of indigenous peoples remain a priority for OHCHR and, in addressing this priority, the United Nations Declaration on the Rights of Indigenous Peoples has provided a key reference and framework for action".

[13] Human Rights Council, *Human rights and indigenous peoples*, UN Doc. A/HRC/RES/24/10 (26 September 2013) (adopted without vote), para. 1: "requests the High Commissioner to continue to submit to the Human Rights Council an annual report on the rights of indigenous peoples containing information on relevant developments in human rights bodies and mechanisms and activities undertaken by the Office of the High Commissioner … that contribute to the promotion of, respect for and the full application of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, and to the follow-up on the effectiveness of the Declaration". [emphasis added]

[14] 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: "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."

[15] 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: "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."

[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, article 43.

[17] *International Covenant on Economic, Social and Cultural Rights*, article 15, para 1 (a). This cultural right includes "protecting access to cultural heritage and resources": see Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 9.

[18] Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 36. [emphasis added] And at 48:

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

[19] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639 at 663, para. 66.

[20] 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.

[21] *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.

[22] In regard to this Covenant, see 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]

[23] Antonio Cassese, *International Law*, 2nd ed. (Oxford/N.Y.: Oxford University Press, 2005),, at 394: "rules [that] now belong to the corpus of customary law: those banning slavery, genocide, and racial discrimination; the norm prohibiting forcible denial of the right of peoples to self-determination; as well as the rule banning torture." [emphasis added]

[24] *Vienna Convention on the Law of Treaties*, *supra* note 5, Art. 53: "… a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 188: "Those peremptory norms that are clearly accepted and recognised include the prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." [emphasis added]

[25] Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed. (New York: Cambridge University Press, 2013), at 220.

[26] See, *e.g.*, Robert McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. L.Q. 857, at 858: "This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*."

Stefan Oeter, "Self-Determination" in Bruno Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 3rd ed. (New York: Oxford University Press, 2013) 313 at 316: "State practice subsequent to the adoption of the Charter has transformed self-determination into a principle of customary international law".

[27] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 1, para. 3.

[28] Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), at 937 - 938.

[29] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, [1971] I.C.J. Rep. 16, para. 53. [emphasis added] See also Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford: Oxford University Press, 2014) (forthcoming).

[30] *Ibid*.

[31] *Report of the International Law Commission*, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), GA OR 68th sess., Supp. No. 10 (A/68/10) at 12 (draft conclusions and commentaries thereto provisionally adopted by the Commission). [emphasis added]

[32] Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, *supra*, para. 5. [emphasis added]

[33] 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. 76. This background document was prepared by the Executive Secretary of the Convention on Biological Diversity, at the request of COP, in Decision III/14, para. 10.

[34] Conference of the Parties to the Convention on Biological Diversity, *Compilation of Views on Use of the Term "Indigenous Peoples and Local Communities": Note by the Executive Secretary*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/INF/1 (26 June 2014), at 6. [bold in original]

[35] *Ibid*., at 8.

[36] *Ibid*., at 8 and 11. [emphasis added]

[37] Article 31 (2) of the *Vienna Convention* also includes other elements that are not relevant to the present context.

[38] *Report of the International Law Commission*, *supra* note 31 at 16 (draft conclusions and commentaries thereto provisionally adopted by the Commission). [emphasis added]

[39] 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), http://sustainabledevelopment.un.org/futurewewant.html, endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote).

[40] See also *UN Declaration*, Article 31(2): "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."

[41] Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed. (New York: Cambridge University Press, 2013), at 220.

[42] Conference of the Parties to the Convention on Biological Diversity, *Report of the Eighth Meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/5 (11 November 2013), at 36, Recommendation 8/6, para. 4. [emphasis added]

[43] Article 1 of the *Convention on Biological Diversity* and the *Nagoya Protocol* [emphasis added]. Indigenous peoples' human rights must be an integral part of any "fair and equitable" benefit sharing regime. See also Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, *supra* note 2, para. 25:

> 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. [emphasis added]

[44] *Convention*, Art. 22(1): "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." [emphasis added]

[45] *Nagoya Protocol*, Article 4(1).

[46] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 73: "Aboriginal title confers ownership rights … including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land." And at para. 70: "the Crown does not retain a beneficial interest in Aboriginal title land."

A Circumpolar Inuit Declaration on Sovereignty in the Arctic, adopted by the Inuit Circumpolar Conference on behalf of Inuit in Greenland, Canada, Alaska, and Chukotka (April 2009), para. 2.1: "Sovereignties overlap and are frequently divided within federations in creative ways to recognize the right of peoples."

See also Neva Collings, "Environment" in United Nations (Department of Economic and Social Affairs), *State of the World's Indigenous Peoples* (New York: United Nations, 2009) 84, at 98: "… the Convention on Biological Diversity … reaffirms that "states have sovereign rights over their own biological resources". On the international and domestic stages, the challenge for indigenous peoples is to assert their sovereign rights as peoples to natural resources, decisions concerning resources, and the way in which states engage with them."

Haida Nation v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Supreme Court of Canada), para. 20: "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims … Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty … sovereignty claims [are] reconciled through the process of honourable negotiation."

[47] *Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945, Arts. 55c and 56. These articles reinforce the purposes of the *UN Charter*, which includes in art. 1(3): "To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Permanent Forum on Indigenous Issues, *Report on the tenth session, (16 - 27 May 2011), supra* note 2, para. 39:

> *Given the importance of the full range of the human rights of indigenous peoples, including traditional knowledge*, ... the Permanent Forum calls on all United Nations agencies and intergovernmental agencies to *implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent consistent with their right to self-determination* as reflected in common article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which makes reference to permanent sovereignty over natural resources. [emphasis added]

[48] All UN member States have a duty to respect the purposes and principles of the *Charter of the United Nations*. This requires actions "promoting and encouraging respect" for human rights (*UN Charter*, Art. 1 (3)). This duty is based on "respect for the principle of equal rights and self-determination of peoples" (*UN Charter*, Art. 55 c).

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

[49] See also *UN Declaration*, Art. 45: "Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future."

[50] See, *e.g.*, *Cal et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, para. 131, where UNDRIP was cited and relied upon: "…where these … Declarations contain principles of general international law, states are not expected to disregard them."

[51] UNDRIP, Article 46(3).

[52] In regard to Indigenous peoples' right to cultural diversity, see *UN Declaration*, preambular para. 2 (right to be different) and the many provisions relating to culture, including Arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance.

In relation to Indigenous peoples' right to biological diversity, see *UN Declaration*, Arts. 29(1) (right to conservation and protection of the environment and the productive capacity of their lands or territories and resources) and 31(1) (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, etc.).

[53] *UN Declaration*, Art. 7(2) (right to live in peace and security, as distinct peoples), read together with arts. 29(1) (right to conservation and protection of environment and the productive capacity of their lands, territories and resources); 32(1) (right to determine and develop priorities and strategies for development or use of their lands, territories and resources); 32(2) (State duty to consult and cooperate in good faith, in order to obtain free and informed consent); and 32(3) (State duty to mitigate adverse environmental, economic, social, cultural or spiritual impacts).

See also *African Charter of Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986, Art. 23(1): "All peoples shall have the right to national and international peace and security"; and Art. 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

[54] *UN Declaration*, Art. 7(2) (peace and security), read together with Arts. 3 (right to self-determination); 20 (right to own means of subsistence and development); 24 (right to health and conservation of vital medicinal plants and animals); 26 (right to lands, territories and resources); 29 (right to conservation and protection of environment); 31 (right to cultural heritage, traditional knowledge and cultural expressions including genetic resources, seeds and medicines); and 32 (right to determine priorities and strategies for development). See also identical Art. 1(2) in the two international human rights Covenants: "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."

See also *Convention on Biological Diversity*, preamble: "*Aware* that conservation and sustainable use of biological diversity is of *critical importance for meeting the food, health and other needs* of the growing world population, for which purpose *access to and sharing of both genetic resources and technologies* are essential". [emphasis added]

[55] See generally *UN Declaration*. John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Seroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: "'indigenous peoples human security' . . . encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects."

[56] *The future we want*, *supra* note 39, para. 49.

[57] *Ibid*., para. 9.

[58] Conference of the Parties to the Convention on Biological Diversity, *Compilation of Views on Use of the Term "Indigenous Peoples and Local Communities": Note by the Executive Secretary*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/INF/1 (26 June 2014), para. 3.

[59] 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)).

[60] 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".

[61] General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1 (16 September 2005) (without a vote).

[62] Anthony Aust, *Modern Treaty Law and Practice*, *supra* note 25, at 208-209. [emphasis added]

[63] For the text of all three questions posed by the CBD Executive Secretary, see Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, *supra* note 4, para. 7. [Italics in original]

[64] *Ibid*., para. 9. [emphasis added]

[65] *Ibid*., para. 12. [emphasis added]

[66] *Ibid*., para. 13. [emphasis added]

[67] Anthony Aust, *Modern Treaty Law and Practice*, *supra* note 25, at 215.

[68] *Report of the International Law Commission*, *supra* note 31 at 13.

[69] *Ibid*. [underline added]

[70] Conference of the Parties to the Convention on Biological Diversity, *Analysis on the Implications of the Use of the Term "Indigenous Peoples and Local Communities" for the Convention and its Protocols*, *supra* note 4, para. 14.

[71] *Ibid*.

[72] *E.g.*, *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 4.

[73] *Statements of the Canadian Delegation*, Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess., Geneva, 21 October - 1 November 1996, cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the U.N. Commission on Human Rights, February 4, 1997* (statement on draft UN Declaration, art. 3, right to self-determination, on October 31, 1996).

[74] *Kailas & others v. State of Maharashtra* in criminal appeal No. 11/2011 (Citation AIR 2011 Supreme Court 598). See Conference of the Parties to the Convention on Biological Diversity, *Compilation of Views on Use of the Term "Indigenous Peoples and Local Communities": Note by the Executive Secretary*, *supra* note 58, at 20, para. 22 [Forest Peoples Programme and Natural Justice *et al*], where it is added that in all Indian languages, "Adivasis" means "original inhabitants" or "indigenous peoples".

[75] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 124.

[76] *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.

[77] Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, para. 22.

[78] 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]

[79] See text accompanying note 8 *supra*.

[80] See text accompanying note 2 *supra*.

[81] See text accompanying note 1 *supra*.

[82] See *supra* note 7.

[83] See text accompanying note 36 *supra*.

[84] See text accompanying note 38 *supra*.

[85] See text accompanying notes 64-66 *supra*.

[86] It is an internal matter of each Indigenous "people" how its communities or institutions exercise rights in this or other contexts.

[87] This recommendation of the Permanent Forum is quoted in the text accompanying note 2 *supra*.