

# **Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises**

**A Submission to the Special Representative of  
the Secretary-General on human rights and transnational  
corporations and other business enterprises**

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## **I. Introduction**

This submission to the United Nations Secretary General's Special Representative on the issue of human rights and transnational corporations and other business enterprises ("the Special Representative") addresses two main areas: 1) the human rights responsibilities and accountability of transnational and other business enterprises ("TNCs"), primarily as related to the issues raised by the Special Representatives' interim report (Part II) and; 2) the nature and extent of indigenous peoples' rights in international law as reflected in the jurisprudence of United Nations and regional human rights treaty bodies (Part III).<sup>1</sup>

Part II touches briefly on the Special Representative's mandate, the notion of social expectations, the scope of the term 'transnational and other business enterprises', and the need for special attention to indigenous peoples' rights and issues in connection with fulfilling the Special Representative's mandate. Part III, which comprises the bulk of this submission, is primarily a descriptive treatment of the rights of indigenous peoples that condition and limit resource extraction operations within or affecting indigenous lands and territories.

## **II. Human Rights and Transnational Corporations and other Business Enterprises**

### **A. TNC Obligations and the Sub-Commission's Norms**

While the obligations incumbent on states are predominantly the focus of international human rights law, there is some evidence in contemporary law that human rights obligations and responsibilities can also apply to non-state actors, including TNCs.<sup>2</sup> The UN human rights treaty bodies routinely refer to the responsibilities of non-state actors, particularly in their General Comments and Recommendations and pursuant to their general oversight mandates.<sup>3</sup> At the regional level, Article 36 of the Charter of

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<sup>1</sup> *Interim Report of the Secretary General's Special Representative on the issue of human rights and transnational and other business enterprises*. UN Doc. E/CN.4/2006/97, 22 February 2006 (hereinafter "Interim Report of the SR").

<sup>2</sup> Among others, see, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. 1) (1992); *Copenhagen Declaration and Programme of Action*, UN Doc. A/CONF.166/9 (1995); *G.A. Res. 42/115*, 11 February 1988, *The Impact of Property on the Enjoyment of Human Rights and Fundamental Freedoms*; Commission on Human Rights Resolutions 1987/18 and 1988/19; *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2; M. Addo (ed.), *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS*. The Hague: Kluwer Law International (1999); J.R. Paul, *Holding Multinational Corporations Responsible Under International Law* 24 *Hastings Int'l. and Comp. Law Rev.* 285 (2001); and, B. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights*, 6 *Minn. J. Global Trade* 153 (1996).

<sup>3</sup> This jurisprudence is discussed in A. Clapham, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS*. Academy of European Law, European University Institute, Oxford: Oxford University Press (2006), Chapter 8 and; K. Lucke, *Human Rights and the Draft UN Norms*. In: T. Cottier, J. Pauwelyn & E. Burgi (eds), *HUMAN RIGHTS AND INTERNATIONAL TRADE*. Oxford: Oxford University Press (2005), 154-56.

the Organization of American States explicitly provides that “Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to which said countries are parties...” (emphasis added). Also, the Inter-American Court of Human Rights has explained that the prohibition of discrimination not only binds state parties to the American Convention on Human Rights but also “give[s] rise to effects with regard to third parties, including individuals.”<sup>4</sup> The Court further explained that

the obligation to respect and ensure human rights, which normally has effects on relations between the State and the individuals subject to its jurisdiction, also has effects on relations between individuals. As regards this Advisory Opinion, the said effects of the obligation to respect human rights in relations between individuals is defined in the context of the private employment relationship, under which the employer must respect the human rights of his workers.<sup>5</sup>

The UN Sub-Commission on the Promotion and Protection of Human Rights articulated the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (“the Norms”). The Norms reflect that body’s views on contemporary human rights law as it applies to TNCs within their spheres of influence. The Norms thus constitute expert opinion on the state of international law. Expert opinion is a recognized source of international law pursuant to Article 38(1) of the Statute of the International Court of Justice.

However, the Special Representative has made no doubt about his view that the Norms, while containing “useful elements,” have “little authoritative basis in international law - hard, soft, or otherwise,” at least to the extent that the Norms claim to restate existing law that imposes direct human rights obligations on TNCs.<sup>6</sup> He also explains that there was an impasse in relation to the Norms due to opposition by most of the business community.<sup>7</sup>

We do not believe that it is useful to contest the Special Representative’s interpretation of the legal basis for the Norms herein and will restrict our remarks to the following two points:

- in our view, the Norms represent a highly significant and legitimate treatment of the subject of TNCs and human rights, and requiring TNCs to respect and protect human

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<sup>4</sup> *Juridical Condition and the Rights of the Undocumented Migrants*, Advisory Opinion of the Inter-American Court of Human Rights, 17 September 2003. Ser. A OC-18/03, at para. 110

<sup>5</sup> *Id.* at para. 146. See, also, *id.* Concurring Opinion of Judge A.A. Cancado-Trindade, at para. 77 and 85 – “the obligations *erga omnes* of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations); [and,] [t]he fundamental rights of the migrant workers, including the undocumented ones, are opposable to the public power and likewise to the private persons or individuals (e.g., employers), in the inter-individual relations.”

<sup>6</sup> Interim Report of the SR, at para. 57 and 60.

<sup>7</sup> *Id.*, para. 55.

rights within their ‘sphere of influence’ is entirely appropriate on both legal and policy grounds; and,

- in an ideal world, the majority of the business community would fully support an effective system of human rights regulation; however, the opposition of TNCs should not by itself hinder the implementation of such a regulatory system anymore than TNC opposition to taxation or other laws should require the withering or abolition of these laws.

Although the Special Representative rejects the legal basis for the Norms, he nevertheless explains that there are legitimate arguments for the desirability “in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended.”<sup>8</sup> In connection with this, the first part of the Special Representative’s mandate provides that he shall “identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.”<sup>9</sup> This part of the mandate is not directly tied to elaborating the regulatory role of states in relation to TNCs (point (b) of the mandate). It, therefore, provides the Special Representative with authority to specify in which circumstances and how TNCs should directly hold human rights obligations and be liable for violations thereof. We urge the Special Representative to fully exercise this authority and to integrate the Norms into his analysis and conclusions.<sup>10</sup>

We submit that one circumstance where imposing direct obligations on TNCs is warranted is in connection with the rights of indigenous peoples, both in general and especially with regard to extractive industries (see sub-section *C infra*). The Norms, the UN Declaration on the Rights of Indigenous Peoples, and international human rights jurisprudence pertaining to indigenous peoples’ rights, provide an adequate basis for the Special Representative to discuss the formulation of standards in this area with indigenous peoples’ representatives. We therefore further urge the Special Representative to undertake the setting of standards in this area, in full cooperation with indigenous peoples’ representatives and the United Nations Permanent Forum on Indigenous Issues.

## **B. Legitimate and Social Expectations and Norms**

Under human rights law, both by virtue of customary international law and the terms of the various human rights instruments, states are obligated to give domestic legal effect to applicable human rights guarantees and to establish effective and prompt judicial

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<sup>8</sup> *Id.* at para. 65.

<sup>9</sup> Interim Report of the SR, at para. 1.

<sup>10</sup> As the Special Representative explains in his interim report (para. 57) in connection with his mandate on standards and the Norms, “Any fair-minded discussion of standards inevitably will cover some of the same grounds.”

and other remedies by which individuals and collectivities (such as indigenous peoples) may seek enforcement of their rights.<sup>11</sup>

States also have affirmative or positive obligations to take appropriate and effective measures to prevent and to exercise due diligence in response to human rights violations committed by private persons, including TNCs.<sup>12</sup> The UN Human Rights Committee's General Comment 23 on the Rights of Minorities (Article 27), for example, explains that "Positive measures of protection" are required not only against the acts of the state itself, "but also against the acts of other persons within the State party."<sup>13</sup> In the same vein, the UN Committee on Economic, Social and Cultural Rights has expressed alarm

at reports that the economic rights of indigenous peoples are exploited with impunity by oil and gas companies which sign agreements under circumstances which are clearly illegal, and that the State party has not taken adequate steps to protect the indigenous peoples from such exploitation. [It] recommend[ed] that action be taken to protect the indigenous peoples from exploitation by oil and gas companies.<sup>14</sup>

In the case of indigenous peoples, special measures of protection are often required to remedy historical and contemporary discrimination and to account for their

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<sup>11</sup> See, for instance, International Covenant on Civil and Political Rights, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 2; and American Convention on Human Rights, Articles 1 and 2. See, also, *inter alia*, Human Rights Committee, *General Comment 31 (art. 2, the nature of the general legal obligation imposed on states parties to the Covenant)*, 29 March 2004, at para. 8.

<sup>12</sup> Inter-American Court on Human Rights, *Velasquez Rodriguez Case, Judgment of 29 July 1988*, Ser. C No. 4, para. 172 – "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention;" Inter-American Commission on Human Rights, *Case 7615 (Brazil)*. OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33; UN Human Rights Committee, Communication Nos. 161/1983, *Annual Rep. Of the HRC 1988*, 197 and Nos. 181/1984, *Annual Rep. of the HRC 1990 (Vol. II)*, 37; African Commission on Human and Peoples' Rights, *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria* (hereinafter "Ogoni Case"), at para. 58, and; European Court of Human Rights, *Sunday Times Case, Judgment of 26 April 1979*, E.C.H.R., Ser. A, (Vol. 30), 318.

<sup>13</sup> Human Rights Committee, General Comment No. 23 (50) (art. 27), 8 April 1994, at para. 6.1. In, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*. UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, (hereafter 'General Comments/Recommendations Compilation'). See, also, Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting). UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 8 – "the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."

<sup>14</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*. 20/05/97. E/C.12/1/Add.13, at para. 29-30.

special circumstances.<sup>15</sup> On this point, the Inter-American Commission on Human Rights has held that “special legal protection” is required for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, “ancestral and communal lands,” and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>16</sup> Similarly, the Inter-American Court has observed that “it is indispensable that States grant effective protection that takes into account [indigenous peoples’] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores.”<sup>17</sup>

TNC acts and omissions that violate human rights are therefore prohibited and punishable pursuant to the obligations of states under human rights law to protect persons and groups within their jurisdiction. While it is the case that the states hold the primary obligations under international law, TNC conduct that contravenes human rights norms is nonetheless a class of prohibited conduct that triggers the state’s duty to actively intervene and protect victims. The fact that the state is ultimately liable under international law does not detract from the responsibility of TNCs to avoid and refrain from engaging in such violative conduct and their accountability should they fail to do so.

In this respect, the Special Representative has highlighted the importance of social expectations and norms, particularly in weak regulatory environments, in relation to the human rights responsibilities and accountability of TNCs.<sup>18</sup> That TNC violations of human rights are prohibited conduct which, by law, the state is required to prevent, protect against and punish, gives rise to both a social and a legitimate expectation that TNCs will not engage in or be complicit in such conduct in the first place. There is thus also a legitimate expectation that TNCs will adopt effective and transparent measures to ensure that they, at a minimum, will identify and avoid human rights violations in their operations and that they are held fully accountable should they fail to do so. Indeed, it could be argued that because violative conduct is prohibited it also gives rise to at least an indirect legal duty on TNCs to avoid complicity in or otherwise refrain from violating human rights. Such expectations, responsibility and accountability are generally applicable and should not be restricted to weak regulatory environments.

In light of the preceding, and strictly speaking, the legal technicalities of determining which entity is the holder of obligations under international law – corporate

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<sup>15</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

<sup>16</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26. (1984), at 76-78, 81.

<sup>17</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgment of the I-A Court of Human Rights, 17 June 2005. Series C No. 125, at para. 63. See, also, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 doc.10, rev.1, at 115 - “Within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population;” *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), at 24, 31; and, *Third Report on the Situation of Human Rights in The Republic of Guatemala* OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114.

<sup>18</sup> Interim Report of the SR, para. 70 and 75.

or state – is perhaps not the most relevant line of inquiry: both are in principle responsible and accountable for their acts and omissions that violate human rights. This is simply a matter of ensuring the effectiveness of the human rights protection regime. As Andrew Clapham explains, “If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves.”<sup>19</sup> The most relevant concern therefore is the further elaboration of and, where necessary, the identification and development of the elements and norms necessary for the effective protection of human rights in which the roles, responsibilities and obligations of both states and TNCs are clearly delineated and specified. In our view, this will involve an examination of the responsibilities and obligations of states and TNCs at both a binding and non-binding level and in both national and international law.<sup>20</sup>

### **C. Indigenous Peoples, Human Rights and Transnational and other Business Enterprises**

The United Nations system has treated indigenous peoples and their rights as a special category in its overall treatment of human rights. The same is also the case in the Inter-American and African human rights protection organs and in the practice of international financial institutions and development agencies. In addition to declaring two International Decades of the World’s Indigenous People, the UN has established specific bodies – the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues – and appointed a Special Rapporteur to address standard setting issues, to give attention to violations of rights, and to ensure that the UN system as a whole devotes adequate attention to indigenous peoples’ rights and issues.

This sustained attention is in part an acknowledgment of the fact that indigenous peoples’ rights continue to be violated on a regular basis in all regions of the world. This is especially the case in connection with extractive industries and agro-industry such as palm oil and soy cultivation, which disproportionately affect indigenous peoples.<sup>21</sup> The UN Committee on the Elimination of Racial Discrimination, for instance, explains that one of the reasons it adopted a General Recommendation on indigenous peoples in 1997 is because

of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists,

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<sup>19</sup> A. Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS, *supra*, at 80.

<sup>20</sup> See, also, Business Leaders Initiative on Human Rights, *Submission to the Office of the UN High Commissioner for Human Rights relating to the “Responsibilities of transnational corporations and related business enterprises with regard to human rights*, 28 September 2004, at p. 3 (stating that “Human rights have always required a combination of both voluntary and mandatory efforts in order to achieve sustainable change and to raise the minimum standard of acceptable behaviour”). Available at: <http://www.ohchr.org/english/issues/globalization/business/docs/blhr.doc>

<sup>21</sup> On palm oil, see, M. Colchester et al, *Promised Land. Palm Oil and Land Acquisition in Indonesia: Implications for Indigenous Peoples and Local Communities*, Forest Peoples Programme, Perkumpulan Sawit Watch, HuMA and the World Agroforestry Centre (2006). Available at: [http://www.forestpeoples.org/documents/prv\\_sector/oil\\_palm/promised\\_land\\_eng.pdf](http://www.forestpeoples.org/documents/prv_sector/oil_palm/promised_land_eng.pdf)



commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.<sup>22</sup>

The litany of human rights abuses perpetrated by TNCs against indigenous peoples is well documented and need not be repeated here.<sup>23</sup> Suffice it to say that these abuses span the full range of human rights guarantees and often take place with the active assistance or acquiescence of states, which, for a variety of reasons, will usually give precedence to TNC operations where conflicts arise with indigenous peoples' rights.<sup>24</sup> The main point we wish to make here is that dedicated and specific attention to the rights, special circumstances and needs of indigenous peoples is required in relation to the fulfillment of the Special Representative's mandate concerning human rights and TNCs. Such attention is required, *inter alia*, for the following reasons:

### **1. National legal regimes do not provide adequate protection to indigenous peoples**

The Special Representative observes in his interim report that in some situations the state-based human rights protection machinery is inoperative or functions inadequately, e.g., where the state cannot or will not protect human rights. He also observes on the basis of case studies he has received that many of the worst TNC human rights abuses occur in low to middle income countries characterized by weak governance, for instance, as classified on the World Bank's rule of law scale.<sup>25</sup>

With regard to indigenous peoples, abundant evidence of widespread and persistent violations of internationally guaranteed human rights can be found in the jurisprudence of international human rights protection organs.<sup>26</sup> These violations occur

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<sup>22</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

<sup>23</sup> See, *inter alia*, D. Fagin, Achieving Restitution: the Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations, 76 *New York Univ. L.R.* 626 (2001); M. McFarland Sanchez-Moreno & T. Higgins, No Recourse: Transnational Corporations and Economic, Social and Cultural Rights in Bolivia, 27 *Fordham Int'l L.J.* 1663 (2004); M. Geer, Foreigners in their Own Land: Cultural Land and Transnational Corporations – Emergent Rights and Wrongs, 38 *Virginia J. Int'l L.* 331 (1998); M. Mullen de Bolivar, A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations under International Human Rights Law and Environmental Law, 8 *J. Transnat'l L. & Pol'y* 105 (1998); Patrick Macklem, Indigenous Rights and Multinational Corporations at International Law, 24 *Hastings Int'l. and Comp. Law Rev.* 475 (2001)

<sup>24</sup> *Inter alia*, S. Joseph, Taming the Leviathans: Multinational Enterprises and Human Rights, 46 *Netherlands Int'l L.R.* 171 (1999) (explaining some of the reasons governments do not enforce human rights in relation to TNCs).

<sup>25</sup> Interim Report of the SR, para. 27 and 30.

<sup>26</sup> United Nations treaty body jurisprudence concerning indigenous peoples for the years 1993-2004 is compiled in: F. MacKay (ed.), *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence 1993-2004*. Available at: [http://www.forestpeoples.org/documents/law\\_hr/un\\_jurisprudence\\_comp\\_sept05\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/un_jurisprudence_comp_sept05_eng.pdf) For Inter-American jurisprudence, see, *Jurisprudencia sobre Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos*, OEA/Ser.L/V/II.120, Doc. 43, 9 September 2004 (original: Spanish). In Africa, see, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Submitted in Accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> ordinary session.

in rich and poor countries, developed and less developed countries, and in countries regarded as having relatively good and bad general human rights records. United Nations or regional treaty bodies are just as likely to express serious concern about severe violations of indigenous peoples' rights in developed countries as they are in less developed countries.

For example, UN treaty bodies routinely express serious concern about the treatment of indigenous peoples and the maintenance or adoption of discriminatory laws or laws that negate indigenous peoples' rights in New Zealand and Canada, both of which are regarded as having good general human rights records and score high on development indices.<sup>27</sup> These bodies are also just as likely to find violations of indigenous peoples' rights, including basic due process rights, the right to judicial protection, and the right to equal protection of the law, in Scandinavian countries or the United States as they are in the poorest countries in the world.<sup>28</sup> A state's relative wealth, its governance capacity and the effectiveness of its judicial system, or other rule of law indicators, therefore, are not necessarily the most pertinent factors in whether indigenous peoples' rights are respected or violated.

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<sup>27</sup> *Inter alia*, Committee on the Elimination of Racial Discrimination, *Decision 1 (66), New Zealand, (Early Warning & Urgent Action Procedure)*. CERD/C/DEC/NZL/1. 27/04/2005 (finding that the 2004 Foreshore and Seabed Act discriminates against indigenous peoples); *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to New Zealand*. UN Doc. E/CN.4/2006/78/Add.3, at para. 13 (observing that "the underlying legal and political fragility of Maori rights translates into a human rights protection gap that seems not to be sufficiently covered by existing legislation"); *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, at para. 8 and 9 (explaining that it remains concerned about practices that "amount to extinguishment of aboriginal rights (arts. 1 and 27);" recommending that Canada "re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights;" and expressing concern "about information that the land of the [Lake Lubicon] Band continues to be compromised by logging and large-scale oil and gas extraction ... (arts. 1 and 27)"); and, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Mission to Canada*. UN Doc. E/CN.4/2005/88/Add.3.

<sup>28</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark*, CERD/C/DEN/CO/17, 18 August 2006, para. 20 (finding that Denmark is denying indigenous peoples' right to identity); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway*, CERD/C/NOR/CO/18, 18 August 2006, at para. 11 (recommending that Norway "adopt special and concrete measures" to ensure indigenous peoples the full and equal enjoyment of human rights and fundamental freedoms); Committee on the Elimination of Racial Discrimination, *Decision 1(68), United States of America, (Early Warning & Urgent Action Procedure)*. CERD/C/USA/DEC/1, 11 April 2006 (finding "that past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the State party under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin; [and,] express[ing] particular concern about: (a) Reported legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers. (b) Information according to which destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, who are denied access to, and use of, such areas. It notes in particular the reinvigorated federal efforts to open a nuclear waste repository at the Yucca Mountain; the alleged use of explosives and open pit gold mining activities ... (d) The conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples);

Almost all states in which indigenous peoples live maintain discriminatory laws, policies and practices – some have adopted such laws in the very recent past – that negate or hinder the exercise and enjoyment of indigenous peoples’ rights.<sup>29</sup> A review of the observations of the UN human rights treaty bodies between 2004 and November 2006 reveals that these bodies found violations (by act or omission and particularly with regard to inadequate domestic legal protections) of indigenous peoples’ rights to own and control their traditional lands and resources in all but one of the states reviewed.<sup>30</sup> Likewise, in all but one state reviewed during the same period the Committee on the Rights of the Child observed that indigenous children were subject to discriminatory laws and practices.<sup>31</sup>

Most states continue to apply a presumption against the existence of indigenous peoples’ rights to own traditional lands, territories and resources, and, with the support of their domestic courts, have rejected indigenous land and resource rights by applying, among others, rigid evidentiary requirements based on colonial norms that exclude and deny indigenous peoples’ perspectives and traditions.<sup>32</sup> For example, the Committee on the Elimination of Racial Discrimination has expressed concern about “the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land” in Canada.<sup>33</sup> It noted in this respect that “to date no Aboriginal group has proven Aboriginal title,” and recommended that Canada “examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.”<sup>34</sup>

Similarly, almost all states invoke the public or general interest in relation to extractive operations on indigenous lands, despite the fact that this is essentially a

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<sup>29</sup> See, for example, *Concluding observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, at para. 22 (expressing “concern that the Canadian Human Rights Act cannot affect any provision of the Indian Act or any provision made under or pursuant to that Act, thus allowing discrimination to be practised as long as it can be justified under the Indian Act;”) and, *Concluding observations of the Human Rights Committee: United States of America*, CCPR/C/USA/Q/3/CRP.4, 27 July 2006, at para. 27 (recommending that the “State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population”).

<sup>30</sup> F. MacKay (ed.), *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence 1993-2004*, *supra*; and, F. MacKay (ed.), *Indigenous Peoples and United Nations Treaty Bodies: A Compilation of United Nations Treaty Body Jurisprudence 2005-2006*. Forest Peoples Programme, Moreton in Marsh.

<sup>31</sup> *Id.*

<sup>32</sup> See, *inter alia*, R. Williams, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA*, University of Minnesota Press, (2005) and; *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21.

<sup>33</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, 01/11/2002. A/57/18, paras.315-343, at para. 330. See, also, *Yorta Yorta v. Victoria*, 194 ALR 538 (2002) (an Australian case giving preference to the written accounts of white settlers over the oral history of aboriginal peoples in denying the existence of native title rights).

<sup>34</sup> *Id.*

‘majority rules’ test that is inherently biased against minority indigenous peoples and is generally not subject to judicial review. In relation to one such provision, the Inter-American Commission has observed that the public interest doctrine

substantially limit[s] the fundamental rights of the indigenous and Maroon peoples to their land *ab initio*, in favor of an eventual interest of the State that might compete with those rights. What is more, according to Suriname’s laws, mining, forestry, and other activities classified as being in the general interest are exempted from the requirement to respect customary rights. In practice, the classification of an activity as being in the “general interest” is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection.”<sup>35</sup>

Violations of indigenous peoples’ rights are especially prominent and evident in relation to the extractives sector across the entire spectrum of states (see box 1 below).<sup>36</sup> This situation has been acknowledged, in one way or another, by the vast majority of human rights protection organs. In this respect, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people observes that “resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. ... [I]n numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades.”<sup>37</sup>

All over the world, states are liberalizing investment laws and redrafting extractives-related legislation to encourage investment in this sector. Between 1990 and 2003 alone, the World Bank funded or otherwise supported revision of mineral, hydrocarbon and other related laws in over 100 countries.<sup>38</sup> Critics of World Bank intervention in this area assert that increasing foreign investment in natural resource exploitation often yields profits for TNCs and local elites which rarely “trickle down” to

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<sup>35</sup> *Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)*, 2 March 2006, at para. 241-42.

<sup>36</sup> See, *inter alia*, the reports of Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57; *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21; the reports of the United Nations Permanent Forum on Indigenous Issues; and, *Indigenous peoples’ permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes*. UN Doc. E/CN.4/Sub.2/2004/30.

<sup>37</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56

<sup>38</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003, p. 8. For a detailed overview of WBG structural, technical and sectoral lending related to extractive industries, see, H. Mainhardt-Gibbs, *The World Bank Extractive Industries Review: The Role of Structural Reform Programs towards Sustainable Development Outcomes*, August 2003. Available at: <http://www.eireview.org/doc/Structural%20Adjustment%20EIR%20Exec%20Summary%20Mainhardt%20Aug%2014.doc>

indigenous peoples and frequently exacerbates poverty and compromises cultural integrity and security.<sup>39</sup> As explained by a member of the UN Working Group on Indigenous Populations,

To attract foreign investment and trade, many developing countries have opened to extractive industries, such as mining and logging, hitherto isolated parts of their territories which are often the last refuges of indigenous peoples and their cultural diversity. By such means, indigenous peoples are collectively sacrificed in order to increase the income of other citizens. Racism against indigenous peoples makes it relatively easy for national political and business leaders to contemplate such measures and to mobilize wider public support for them. If indigenous communities resist dispossession, racism makes it easier for politicians to justify the use of violence to crush the protesters.<sup>40</sup>

This is not to say that there have not been some improvements in national laws pertaining to indigenous peoples' rights over the past two decades. Nonetheless, and despite such improvements, extractives sector legal reforms have predominately weakened indigenous peoples' rights, both legally and in practice.<sup>41</sup> As a result, indigenous lands and territories are increasingly on the front line of state- and TNC-directed resource exploitation operations, and protections in domestic laws are for the most part inadequate and/or selectively implemented and enforced.<sup>42</sup> In some cases, domestic legal protections are non-existent. There are also significant disparities in power and resources between government ministries or agencies responsible for extractives and those responsible for indigenous peoples.

The human rights problems experienced by indigenous peoples in relation to extractive industries are for the most part severe and there are systemic problems in almost every state's laws and institutions with respect to recognition of and respect for their rights. In some cases, there is no exaggeration to say that indigenous peoples' survival is threatened by extractive operations. This situation demands international oversight and scrutiny and represents a situation where, among other things, the direct imposition of human rights obligations to TNCs is warranted and urgently needed. Sector specific standards, building on existing human rights law, that address indigenous

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<sup>39</sup> *Inter alia, see*, Kay Treakle, *Ecuador: Structural Adjustment and Indigenous and Environmental Resistance*, in, *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS AND GRASSROOTS MOVEMENTS* (J. Fox & L. Brown eds., 1998), 219

<sup>40</sup> *Working paper on combating racism against indigenous peoples submitted by Mrs. Erica-Irene A. Daes, member of the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights*. UN. Doc. A/CONF.189/PC.3/4, 20 July 2001, at para. 4.

<sup>41</sup> See, *inter alia*, NCIP Administrative Order No. 01, 2006, *The Free and Prior Informed Consent (FPIC) Guidelines 2006* (revising and weakening earlier order on the same subject).

<sup>42</sup> See, for instance, *Report of the Roundtable on Mining and Indigenous Peoples Issues*. Convened through the IUCN-ICMM Dialogue on Mining and Biodiversity, Gland, Switzerland, 8-9 November 2005, at p. 4 (explaining that "The 'public good' was seen as being invoked as a justification for going forward with a project, but the group questioned who the 'public' was in 'public good' concluding that in many cases it is the urban elite. The state was described as often having significant internal power disparities, with those ministries managing mining having more power and access than those responsible for Indigenous peoples' concerns. It was also felt that existing legal frameworks often give more weight to mining interests than to protecting Indigenous peoples' rights").

peoples and extractive industries – indeed, any industry that involves land conversion, such as large-scale agro-industry – are also urgently needed. We request that the Special Representative fully consider this option as he carries out his mandate and that he does so in full collaboration with indigenous peoples

**Box 1 – Observations of three UN treaty bodies finding violations of indigenous peoples’ rights in connection with extractive industries (1996-2006)<sup>43</sup>**

CERD	HRC	CESCR
Guatemala, May 2006	United States, July 2006	Norway, June 2005
USA, April 2006	Canada, April 2006	Canada, May 2006
Suriname, August 2006	Brazil, December 2005	Mexico, May 2006
Peru, August 2006	Thailand, July 2005	Ecuador, June 2004
Dem. Rep. Congo, August 2006	Finland, October 2004	Russian Fed. December 2003
Guyana, April 2006	Colombia, May 2004	Brazil, May 2003
Nigeria, November 2005	Suriname, May 2004	Colombia, November 2001.
Suriname, November 2005	Philippines, December 2003	Panama, September 2001
Suriname, April 2005	Sweden, April 2002	Venezuela, May 2001
USA, August 2005	Venezuela, April 2001	Honduras, May 2001
Sweden, May 2004	Guyana, April 2000	Bolivia, May 2001
Suriname, March 2004	Chile, March 1999	Cameroon, December 1999
Bolivia, December 2003	Ecuador, August 1998	Canada, December 1998
Suriname, March 2003		Nigeria, May 1998
Ecuador, March 2003		Russian Fed., May 1997
Costa Rica, March 2002		Peru, May 1997
USA, August 2001		Paraguay, May 1996
Sweden, May 2001		
Finland, May 2001		
Chile, March 2001		
Colombia, August 1999		
Finland, March 1999		
Cambodia, March 1998		
Philippines, October 1997		
Panama, March 1997		
Colombia, March 1996		
Russian Fed., March 1996		
Finland, March 1996		

**2. Voluntary self-regulation by TNCs has not proved effective**

Over the past few decades a growing number of TNCs active in the extractives sector have adopted policies by which they commit to respect human rights, sometimes explicitly including indigenous peoples’ rights, on a voluntary basis. Other companies have a policy on indigenous peoples but the word rights is not used anywhere in their

<sup>43</sup> Countries are listed either where the Committee’s made direct or indirect reference to rights violations in relation to extractive industries. This sample is obviously skewed in a number of ways, e.g., it only represents those states that are party to the instruments and those states that have reported to the Committees; and the Committees are dependent on information to reach their conclusions and therefore numerous situations are not addressed because no information was available or presented. This therefore most likely represents only a small proportion of the actual violations taking place.

policy.<sup>44</sup> Amnesty International and the Prince of Wales International Business Leaders Forum give one indication of why this has occurred:

The drive for new resources can lead extractive firms into association with human rights violations. Unlike some aspects of political risk, companies cannot readily insure themselves against this, except through having effective policies to deal with the human rights issues confronting them. Experience has shown that problems are most likely to arise when resources are located in zones of conflict [and] in territories with indigenous populations where land rights are contested or inadequately protected ....<sup>45</sup>

Whatever the rationale for their adoption, there is ample evidence to support the conclusion that these policies often do not contain adequate protections for indigenous peoples' rights, that they have been applied selectively, sometimes not at all, depending on political or other considerations and, more generally, that they have not led to a marked improvement in the majority of TNCs performance with respect to human rights. While we do not advocate that TNCs should abandon developing and implementing effective human and indigenous peoples' rights policies, we do not believe that this approach alone will reduce rights violations by TNCs. There is, therefore, a pressing need to further elaborate or add effective regulation and accountability mechanisms in both domestic and international law to voluntary regulation efforts by TNCs.

While there are many examples, the little known and still evolving case of the Lokono indigenous people of west Suriname amply illustrates the inadequacy of voluntary TNC policies as well as the difficulties encountered by both indigenous peoples and TNCs where domestic legal systems fail to recognize and guarantee indigenous peoples' rights. This case also provides ample evidence of the need to move beyond voluntary regulation and to further elaborate and impose direct human rights obligations on TNCs in the case of indigenous peoples and extractive industries.

Suriname is the only country in South America that has failed to legally recognize, at least in some form, indigenous peoples' traditional ownership rights to their lands, territories and resources. By law, the state owns all ungranted land and all natural resources, and can issue resource exploitation concessions without regard for indigenous peoples' rights to land or otherwise.<sup>46</sup> There are no applicable judicial or administrative

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<sup>44</sup> See, for instance, *Alcan Indigenous Peoples Policy*. Available at:

<http://www.alcan.com/web/publishing.nsf/Content/Alcan+Indigenous+Peoples+Policy>

<sup>45</sup> *Business and Human Rights. A Geography of Corporate Risk. Extractives Sector*, Amnesty International and the Prince of Wales International Business Leaders Forum, at p. 5 Available at: <http://www.iblf.org/docs/geography/extractives.pdf>

<sup>46</sup> See, Inter-American Commission on Human Rights, *Report on Admissibility and Merits No. 09/06, Twelve Saramaka Clans*, Case 12.338 (Suriname), 2 March 2006, at para. 230 (finding that "indigenous and Maroon communities lack legal status in Suriname and are not eligible to receive communal titles on behalf of the community or other traditional collective entities that possess land;") and, *Moiwana Village v. Suriname*, Inter-American Court of Human Rights, Judgment of 15 June 2005, Series C No. 124, at para. 86(5) (determining the following to be 'proven facts': "Although individual members of indigenous and tribal communities are considered natural persons by

remedies that indigenous peoples may invoke should their rights be threatened or violated.<sup>47</sup>

Because of this, indigenous peoples in Suriname, who have vociferously advocated for recognition of their land rights for decades, have been forced to seek the protection of the Inter-American human rights system. In 2005, the Inter-American Court determined that Suriname had violated a tribal community's right to property and held that its property rights arise from its traditional occupation and use, as defined by its customary laws, and are not dependent for their existence on Suriname's domestic laws.<sup>48</sup> It ordered that Suriname establish constitutional and legislative mechanisms to recognize and secure the community's property rights and that it halt any third party activities in its traditional territory.<sup>49</sup>

In 2006, the Inter-American Commission reached the same conclusion in another case. In this case, which involved logging and mining concessions, the Commission stated unambiguously that "in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law."<sup>50</sup> Suriname however failed to comply with the Commission's recommendations and the case is now pending before the Inter-American Court for a binding judgment.

Suriname's 2004 Mining Bill has also been deemed to be racially discriminatory by the UN Committee on the Elimination of Racial Discrimination on the grounds that it denies indigenous peoples' access to judicial remedies and fails to require their agreement to mining.<sup>51</sup> The Committee's concerns in this respect have been reiterated in two urgent action decisions issued in 2005 and 2006, both of which highlight Suriname's obligations to recognize, secure and protect indigenous peoples' traditional territories.<sup>52</sup> Both decisions also drew the attention of the UN Secretary General, and "the High

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Suriname's Constitution, the State's legal framework does not recognize such communities as legal entities. Similarly, national legislation does not provide for collective property rights").

<sup>47</sup> *Id.* Twelve Saramaka Clans, at para. 241-43 (explaining that "the classification of an activity as being in the "general interest" is not actionable and constitutes a political issue that cannot be challenged in the Courts. What this does in effect is to remove land issues from the domain of judicial protection. The rights of indigenous and Maroon peoples ... to their lands, territories and resources, and cultural identity are not explicitly recognized or guaranteed in the 1987 Constitution and, for that reason, there are no provisions contemplating judicial recourse if they are violated;") and, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 14 (observing that "indigenous and tribal peoples cannot as such seek recognition of their traditional rights before the courts because they are not recognized legally as juridical persons").

<sup>48</sup> *Moiwana Village v. Suriname*, *supra*, para. 133-34.

<sup>49</sup> *Id.* para. 209-11.

<sup>50</sup> Twelve Saramaka Clans Case, *supra*, at para. 214.

<sup>51</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. UN Doc. CERD/C/64/CO/9/Rev.2, 12 March 2004, at para. 13 and 14. See, also, Follow-Up Procedure, Decision 3(66), Suriname. UN Doc. CERD/C/66/SUR/Dec.3, 9 March 2005, at para. 4.

<sup>52</sup> *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005; and *Decision 1(69), Suriname*. UN Doc. CERD/C/DEC/SUR/3, 18 August 2006



Commissioner for Human Rights as well as the competent United Nations bodies, in particular the Human Rights Council, to the particularly alarming situation in relation to the rights of indigenous and tribal peoples in Suriname....<sup>53</sup>

Against this background, in 2003, Suriname granted a 2,800 square kilometer concession and bauxite exploration permits to the locally registered, wholly-owned subsidiaries of BHP Billiton and Alcoa. The concession and permits apply to the Bakhuis Mountains, part of the Lokono people's traditional territory, and were issued without any prior notification to or agreement by the affected communities. The companies failed to conduct an environmental and social impact assessment for the (now concluded) exploration work, even though the concession is in a traditional indigenous territory and involved significant impacts on primary tropical rainforests.<sup>54</sup>

During the exploration phase, the Lokono were excluded from the concession area: "Carlo Lewis, Village Chief of Apura, mentions that because of the developments in their territory they are forced to change their way of living. 'We are not against the developments, but our way of living has to be taking into account. We are already no longer allowed to hunt in the Bakhuis territory and we cannot go to the supermarket like the people in the city, because we live from the forest.'"<sup>55</sup> In 2005, the Committee on the Elimination of Racial Discrimination indirectly referred to the Bakhuis project in an urgent action decision, where it expressed its deep concern that Suriname is "authorizing additional resource exploitation and associated infrastructure projects that pose substantial threats of irreparable harm to indigenous and tribal peoples, without any formal notification to the affected communities and without seeking their prior agreement or informed consent."<sup>56</sup> This was widely publicized in the local press and copies were transmitted to BHP Billiton and Alcoa.

It was recently announced that the companies and government will reach an agreement on the granting of permits for mining and possible construction of a hydroelectric dam by the end of 2006.<sup>57</sup> Although not required to do so by Surinamese law, the companies contracted a firm to conduct an environmental and social impact assessment for the mining operations in September 2005. Dr. Robert Goodland, the former head of the World Bank's Environment Department, has strongly criticized both the impact assessment plan – for failing to adequately account for indigenous peoples'

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<sup>53</sup> *Id.* at para. 7 and 4, respectively.

<sup>54</sup> R. Goodland, *Environmental and Social Reconnaissance: The Bakhuis Bauxite Mine Project. A report prepared for The Association of Indigenous Village Leaders of Suriname and The North-South Institute*, 2006, p. 6 – "BHP/Billiton are to be commended for publicly apologizing in August 2005 for failing to assess the environmental and social impacts of their exploration or pre-feasibility phase which was scheduled to end in October 2005." Available at: [http://www.nsi-ins.ca/english/pdf/Robert\\_Goodland\\_Suriname\\_ESA\\_Report.pdf](http://www.nsi-ins.ca/english/pdf/Robert_Goodland_Suriname_ESA_Report.pdf)

<sup>55</sup> 'Implementation of the Kabalebo Project: Land Rights Capture the attention of Indigenous Peoples in Southern Suriname', *De Ware Tijd*, 05 May 2005 (Original in Dutch)

<sup>56</sup> *Decision 1(67), Suriname*. UN Doc. CERD/C/DEC/SUR/2, 18 August 2005, at para. 3.

<sup>57</sup> See, 'Bauxite negotiations this month: New bauxite deal to improve on the Brokopondo agreement', *De Ware Tijd*, 02 May 2006.

issues and participation – and the process leading to bauxite mining itself – for failing to respect the rights of indigenous peoples.<sup>58</sup> In an extensive 2006 report, he states that

The Bakuys bauxite mine project is a classic case of asymmetric power. Unsustainable mining confronts sustainable traditional societies. Rich and powerful multinationals will impose potentially severe impacts on inexperienced, weak, largely illiterate and poor Indigenous Peoples. Multinationals have great difficulty even in communicating with the affected people. Practically all the benefits will accrue to two stakeholders, namely the multinationals as they will reap a saleable commodity (bauxite) and the government as they will reap taxes and royalties. These two stakeholders will gain substantial benefits, but bear no adverse impacts. The Indigenous Peoples, on the contrary, will bear practically all the negative impacts and few, if any, of the benefits....<sup>59</sup>

With regard to the proposed dam, Dr. Goodland observes that “Most of the area to be impounded is fairly intact Rain Forest, which is also the traditional territory of Indigenous Peoples on which they depend for their livelihoods. Loss of at least 2,460sq km of forest means that much less habitat from which the forest dwellers can harvest.”<sup>60</sup>

BHP Billiton and Alcoa both have company policies that commit them to observe and uphold international human rights standards and both are signatories to the UN Global Compact. They are also members of the International Council on Metals and Mining and have subscribed to its Sustainable Development Principles. These Principles provide that ICMM members will implement and measure their performance against, among others, the following principle: “Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities,” including “[r]espect the culture and heritage of local communities, including indigenous peoples.”<sup>61</sup>

BHP Billiton is the lead company on the mining project. Its corporate sustainable development policy provides that, “Wherever we operate we will develop, implement and maintain management systems for sustainable development that drive continual improvement and ensure we: ... understand, promote and uphold fundamental human rights within our sphere of influence, respecting the traditional rights of Indigenous

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<sup>58</sup> R. Goodland, *supra*. One important criticism is found on p. 9-10, which states that “SRK’s [the company contracted to conduct the ESIA] repeated but unsubstantiated claims that there are no Indigenous Peoples living in the bauxite concession, is moot, misleading and risky. ... As there are at least four distinct vulnerable ethnic minorities (Arawak, Warau, Trio, Karinya/Carib) in the indigenous communities likely to be impacted by Bakuys, this gap in SRK’s Plan of Study needs to be rectified. Affected Amerindian communities would include: downstream of the Nickerie, Tapoeripa, Post, Utrecht and Cupido; downstream of the Wayambo, Donderskamp and Corneliskondre; downstream of the Kabalebo and Corantijn, Apoera, Section, Washabo, Zandlanding and several Guyanese villages including Orealla and Siperuta.”

<sup>59</sup> *Id.* at p. 4.

<sup>60</sup> *Id.* at p. 21.

<sup>61</sup> *ICMM Sustainable Development Principles*, Principle 3. Available at: [http://www.icmm.com/icmm\\_principles.php](http://www.icmm.com/icmm_principles.php) ICMM is made up of 15 of the largest mining and metal companies, and 24 national mining and global commodities associations.

peoples and valuing cultural heritage.”<sup>62</sup> Using almost the same words, BHP Billiton’s Health, Safety, Environment and Community Policy provides that “Where ever we operate we will ... support the fundamental rights of employees, contractors and the communities in which we operate [and] respect the traditional rights of Indigenous peoples.”<sup>63</sup> Additionally, BHP Billiton explains that its Management Standards require that operations demonstrate “the assessment and prioritisation of human rights issues as they apply to our sphere of influence” and contain a

Guideline on Human Rights and a Human Rights Self-Assessment toolkit ... intended to assist sites in appraising their human rights exposures and developing plans to manage these risks as appropriate. Furthermore, the toolkit aims to ensure that we achieve our Company’s target of no Company transgressions of the principles contained within the UN Universal Declaration of Human Rights. The toolkit is aligned with the Company’s Enterprise-Wide Risk Management approach to ensure that human rights issues are readily identifiable and comparable along with the spectrum of Company social, environmental and financial risks.<sup>64</sup>

BHP Billiton employs the concept of ‘sphere of influence’ in accordance with the Global Compact’s model. Relations with local communities are in the second circle of influence next only to ‘employees and contractors’. With regard to its responsibilities to local communities, BHP Billiton states that “When engaging with our local host communities, we have a responsibility to protect those human rights directly affected by our activities.”<sup>65</sup> There is no disagreement that the Lokono are directly affected by BHP Billiton and Alcoa’s activities.

Despite these policy statements and relatively sophisticated management and assessment procedures (including audits), when the Lokono requested that the companies respect their rights, and in particular negotiate a protocol that defines and protects ‘traditional rights’, the companies responded as follows: “until such time as traditional rights are recognized by the Republic of Suriname and incorporated into Surinamese law, formal endorsement by BHP Billiton and Alcoa of such claims would be premature.”<sup>66</sup>

Apart from contradicting their public commitments, which clearly do endorse respect for traditional rights, there is nothing in Surinamese law that would preclude the companies from negotiating a common understanding of the term ‘traditional rights’ and how these rights will be respected. To allay any doubts, the companies could seek the state’s endorsement of this protocol or seek to involve it directly in the negotiations.

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<sup>62</sup> *BHP/Billiton’s Sustainable Development Policy*, September 2005, at p.1. Available at: <http://www.bhpbilliton.com/bbContentRepository/docs/SustainableDevelopment/policiesAndKeyDocuments/HSECPolicy.pdf>

<sup>63</sup> *BHP Billiton’s Health, Safety, Environment and Community Policy*, at p.1. Available at [www.bhpbilliton.com](http://www.bhpbilliton.com)

<sup>64</sup> BHP Billiton Sustainability Report 2006, at p. 417. Available at: <http://sustainability.bhpbilliton.com/2006/documents/BHPBillitonSustainabilityReport2006.pdf>

<sup>65</sup> *Id.* at p. 416-17.

<sup>66</sup> *Letter to the indigenous leaders of Apoera, Section and Washabo from E. Sholtz, Managing Director, BHP Billiton Suriname and W. Pederson, Managing Director, Suralco L.L.C.*, 4 November 2006, (ref. 170/EGS/hc), at p. 2.

Moreover, conducting an environmental impact assessment is neither required nor prohibited by Surinamese law, yet, however belatedly, the companies are presently conducting such an assessment.

‘Traditional rights’ by definition are rights held and exercised in accordance with custom or tradition and do not therefore rely on national law for their existence. This is acknowledged in BHP Billiton’s 2006 Sustainability Report, which states that

We include consideration for peoples with recognised legal interests in land, as well as those that do not have such an interest. For example, Indigenous peoples may not have a recognised legal interest but nonetheless are connected to the land by tradition and custom. These peoples may also be leading a traditional lifestyle and be dependent, to a greater or lesser extent, on the land for their existence.<sup>67</sup>

Rather than comply with their policy commitments, the companies have chosen to hide behind national law – a law that has been declared to violate international human rights guarantees by the two highest human rights bodies in the Americas in 2005 and 2006 and by two UN bodies in 2004. They have also chosen to proceed with their operations with full knowledge that these operations directly contravene Suriname’s human rights obligations. It is a settled principle of international law that states may not invoke their domestic law to excuse violation of their international obligations; to what extent to should TNCs be permitted to invoke domestic law to excuse violation of a state’s international obligations and their own responsibilities?

The companies also reject inclusion of indigenous peoples’ right to consent (“FPIC”) to mining on their lands in the proposed protocol on the grounds that “there is a lack of international consensus on the application of FPIC ... and we reiterate that neither BHP Billiton nor Alcoa have a commitment to FPIC in their corporate policies.”<sup>68</sup> International consensus or not, the Inter-American Commission on Human Rights has repeatedly held that indigenous peoples’ FPIC is required in relation to resource exploitation pursuant to the right to property.<sup>69</sup> The Inter-American Court has held that the failure of states to delimit, demarcate and title lands and territories belonging to indigenous peoples gives rise to, *inter alia*, an obligation not to allow ‘third parties’ to interfere with the enjoyment of their property rights in those areas.<sup>70</sup> Clearly, in the Americas, FPIC and protection of indigenous territories are part of regional international human rights law, law which both companies have agreed to uphold.

The Lokono people also wrote to ICMM to highlight inconsistencies between BHP Billiton and Alcoa’s conduct and ICMM’s Sustainable Development Principle 3 (quoted above), as well as its 2006 draft Position Statement on Indigenous Peoples.

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<sup>67</sup> BHP Billiton Sustainability Report 2006, *supra*, at p. 418.

<sup>68</sup> *Id.* at p. 3.

<sup>69</sup> Twelve Saramaka Clans Case, *supra*, at para. 214. See, also, *infra* notes 196 – 250 and accompanying text.

<sup>70</sup> *Inter alia*, Moiwana Village Case, *supra*, at para. 211; and *Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001. Series C No. 79, para. 164.

ICMM's response observes that, while FPIC is provided for in the draft Position Statement at Commitment 5:

it is incorrect to interpret these documents as supporting the broad scale adoption of Free Prior Informed Consent (FPIC) without further understanding how it can be implemented. ICMM's view is that practical implementation of FPIC presents significant challenges for government authorities as well as affected companies as the concept is not well defined and with very few exceptions, is not enshrined in local legislation. ... We also recognise the primary role of sovereign states in determining how their mineral endowments are managed.<sup>71</sup>

Lokono leaders again asked why the mining companies, in this case the ICMM, have a policy if that policy means little or nothing in practice. It should be noted that the ICMM's draft Position Statement also contemplates situations such as that pertaining in Suriname. It provides that member companies will follow national laws applying to indigenous peoples but, "Where these do not exist ICMM members reaffirm their commitment to the ICMM Sustainable Development Framework and this position statement."<sup>72</sup> However, while this provision may be applicable in Suriname, in the vast majority of cases where a national legal framework does exist, however inadequate that framework may be, it will void and take precedence over the application of the Position Statement altogether. Again, states may not invoke their domestic laws to excuse violation of their international obligations; to what extent should mining companies be permitted to do the same in relation their human rights obligations and responsibilities?

The case of the Lokono people in west Suriname is important because it demonstrates that TNCs' voluntary policies on human rights may become merely rhetorical statements as well as the ineffectiveness of these policies in restraining TNC involvement and complicity in human rights violations. Suriname is a country – an "alarming situation" in the words of a UN human rights treaty body – where extreme caution and due diligence are required if rights violations are to be avoided. Yet, with full knowledge of the rights issues at stake, despite corporate policies to the contrary, and despite the Committee on the Elimination of Racial Discrimination's warning about the threat of irreparable harm to indigenous peoples, BHP Billiton and Alcoa continue to disregard indigenous peoples' rights. That they invoke Suriname's national law – a law declared to violate human rights guarantees by two UN and two regional human rights treaty bodies – to excuse their conduct further compounds their responsibility for and complicity in violations.

This case is also important because, while Suriname's law is grossly deficient with regard to indigenous peoples' rights, the provisions that permit extractive companies to operate on indigenous lands are similar to those in the laws of many other countries. So, while Suriname may be a classic example of a state that either will not or cannot respect human rights and, therefore, potentially represents a circumstance where, in the

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<sup>71</sup> *Letter to the indigenous leaders of Apoera, Section and Washabo from A-M Fleury, Association Programme Director, ICMM, 23 October 2006, at p.1.*

<sup>72</sup> *ICMM, Draft Position Statement, Indigenous Peoples and Mining Issues, March 2006, at Recognition Statements No. 6. Available at: [http://www.icmm.com/library\\_pub\\_detail.php?rcd=190](http://www.icmm.com/library_pub_detail.php?rcd=190)*

Special Representative's view, direct obligations should be imposed on TNCs, the underlying problem – lack of adequate protection for indigenous peoples' rights in domestic law – is common to many States.

#### **D. Transnational Financial Institutions**

When considering the nature of the TNCs encompassed by his mandate, we urge the Special Representative to include and account for the banking industry. While this industry may be one step removed from human rights violations perpetrated by TNCs operating on the ground, it is nonetheless indispensable to many TNC operations through its various financing vehicles. As such, banks may be complicit in human rights violations in much the same way as other TNCs, and their responsibilities and accountability should also fall within the mandate of the Special Representative and be included in his reports.<sup>73</sup>

Attention to banks on human rights grounds is normally given in connection with international project finance where it is easy to make a direct connection between bank financing and human rights violations. Also, there are specific stages in these projects where it is relatively straight forward to require attention to human rights as part of due diligence and finance agreements, among others. Reference is often made in this context to the Equator Principles, which are based on the safeguard policies of the International Finance Corporation, and have been accepted by 41 large commercial banks for projects over US\$10 million. However, it is important to note that the Equator Principles and the IFC standards are not fully consistent with international human rights standards, do not apply to all banks, including some very large banks, and that project finance constitutes only a very small percentage (as low as 2 percent) of the overall funds and services that TNCs may access from commercial banks. There is therefore a large gap in the policy and other instruments that could and should apply to the banking industry in relation to human rights.

Additionally, NGOs and others, including financial auditing services, have identified serious problems with the implementation of the Equator Principles by subscribing banks. Among other things, they have noted that some of these banks continue to invest in projects that conflict with the Principles and continue to cause environmental and social problems on the ground, including in the case of indigenous peoples.<sup>74</sup>

The Sakhalin II oil project in Russia is a prime example. According to reports, the project, part funded by two Equator Principles banks, is operating on indigenous peoples' lands without their meaningful participation in decision making; indigenous peoples were

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<sup>73</sup> The UN High Commissioner for Human Rights defines 'complicity' in this context as follows: "A company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse." *The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity*, OHCHR Briefing Paper, Office of the United Nations High Commissioner for Human Rights (2004), at p. 6.

<sup>74</sup> Among others, see, *Shaping the Future of Sustainable Finance*. A report by BankTrack and WWF-UK. Available at: <http://www.banktrack.org/?id=47>

not consulted and their issues were not adequately addressed in the environmental and social impact assessment; oil spills have seriously degraded salmon spawning areas and fishing grounds, which are a fundamental part of indigenous peoples' means of subsistence; an oil storage facility has been constructed on a sacred burial site; and an Indigenous Peoples Development Plan – a requirement in IFC projects that must be completed prior to project approval – was not started until well after the project had commenced.<sup>75</sup>

Similarly, a study on the involvement of Swiss banks, Credit Suisse (an Equator Principles bank) and UBS, in the financing of extractive companies and projects found that in “over 60 individual cases, our research show[s] how often raw material extraction leads to human rights violations.”<sup>76</sup>

The Committee on the Elimination of Racial Discrimination has confirmed that banks may be subject to human rights responsibilities, which, in turn, may trigger the obligations and international responsibility of states. In Communication 10/1997 submitted against Denmark, the Committee found that Denmark was liable for the discriminatory acts of a private bank in relation to denial of a loan application because it had failed to initiate a proper investigation of the allegations of discrimination by the bank.<sup>77</sup> The Committee, *inter alia*, recommended that Denmark “take measures to counteract racial discrimination in the loan market.”<sup>78</sup> This case illustrates that not only does the Convention “extend to the private sector, but that discrimination obligations for the non-state actor also extend to indirect discrimination” (the Convention prohibits acts that have either the purpose or effect of discriminating).<sup>79</sup> Both direct and indirect discrimination are highly relevant in the context of indigenous peoples' rights.

### **III. Indigenous Peoples' Rights and Extractive Industries**

While some indigenous peoples have benefited from extractive industries, mainly in the so-called developed countries,<sup>80</sup> threats to indigenous peoples' rights and well-being are particularly acute in relation to resource extraction operations, be they state- or TNC-directed.<sup>81</sup> These operations have had and continue to have a devastating impact on

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<sup>75</sup> *Risky Business –the new Shell. Shell's failure to apply its Environmental Impact Assessment Guidelines to Sakhalin II*, WWF-UK, November 2005. Available at:

[http://www.banktrack.org/doc/File/Projects/sakhalin%20II%20russia/risky\\_business\\_final2.pdf](http://www.banktrack.org/doc/File/Projects/sakhalin%20II%20russia/risky_business_final2.pdf)

<sup>76</sup> *Solidly Swiss? Credit Suisse, UBS and the Global Oil, Mining and Gas Industry*, Berne Declaration, Zurich (2005), at p. 3. Available at: <http://www.db-si.ch/en/p25011223.html>

<sup>77</sup> *Communication No. 10/1997: Denmark*, 6 April 1999. UN Doc. CERD/C/54/D/10/1997, at para. 9.3.

<sup>78</sup> *Id.* at para. 11.1.

<sup>79</sup> A. Clapham, *supra*, at p. 320.

<sup>80</sup> See, for instance, *Indian Energy Solutions 2003*, Council of Energy Resource Tribes, Denver Colorado (2003). Available at: [http://www.certdearth.com/Reports/report\\_03.pdf](http://www.certdearth.com/Reports/report_03.pdf)

<sup>81</sup> Among others, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97, at para. 56 (observing that “...resources are being extracted and/or developed by other interests (oil, mining, logging, fisheries, etc.) with little or no benefits for the indigenous communities that occupy the land. Whereas the World Bank has developed operational directives concerning its own activities in relation to these issues ... and some national

indigenous peoples, undermining their ability to sustain themselves physically and culturally.<sup>82</sup> Victoria Tauli-Corpuz, the Chairperson of the United Nations Permanent Forum on Indigenous Issues, explains that “For many indigenous peoples throughout the world, oil, gas and coal industries conjure images of displaced peoples, despoiled lands, and depleted resources. This explains the unwavering resistance of most indigenous communities with any project related to extractive industries.”<sup>83</sup> It is therefore no coincidence that the majority of complaints submitted by indigenous peoples to intergovernmental human rights bodies involve alleged rights violations in connection with resource extraction (see box 2 below).

The Special Representative’s interim report recognizes that human rights violations are particularly pronounced in the extractives sector and include “a broad array of abuses in relation to local communities, especially indigenous people.”<sup>84</sup> Abuses of indigenous peoples’ rights in relation to extractive industries were also highlighted in the 2005 Consultation on Human Rights and Extractive Industries convened by the Office of the UN High Commissioner for Human Rights.<sup>85</sup>

Discussing this same issue, the UN Special Rapporteur on indigenous land rights observes that

The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests.

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples’ rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.<sup>86</sup>

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legislation specifically protects the interests of indigenous communities in this respect, in numerous instances the rights and needs of indigenous peoples are disregarded, making this one of the major human rights problems faced by them in recent decades.”)

<sup>82</sup> Among others, T. Downing, *Indigenous Peoples and Mining Encounters: Strategies and Tactics*, Minerals Mining and Sustainable Development Project: International Institute for Environment and Development and World Business Council: London (2002), at 3 (concluding that “indigenous peoples experiences with the mining industry have largely resulted in a loss of sovereignty for traditional landholders; the creation of new forms of poverty due to a failure to avoid or mitigate impoverishment risks that accompany mining development; a loss of land; short and long-term health risks; loss of access to common resources; homelessness; loss of income; social disarticulation; food insecurity; loss of civil and human rights; and spiritual uncertainty.”)

<sup>83</sup> E. Caruso *et al.*, (eds.), *EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK*. Tebtebba Foundation & Forest Peoples Programme: Capitol Publishing House: Manila (2003), at 9.

<sup>84</sup> Interim Report of the SR, at para. 25.

<sup>85</sup> *Report of the United Nations High Commissioner for Human Rights on the sectoral consultation entitled “Human rights and the extractive industry”, 10-11 November 2005*. UN Doc. E/CN.4/2006/92, para. 24 and 30(a).

<sup>86</sup> *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21. at paras. 49-50.



**Box 2 – Examples of cases submitted to UN and Regional Treaty Bodies alleging rights violations in connection with extractive industries**

**Human Rights Committee**

Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada (oil, gas, timber)  
I. Lansman et al. vs. Finland (Communication No. 511/1992) (logging)  
J. Lansman et al. vs. Finland (logging, mining)  
O. Sara et al. v. Finland (logging)  
Äärelä and Näkkäljärvi v. Finland (logging)  
J. Lansman et al. (no. 2) vs. Finland (logging, mining)

**Committee on the Elimination of Racial Discrimination (urgent action requests)**

Suriname: Decision 1 (67) (mining, logging)  
Suriname: Decision 3 (66) (mining, logging)  
Democratic Republic of Congo (mining, logging)  
Brazil (mining)  
United States of America, Decision 1 (68) (mining)  
Suriname, Decision 1(69) (mining, logging)  
Papua New Guinea, Decision 3(47) (mining)  
Papua New Guinea, Decision 8 (46)

**International Labour Organization**

Bolivian Central of Workers on behalf of the Confederation of Indigenous Peoples of Bolivia (logging, mining, oil)  
Confederación Ecuatoriana de Organizaciones Sindicales Libres on behalf of the Independent Federation of the Shuar People of Ecuador (oil)  
Single Confederation of Workers of Colombia (Colombia) (oil)

**Inter-American System**

Case 7615 (Brazil) (Yanomami case) (mining and infrastructure)  
Mayagna (Sumo) Indigenous Community Case v. Nicaragua (logging)  
Mary and Carrie Dann (United States) (mining)  
Community of San Mateo de Huanchor and its Members (Peru) (mining)  
Maya Indigenous Communities of the Toledo District, (Belize) (logging, oil)  
Sarayaku Indigenous Community Case (Ecuador) (oil)  
Carrier Sekani Case (Canada) (logging)  
Association of Indigenous Communities Lhaka Honhat (Argentina) (mining)  
Twelve Saramaka Clans, (Suriname) (logging, mining)

**African System**

Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria (oil)

Additionally, a 2003 World Bank Group evaluation observes that mining and energy projects:

risk and endanger the lives, assets, and livelihoods of [indigenous peoples]. Moreover, modern technology allows interventions in hitherto remote areas, causing significant displacement and irreparable damage to IP land and assets. In this context, IP living on

these remote and resource rich lands are particularly vulnerable, because of their weaker bargaining capacity, and because their customary rights are not recognized in several countries.<sup>87</sup>

International human rights law places clear and substantial obligations on states in connection with resource exploitation on or affecting indigenous lands and territories: the UN Human Rights Committee (“HRC”) has stated that a state’s freedom to encourage economic development is strictly limited by the obligations it has assumed under international human rights law rather than by a margin of appreciation.<sup>88</sup> The Inter-American Commission on Human Rights has observed that state policy and practice concerning resource exploitation cannot take place in a vacuum that ignores its human rights obligations,<sup>89</sup> as have the African Commission on Human and Peoples’ Rights<sup>90</sup> and other intergovernmental human rights bodies.<sup>91</sup>

In other words, States may not justify violations of indigenous peoples’ rights in the name of national development. The basic principle, reaffirmed at the 1993 Vienna World Conference on Human Rights is that, “[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”<sup>92</sup> The Inter-American Court of Human Rights has also observed that “the application of bilateral trade agreements does not justify the non-compliance of a State’s obligations under the American Convention [on Human Rights]; on the contrary, their application should always be compatible with the American Convention....”<sup>93</sup>

Bearing this in mind, the following sections describe the rights of indigenous peoples that limit and condition resource exploitation, state-directed, TNC or otherwise.

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<sup>87</sup> *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*. OED Report No. 25754, 10 April 2003, World Bank: Washington DC, at 26. Available at: [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016\\_20030501182633/additional/862317580\\_200306204005416.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/05/01/000160016_20030501182633/additional/862317580_200306204005416.pdf)

<sup>88</sup> *I. Lansman et al. vs. Finland (Communication No. 511/1992)*, CCPR/C/52/D/511/1992, 10.

<sup>89</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997, 89.

<sup>90</sup> Ogoni Case, para. 58 – “The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.”

<sup>91</sup> Among others, see, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee’s 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.; and, UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions (1997). In, General Comments/Recommendations Compilation, *supra*, pps. 49-54, at para. 18.

<sup>92</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12 July 1993. See, also, the Millennium Declaration, which declares that “no effort” will be spared to achieve “respect for all internationally recognized human rights.” *The Millennium Declaration*, UN Doc. A/RES/55/2, at para. 24.

<sup>93</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, at para. 140.

## **A. Rights to Lands, Territories and Resources**

For indigenous peoples, secure, effective and collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural communities.<sup>94</sup> These rights are almost always collective in nature and often involve rights and duties held of and owed to previous and future generations. According to the UN Rapporteur on indigenous land rights:

(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.<sup>95</sup>

This multifaceted nature of indigenous peoples' relationship to land, as well as the relationship between development and territorial rights, was emphasized by then-United Nations High Commissioner for Human Rights, Mary Robinson, in her December 2001 Presidential Fellow's Lecture at the World Bank. She explains that, for indigenous peoples

economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by a recognition of indigenous peoples' own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.<sup>96</sup>

In short, without secure and enforceable rights to lands, territories and resources indigenous peoples' means of subsistence and cultural integrity are permanently threatened. Their lands and territories are their resource base and 'food basket'. Land and territory are also the source of, *inter alia*, medicines, construction materials and household and other tools and implements. Loss or degradation of land and resources results in deprivation of the basics required to sustain life and to maintain an adequate standard of living. The UN Special Rapporteur on indigenous land rights concurs stating that failure to guarantee indigenous peoples' property rights substantially undermines their socio-cultural integrity and economic security: "Indigenous societies in a number of

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<sup>94</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra*, paras. 39-40. See, also, Indigenous people and their relationship to land, *supra*.

<sup>95</sup> *Indigenous peoples and their relationship to land*, *id.*, at para. 20.

<sup>96</sup> *Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance*. Lecture by Mary Robinson, United Nations High Commissioner for Human Rights, World Bank, Washington D.C., Preston Auditorium, 3 December 2001.

countries are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to lands, territories and resources....”<sup>97</sup>

In recognition of the preceding, international law requires that indigenous peoples’ ownership and other rights to their lands, territories and resources traditionally owned or otherwise occupied and used be legally recognized, respected, secured in fact and protected. This includes titling and demarcation and measures to ensure the integrity and sustainability of those lands and territories. A right to restitution or restoration of indigenous lands and territories taken or used without indigenous peoples’ free, prior and informed consent also exists. These rights are protected in connection with a variety of other rights, including the general prohibition of racial discrimination, the right to equal protection of the law, the right to property, the right to cultural integrity and as part and parcel of the right to self determination.

### **1. United Nations Instruments**

Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>98</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>99</sup> provides in pertinent part that: “(1) All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue the economic, social and cultural development. (2) 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.” Common Article 47 of the Covenants describes the right set forth in sub-paragraph 2 as “the inherent right of peoples.”<sup>100</sup>

Articles 3 and 3(bis) of the UN Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council in June 2006, similarly provide, respectively, that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue the economic, social and cultural development;” and “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>101</sup> The Proposed American Declaration on the Rights of Indigenous Peoples also recognizes these rights.<sup>102</sup>

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<sup>97</sup> Indigenous people and their relationship to land, *supra*, at para. 123.

<sup>98</sup> The ICCPR is in force for 160 States as of November 2006.

<sup>99</sup> The ICESCR is in force for 155 States as of November 2006.

<sup>100</sup> Article 47 of the ICCPR and Article 25 of the ICESCR, provide that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”

<sup>101</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, approved by the Human Rights Council. UN Doc. A/HRC/1/L.3, 23 June 2006.

<sup>102</sup> *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights in 1997, Article XV(1). See, also, *Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, OEA/Ser.K/XVI, GT/DADIN/doc.139/03, 17 June 2003, Article III.

That the right to self-determination is vested in indigenous peoples has been affirmed on numerous occasions by the HRC, which often addresses indigenous peoples' rights in relation to Article 1 of the ICCPR in its concluding observations.<sup>103</sup> The same is also the case for the Committee on Economic, Social and Cultural Rights ("CESCR") in relation to Article 1 of the ICESCR.<sup>104</sup> In so doing, these Committees have made explicit and reinforced the relationship between indigenous peoples' rights to their traditional territories and resources and the right to self-determination. For indigenous peoples, the right to self-determination establishes a right to own and control their territories and resources and to be effectively involved in decision making processes that may affect them.

The HRC has also addressed indigenous peoples' right to self-determination in its case law. In *Apirana Mahuika et al. vs. New Zealand*, for instance, it held that Article 1 could be read conjunctively with Article 27 of the Covenant,<sup>105</sup> and that "the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27."<sup>106</sup> In this case, the authors contended that the *Treaty*

<sup>103</sup> *Inter alia*, *Concluding Observations of the Human Rights Committee: Canada*, 20/04/2006. UN Doc. CCPR/C/CAN/CO/5; *Concluding Observations of the Human Rights Committee: Brazil*, 01/12/2005. UN Doc. CCPR/C/BRA/CO/2; and, *Concluding Observations of the Human Rights Committee: Norway*, 25/04/2006. UN Doc. CCPR/C/NOR/CO/5.

<sup>104</sup> *Inter alia*, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, 26 November 2002, at para. 7; and *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*. 12/12/2003. UN Doc. E/C.12/1/Add.94, at para. 11 and 39 --

11. The Committee is concerned about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant. The Committee notes that the Law of 2001 On Territories of Traditional Nature Use of Indigenous Numerically Small Peoples of the North, Siberia and the Far East of the Russian Federation, which provides for the demarcation of indigenous territories and protection of indigenous land rights, has still not been implemented.

39. The Committee, recalling the right to self-determination enshrined in article 1 of the Covenant, urges the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence. The Committee also encourages the State party to ensure the effective implementation of the Law on Territories and Traditional Nature Use.

<sup>105</sup> *Apirana Mahuika et al. vs. New Zealand*, (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 3 -- "When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27."

<sup>106</sup> *Id.* at para. 9.2 -- "The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27." See, also, *J G A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997. UN Doc. CCPR/C/69/D/760/1997 (2000), at para. 10.3 ("the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26 and 27.") For an extensive discussion on this issue by a former member of the Human Rights Committee, see, M. Scheinin, *The Right to Self-Determination under the Covenant*

of *Waitangi (Fisheries Claims) Settlement Act* expropriated their commercial fishing resources in violation of Articles 1 and 27. In resolving this issue, the HRC set forth a test to assess whether indigenous peoples' right to freely dispose of their natural wealth and resources is satisfied, stating that

With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty [of Waitangi] were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control.<sup>107</sup>

The test to be employed therefore is whether indigenous peoples enjoy 'effective possession' and 'effective control' over their natural resources. In *Apirana Mahuika*, the resource in question was commercial fisheries and thus the HRC also holds the view that indigenous peoples' resource rights are not limited only to subsistence resources *per se*.

This test incorporates and is relevant to both sub-paragraphs 1 and 2 of Article 1 of the Covenants because it not only addresses the material aspects of the right to self-determination ("effective possession" of territory and resources) but also the self-government aspects of that right ("effective control" over territory and resources). This is an acknowledgment that indigenous peoples' right "to freely determine their economic, social and cultural development" (Art. 1(1)) is fundamentally related to their right to freely dispose of their natural wealth and resources and to be secure in their means of subsistence (Art. 1(2)). For indigenous peoples to freely pursue their economic, social and cultural development, they must be in a position to determine how best to utilize their territory and resources.

Consistent with the preceding, the HRC and the CESCR have held that unilateral extinguishment of indigenous peoples' territorial and resource rights contravenes the right to self-determination. The HRC has stressed "that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant;"<sup>108</sup> and recommended "that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished."<sup>109</sup> Similarly, the CESCR has held that "extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party."<sup>110</sup> As a remedy, it recommended

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on Civil and Political Rights. In, P. Aikio and M. Scheinin (eds.), OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION, Turku: Institute for Human Rights, Abo Akademi University, (2000).

<sup>107</sup> *Id.* at para. 9.7.

<sup>108</sup> *Concluding observations of the Human Rights Committee: Canada. 07/04/99.* UN Doc. CCPR/C/79/Add.105, at para. 8. *In accord, Concluding observations of the Human Rights Committee: Australia. 28/07/2000.* UN Doc. CCPR/CO/69/AUS, para. 8.

<sup>109</sup> *Concluding Observations of the Human Rights Committee: United States of America. 03/10/95.* UN Doc. A/50/40, paras.266-304, at para. 302. See, also, *Concluding Observations of the Human Rights Committee: United States of America. 27/07/06.* UN Doc. CCPR/C/USA/Q/3/CRP.4, para. 37.

<sup>110</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98.* UN Doc. E/C.12/1/Add.31, at para. 18.

that the state party “take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture.”<sup>111</sup>

Thus, the Committee’s have admonished against governmental acts that would unilaterally infringe on indigenous peoples’ ownership, control and enjoyment of their rights to lands and natural resources and determined such infringements to be incompatible with the right to self-determination.

A major United Nations study on indigenous peoples’ right to permanent sovereignty over natural resources also addresses the legality of laws that purport to unilaterally extinguish indigenous peoples’ resource rights and the extent to which states may limit these rights. With regard to laws that vest full ownership of all resources in the state, the study explains that

Such legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State. ... The result of these legal regimes is to transfer ownership of indigenous peoples’ resources to the State itself. Of course, in some situations, the ownership of the resources in question was transferred freely and lawfully by the indigenous people who held it. These situations do not concern us here. However, as a general matter it is clear that indigenous peoples were not participants in the process of adopting State constitutions and cannot be said to have consented to the transfer of their subsurface resources to the State.<sup>112</sup>

This point is reiterated in the study’s conclusions and recommendations, which provide that “Laws and legal systems that arbitrarily declare that resources which once belonged to indigenous peoples are now the property of the State are discriminatory against the indigenous peoples, whose ownership of the resources predates the State, and are thus contrary to international law;”<sup>113</sup> and, “States’ powers to take resources for public purposes (with compensation) must be exercised, if at all, in a manner that fully respects and protects all the human rights of indigenous peoples. In the generality of situations, this would appear to mean that States may not take indigenous resources, even with fair compensation, because to do so could destroy the future existence of the indigenous culture and society and possibly deprive it of its means of subsistence.”<sup>114</sup>

With regard to the extent of indigenous peoples’ rights over natural resources, the same study on indigenous peoples’ permanent sovereignty over natural resources states that “in general these would be the interests normally associated with ownership: the right to use or conserve the resources, the right to manage and to control access to the

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<sup>111</sup> *Id.* at para. 43.

<sup>112</sup> *Indigenous peoples’ permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes.* UN Doc. E/CN.4/Sub.2/2004/30, at para. 43.

<sup>113</sup> *Id.* at para. 59.

<sup>114</sup> *Id.* at para. 61.

resources, the right to freely dispose of or sell the resources, and related interests.”<sup>115</sup> Concerning the nature of the natural resources themselves, the study adds that

In general these are the natural resources belonging to indigenous peoples in the sense that an indigenous people has historically held or enjoyed the incidents of ownership, that is, use, possession, control, right of disposition, and so forth. These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories.<sup>116</sup>

Other principles of international and comparative law support indigenous peoples’ maintenance of their natural resource rights including subsoil rights and rights to non-traditional uses and commercial exploitation of those resources. The UN Committee on the Elimination of Racial Discrimination, for instance, has recognized indigenous peoples’ ownership rights over water, subsoil and other natural resources pursuant to the right to property in Article 5(d)(v) of the Convention on the Elimination of All Forms of Racial Discrimination. In March 2006, it recommended that a reporting state “recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources....”<sup>117</sup>

That subsoil mineral rights may vest in indigenous peoples pursuant to their customary laws also has been recognized by the South African Constitutional Court and the Canadian Supreme Court.<sup>118</sup> In 2003, the Constitutional Court of South Africa observed that

We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.<sup>119</sup>

In the same vein, the Canadian Supreme Court has held that “aboriginal title also encompass[es] mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way....”<sup>120</sup>

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<sup>115</sup> *Id.* at para. 41.

<sup>116</sup> *Id.* at para. 42.

<sup>117</sup> See, for instance, *Concluding Observations: Guyana*. UN Doc. CERD/C/GUY/CO/14, 4 April 2006, at para. 16.

<sup>118</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, at 1086. See, also, *Guerin v R.* (1985) 13 D.L.R. 4<sup>th</sup> 321. For US and Australian cases in accord, see, *inter alia*, *United States v. Shoshone Tribe of Indians* 304 US 111 (1938); *United States v. Klamath and Modoc Tribes* 304 US 119 (1938); and, *Otoe and Missouri Tribe v. United States* 131 F Supp 265 (1955); *Mabo v. Queensland No.2* (1992) 175 CLR 166 and; *Ward on behalf of the Miriuwung and Gajerrong People v. Western Australia* (1998) 159 ALR 483.

<sup>119</sup> *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others*, CCT 19/03, 2003, para. 64.

<sup>120</sup> *Delgamuukw v. British Columbia*, *supra*.



As noted above, Article 27<sup>121</sup> of the ICCPR may be read in conjunction with right to self-determination. Article 27 protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, *inter alia*, land and resource, subsistence and participation rights.<sup>122</sup> These rights are vested in individuals, but exercised “in community with other members of the group,” thereby providing some measure of collectivity.

The HRC has interpreted article 27 to include the “rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”<sup>123</sup> In reaching this conclusion, the HRC recognized that indigenous peoples’ subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival. The HRC further elaborated upon its interpretation of Article 27 in 1994, stating that

With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>124</sup>

In July 2000, the HRC added that Article 27 requires that “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...” and; “securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities ... must be protected under article 27....”<sup>125</sup>

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<sup>121</sup> Article 27 reads: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

<sup>122</sup> Bernard Ominayak, Chief of the Lubicon Lake Band vs. Canada, *Report of the Human Rights Committee*, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40, vol. 2 (1990), 1. See also, Kitok vs. Sweden, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; Lovelace vs. Canada (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981). *I. Lansman et al. vs. Finland* (Communication No. 511/1992), *supra* note 4; *J. Lansman et al. vs. Finland* (Communication No. 671/1995), UN Doc. CCPR/C/58/D/671/1995; and General Comment No. 23 (50) (art. 27), *adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5..* Although not decided under article 27, see, also, *Hopu v. France*. Communication No. 549/1993: France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997.

<sup>123</sup> Among others, Ominayak vs. Canada, *id.* See, also, A. Huff, Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada. 10 *Colorado J. Int’l. Enviro. Law and Policy* 161 (1999).

<sup>124</sup> *General Comment No. 23 (50) (art. 27)*, *supra* note 18, at 3.

<sup>125</sup> *Concluding observations of the Human Rights Committee: Australia*, *supra* note 15, at paras. 10 and 11.

Article 30 of the UN Convention on the Rights of the Child contains almost identical language to that found in ICCPR Article 27.<sup>126</sup> Therefore, the points made above are also relevant to the rights of indigenous children under that instrument. This is confirmed in the Committee on the Rights of the Child's 2003 *Recommendations of the Rights of Indigenous Children*, in which the Committee: "Acknowledges that, as stated in the Human Rights Committee's General Comment No. 23 on the rights of minorities (1994) and in ILO Convention 169, the enjoyment of the rights under article 30, in particular the right to enjoy one's culture, may consist of a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."<sup>127</sup> Article 30 and ICCPR Article 27 embody one manifestation of the general norm of international law relating to the right to cultural integrity.<sup>128</sup>

The CESCR has highlighted state obligations to recognize and respect indigenous peoples' land and resource rights under the ICESCR. In the case of Panama, for instance, the Committee expressed its concern "that the issue of land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands."<sup>129</sup>

Under the International Convention on the Elimination of All Forms of Racial Discrimination, state parties are obligated to recognize, respect and guarantee the right "to own property alone as well as in association with others" and the right to inherit property, without discrimination.<sup>130</sup> These provisions of the Convention are declaratory of customary international law.<sup>131</sup>

In its 1997 *General Recommendation on Indigenous Peoples*, the UN Committee on the Elimination of Racial Discrimination ("CERD") contextualized these rights to indigenous peoples. In particular, the Committee called upon states parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their

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<sup>126</sup> The CRC is force for 192 States as of November 2006.

<sup>127</sup> Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children, Recommendations*, adopted at the Committee's 34<sup>th</sup> session, 3 October 2003, at para. 6. Available at: <http://www.ohchr.org/english/bodies/crc/docs/discussion/indigenouschildren.pdf>

<sup>128</sup> Human Rights Committee, General Comment No. 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* : 04/11/94 (1994), para. 8. See, also, S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 *Ariz. J. Int'l & Comp. L.* 1, 15 (1991) and, L.V. Prott, *Cultural Rights as Peoples Rights in International Law*. In, J. Crawford (ed.), *THE RIGHTS OF PEOPLES*. Oxford: Clarendon Press (1988), 93.

<sup>129</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama. 24/09/2001*. UN Doc. E/C.12/1/Add.64, at para. 12.

<sup>130</sup> ICERD has been ratified by 174 States as of December 2002.

<sup>131</sup> T. Meron, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW*. Oxford: Clarendon Press (1989), 21.

lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.”<sup>132</sup> While this General Recommendation is technically non-binding, it is nonetheless “a significant elaboration of norms” and corresponding state obligations under the Convention.<sup>133</sup>

CERD has also observed that extinguishment of indigenous peoples’ traditional and other rights to lands and natural resources violates the right to property and the prohibition of racial discrimination. In a decision on Australia under its Urgent Action procedure, CERD expressed concern about the compatibility of amendments to Australia’s Native Title Act with that state’s international obligations. In particular, it observed that

While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for Governments and third parties at the expense of indigenous title.

The Committee notes, in particular, four specific provisions that discriminate against indigenous title holders under the newly amended Act. These include the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses.<sup>134</sup>

Recent normative developments relating to indigenous lands, territories and resources are expansive, requiring legal recognition, restitution and compensation, protection of the total environment thereof, and various measures of participation in and consent to extra-territorial activities that may affect subsistence and resource rights and environmental and cultural integrity. Article 26 of the UN Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council in June 2006, provides that

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

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<sup>132</sup> General Recommendation XXIII (51) concerning Indigenous Peoples, *supra*.

<sup>133</sup> P. Thornberry, *INDIGENOUS PEOPLES AND HUMAN RIGHTS*. Manchester: Manchester University Press (2002), at 217-18.

<sup>134</sup> *Decision 2 (54) on Australia, 18/03/99*. UN Doc. A/54/18, para.21(2), at para. 6-7.

## **2. International Labour Organisation**

International Labour Organisation Convention No 169 contains a number of provisions on indigenous territorial rights.<sup>135</sup> These provisions are framed by Article 13(1) which requires that state parties recognize and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially “the collective aspects of this relationship.” Article 14 requires that indigenous peoples’ collective “rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized” and that state parties “shall take steps as necessary to identify” these lands and to “guarantee effective protection of rights of ownership and possession.” Article 13(2) defines the term ‘lands’ to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.”

The preceding provisions on land rights must be read in connection with Article 7(1), which provides that “[t]he people 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.” This provision recognizes that indigenous peoples have the right to some measure of self-government with regard to their institutions and in determining the direction and scope of their economic, social and cultural development.

A number of formal cases have been submitted to the Governing Body of the ILO that concern indigenous peoples and extractive industries, all of which allege violations of the Convention’s land rights and participation provisions. In a case against Colombia concerning oil extraction, the Governing Body explained that

the Government has applied the criterion of the "regular and permanent presence of indigenous communities" in deciding whether the siting of an exploratory or operational project in a given area will affect the communities in question. In this regard, the Committee recalls that the Convention refers to the concept of "rights of ownership and possession (of the peoples concerned) over the lands which they traditionally occupy" (Article 14, paragraph 1), a concept that is not necessarily equivalent. Furthermore, the Convention does not cover merely the areas occupied by indigenous peoples, but also "the process of development as it affects their lives ... and the lands that they occupy or otherwise use" (Article 7, paragraph 1). The existence of an exploratory or operational project immediately adjacent to land that has been officially recognized as a reserve of the peoples concerned clearly falls within the scope of the Convention.<sup>136</sup>

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<sup>135</sup> As of November 2006, the following 17 States have ratified ILO 169: Mexico, Norway, Costa Rica, Colombia, Denmark, Ecuador, Fiji, Guatemala, The Netherlands, Dominica, Peru, Bolivia, Honduras, Venezuela, Argentina, Brazil and Paraguay. The following States have submitted it to their national legislatures for ratification or are discussing ratification: Chile, The Philippines, Finland, El Salvador, Russian Federation, Panama, South Africa, Sweden and Sri Lanka. Germany has adopted ILO 169 as the basis for its overseas development aid and the Asian Development Bank and the UNDP have incorporated some of its substance into their policies on Indigenous peoples. See, for instance, Asian Development Bank, *The Bank’s Policy on Indigenous Peoples*, April 1998.

<sup>136</sup> *Report of the Committee of Experts set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of*

### In a case involving Ecuador, the Governing Body

stress[ed] that it is fully aware of the difficulties entailed in the settlement of disputes relating to land rights, including the rights relating to the exploration and exploitation of subsurface products, particularly when differing interests and points of view are at stake such as the economic and development interests represented by the hydrocarbon deposits and the cultural, spiritual, social and economic interests of the indigenous peoples situated in the zones where those deposits are situated. However, the spirit of consultation and participation that constitutes the essence of Convention No. 169 requires that the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation.<sup>137</sup>

ILO 169's predecessor, ILO 107 adopted in 1957, also provides that "[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized." The ILO Committee of Experts has held that the rights that attach under Article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. The Committee stated that the fact that the people has some form of relationship with land presently occupied, even if only for a short time was sufficient to form an interest and, therefore, rights to that land and the attendant resources.<sup>138</sup>

### **3. Convention on Biological Diversity**

The Convention on Biological Diversity ("CBD"), a binding international environmental treaty is also relevant. Article 10(c) of the CBD provides that state parties shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements." Although the precise scope and meaning of this article have yet to be formally articulated, it certainly includes indigenous agriculture, agro-forestry, hunting, fishing, gathering, use of medicinal plants, and other subsistence activities. This article, by implication, should also be read to include protection for the land base, ecosystem and environment in which those resources are found.<sup>139</sup>

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*the ILO Constitution by the Central Unitary Workers' Union. (CUT). Doc.GB.276/17/1/GB.282/14/3, submitted 1999, at para. 86.*

<sup>137</sup> *Report of the Committee of Experts set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL). Doc. GB.277/18/4, GB.282/14/2, submitted 2000, at para. 36.*

<sup>138</sup> *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III(4A), at 287, International Labour Conference, 75th Session, Geneva (1988).*

<sup>139</sup> This is acknowledged in the *Adis Ababa Principles and Guidelines on Sustainable Use of Biodiversity*, adopted in 2004 by the VIIth Conference of Parties to the CBD, especially in Principles 1 and 2. Principle 2 provides that "sustainability is generally enhanced if Governments recognize and respect the 'rights' or 'stewardship' authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities...." The first principle of the 'Ecosystem Approach', adopted by the COP in Decision V/6 and considered to be one of the main tools for the implementation of the Convention, states that "Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other

These observations on Article 10(c) are supported by the analysis of the Secretariat of the CBD in its background paper entitled ‘Traditional Knowledge and Biological Diversity’. In that paper, the Secretariat said the following about the language “protect and encourage” found in Article 10(c):

In order to protect and encourage, the necessary conditions may be in place, namely, security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures of indigenous and local communities, best evidenced by appropriate legislative protection (which includes protection of intellectual property, sacred places, and so on). Discussions on these issues in other United Nations forums have also dealt with the issue of respect for the right to self-determination, which is often interpreted to mean the exercise of self-government.<sup>140</sup>

The CBD also addresses indigenous peoples’ rights in relation to the establishment and management of protected areas within their traditional territories. Decision VII/28 on Protected Areas adopted by the 7<sup>th</sup> Conference of Parties to the CBD provides that “the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.”<sup>141</sup> These applicable international obligations are defined, *inter alia*, in international human rights law. This is particularly relevant in the current context given that large extractive projects, such as the Chad-Cameroon pipeline, also often include biodiversity off-sets to compensate for habitat loss. These off-sets also affect indigenous peoples’ rights and are directly related to the extractive project.

#### **4. Inter-American Human Rights Law**

Similar conclusions about indigenous peoples’ rights have been reached under Inter-American human rights instruments, specifically the American Convention on Human Rights (1969) and the American Declaration on the Rights and Duties of Man (1948). The jurisprudence of the Inter-American system establishes clear and strong standards requiring recognition, protection and restoration of indigenous peoples’ communal property rights as well as securing those rights in practice.

The Inter-American Commission on Human Rights (“IACHR”) has stated on a number of occasions that the rights guaranteed by the American Convention “must be interpreted and applied in connection with indigenous peoples with due consideration of the principles relating to protection of traditional forms of property and cultural survival and of the rights to lands, territories, and natural resources.”<sup>142</sup> Likewise, the Inter-

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local communities living on the land are important stakeholders and their rights and interests should be recognized. ...”

<sup>140</sup> *Traditional Knowledge and Biological Diversity*, UNEP/CBD/TKBD/1/2, 18 October 1997.

<sup>141</sup> Decision VII/28 Protected Areas, at para. 22. In, *Decisions Adopted by the Conference of Parties to the Convention on Biological Diversity at its Seventh Meeting*. UNEP/BDP/COP/7/21, pps. 343-64.

<sup>142</sup> *Report N° 75/02*, Case N° 11.140, Mary and Carrie Dann (United States), Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, para. 129-31; and, *Report No. 09/06*, Case No. 12.338, Twelve Saramaka Clans (Suriname), 2 March 2006, at para. 175.

American Court of Human Rights (“the Court”) has repeatedly recognized the “importance of taking into account certain aspects of the customs of the indigenous peoples of the Americas for purposes of application of the American Convention on Human Rights.”<sup>143</sup> It has also held that, “it is indispensable that States grant effective protection that takes into account [indigenous peoples’] particularities, their economic and social characteristics, as well as their especially vulnerable situation, their customary law, values, customs and mores.”<sup>144</sup> The decisions of the Court in relation to the American Convention are, as a matter of international law, binding on the respondent states and may be executed in domestic courts.<sup>145</sup>

It is well established in the Inter-American system that indigenous peoples have been historically discriminated against and therefore, that special measures and protections are required if they are to enjoy equal protection of the law and the full enjoyment of other human rights. These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, “ancestral and communal lands,” and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>146</sup> The IACHR characterized the preceding as “human rights also essential to the right to life of peoples.”<sup>147</sup>

Both the IACHR and the Court have related recognition and protection of indigenous peoples’ rights to own and control their traditional lands, territories and resources to their right to development.<sup>148</sup> On this point, the IACHR explains that for the “organs of the inter-American system, the protection of the right to property of the indigenous people to their ancestral territories is a matter of particular importance, because the effective protection of ancestral territories implies not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social and cultural development upon their relationship with the land.”<sup>149</sup>

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<sup>143</sup> *Bamaca Velasquez Case*, 25 November 2000. Series C No. 70, para. 81; *Mayagna (Sumo) Awas Tingni Community Case*, August 31, 2001. Series C No. 79, para. 149; and *Aloeboetoe et al. Case*, September 10, 1993. Series C No. 15, para. 62.

<sup>144</sup> *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005. Series C No. 125, at para. 63.

<sup>145</sup> Article 67 of the American Convention on Human Rights provides that “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State.”

<sup>146</sup> See, among others, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26. (1984), at 76-78, 81; *Report on the Situation of Human Rights in Ecuador*, *supra* note 5, at 103-4; *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), at 24, 31; and, *Third Report on the Situation of Human Rights in The Republic of Guatemala* OEA/Ser.L/V/II. 67, doc. 9 (1986), at 114.

<sup>147</sup> *Third Report on the Situation of Human Rights in The Republic of Guatemala*, *id.*

<sup>148</sup> For a more extensive discussion of the protection of indigenous peoples’ property rights in the Inter-American system, see, S.J. Anaya and R. Williams, *The Protection of Indigenous Peoples’ Rights over Land and Natural Resources under the Inter-American Human Rights System*. 14 *Harv. Hum. Rts. J.* 33 (2001).

<sup>149</sup> *Report No. 40/04*, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize), 12 October 2004, at para. 120.

In the Inter-American system, indigenous peoples' property rights derive from their own laws and forms of land tenure, and their traditional occupation and use, and exist as valid and enforceable rights absent formal recognition by the state.<sup>150</sup> In the 2004 *Maya Indigenous Communities Case*, for instance, the IACHR observed that "the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a State's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition."<sup>151</sup>

The IACHR has related territorial rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop and transmit culture free from unwarranted interference.<sup>152</sup> In its *Second Report on the Human Rights Situation in Peru*, for example, it explained that "Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation and registration of the lands represent essential rights for cultural survival and for maintaining the community's integrity."<sup>153</sup>

In the *Mary and Carrie Dann Case*, citing various international standards and jurisprudence, the IACHR observed that "general international legal principles applicable in the context of indigenous human rights" include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a State, recognition by that State of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>154</sup>

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<sup>150</sup> *Sawhoymaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146, para. 248; Case 11.577 (Awas Tingni Indigenous Community - Nicaragua), *Annual report of the IACHR*. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), April 16, 1999, 1067, para. 108 and, See, also, Art. XVIII, *Proposed American Declaration on the Rights of Indigenous Peoples*, approved by the IACHR in 1997.

<sup>151</sup> *Maya Indigenous Communities*, *supra*, at para. 117.

<sup>152</sup> *Report on the Situation of Human Rights in Ecuador*, *supra*, at 114-15.

<sup>153</sup> *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev., (2000), at Ch. X, para. 16. See, also, *in accord*, *Third Report on the Human Rights Situation of Human Rights in Paraguay*. OEA/Ser.L/V/II.110 Doc.52 (2001), Ch. IX, para. 47

<sup>154</sup> *Report N° 75/02*, Case N° 11.140, *Mary and Carrie Dann* (United States), Dec. 27, 2002. OEA/Ser.L/V/II.116, Doc. 46, at para. 130. (footnotes omitted).



In this case, it interpreted the American Declaration on the Rights and Duties of Man to require “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources ....”<sup>155</sup>

In a 2003 case involving timber and oil concessions, the IACHR held that Belize is obligated to

effectively delimit and demarcate the territory to which the Maya people’s property right extends and to take the appropriate measures to protect the right of the Maya people in their territory, including official recognition of that right. In the Commission’s view, this necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land use practices and customary land tenure system be taken into account in this process.<sup>156</sup>

The OAS Proposed Declaration also provides a substantial measure of protection (Art. XVIII):

1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property.
2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.
3. i) Subject to 3.ii.), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and inalienable.
- ii) Such titles may only be changed by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- iii) Nothing in 3.i.) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.
4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.

In the *Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua Case*, the Court confirmed that indigenous peoples’ territorial rights arise from traditional occupation and use and indigenous forms of tenure, not from grants, recognition or registration by the state. The latter simply confirm and secure pre-existing rights. In its judgment, issued in September 2001, the Court observed that

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<sup>155</sup> *Id.* at para. 131.

<sup>156</sup> *Report No. 40/04*, Maya Indigenous Communities of the Toledo District, Case 12.053 (Belize), 12 October 2004, at para. 132 (footnote omitted).

Among indigenous people there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather in the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production, but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>157</sup>

In this case, the Court determined that “Indigenous peoples’ customary law must be especially taken into account,” and held that, “[a]s a result of customary practices, possession of land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”<sup>158</sup> It ordered, among others, that “the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.”<sup>159</sup> These norms have been reaffirmed and further elaborated on by the Court in three subsequent cases decided in 2005 and 2006.<sup>160</sup>

In the *Yakye Axa Case*, the Court found violations of the rights to judicial protection and to property in relation to Paraguay’s failure to effectively restore and secure the rights of the Yakye Axa to their traditional lands, large parts of which were held by private persons. It ordered that the state identify these traditional lands and regularize the indigenous people’s ownership rights, and that a fund be established for the expropriation of privately held lands to ensure their return, free of charge, to the Yakye Axa.<sup>161</sup>

As discussed in greater detail below, the Court also found a violation of the right to life because the denial of the indigenous people’s rights to their traditional lands and resources had also “deprived them of the possibility of accessing their means of traditional subsistence, as well as the use and enjoyment of necessary natural resources such as clean water and the practice of traditional medicine for the prevention and cure of diseases.”<sup>162</sup> Additionally, “the State has not adopted the necessary positive measures

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<sup>157</sup> The Mayagna (Sumo) Indigenous Community Case, *supra*, at para. 149.

<sup>158</sup> *Id.* at para. 151.

<sup>159</sup> *Id.* at para. 164.

<sup>160</sup> *Yakye Axa Indigenous Community v. Paraguay, supra; Moiwana Village v. Suriname, supra; Sawhoyamaya Indigenous Community v. Paraguay*, 29 March 2006, Series C No. 146.

<sup>161</sup> *Yakye Axa Indigenous Community Case, id.* para. 217.

<sup>162</sup> *Id.* at para. 168, 176 (unofficial translation). See, also, *Mayagna (Sumo) Awas Tingni Community Case (Provisional Measures)*, Order of the Inter-American Court of Human Rights of September 6, 2002, Considerations, para. 8 (“In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur

that would assure the members of the Yakye Axa Community, during the period that they have remained without territory, conditions of life with dignity.”<sup>163</sup>

Similar violations were also found in the *Sawhoyamaxa Indigenous Community Case*.<sup>164</sup> Reviewing its prior jurisprudence, the Court observed that

1) traditional indigenous land ownership is equivalent to full title granted by the State; 2) traditional ownership grants the indigenous people the right to demand official recognition of their property and its consequent registration; 3) the indigenous people who have been forced to leave their traditional lands against their wishes or who have otherwise lost possession of their traditional lands, still hold the right to property over these lands, even in the absence of legal title, except when the lands in question have been legitimately transferred to third parties in good faith; and 4) the indigenous people who have suffered the involuntary expropriation of their lands and these have been legally transferred to unknowing third parties, have the right to recover them or be compensated with other lands of the same extension and quality. This means that title is not a pre-requisite that conditions the existence of the right to restitution of indigenous lands.<sup>165</sup>

The Court also examined the issue of whether indigenous peoples’ right to restitution of their traditional territories continues indefinitely in *Sawhoyamaxa*. Observing that “the spiritual and material base of the identity of indigenous communities is sustained primarily through its unique relationship with its traditional territory,” it held that the right to restitution continues as long as indigenous peoples maintain some degree of spiritual and material connection with their traditional territory.<sup>166</sup> Evidence of the requisite connection may be found in “traditional spiritual or ceremonial use or presence; settlement or sporadic cultivation; seasonal or nomadic hunting, fishing or harvesting; use of natural resources in accordance with customary practices; or any other factor characteristic of the culture of the group.”<sup>167</sup> The Court further held that if indigenous peoples are prevented by others from maintaining their traditional relationships with their territories, the right to recovery nonetheless continues “until such impediments disappear.”<sup>168</sup>

If a state is unable to return indigenous peoples’ traditional lands and communal resources for “concrete and justifiable reasons,” compensation or the provision of alternative lands is required.<sup>169</sup> The Court explicitly stated that the following did not constitute justifiable reasons that would preclude the return of indigenous lands and

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and, in particular, the duty to prevent its agents from violating it;” citing, “*Street Children*” Case (*Villagrán Morales et al.*), 19 November 1999. Series C No. 63, para. 144.)

<sup>163</sup> *Id.*

<sup>164</sup> *Sawhoyamaxa Indigenous Community, supra*, para. 248.

<sup>165</sup> *Id.* at para. 128.

<sup>166</sup> *Id.* at para. 131.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 132.

<sup>169</sup> *Id.* para. 138-9.

resources: that the lands in question were in private hands; that these lands were being used productively and; because of the application of bilateral trade agreements.<sup>170</sup>

In the 2005 *Moiwana Village Case*, the Court found that Suriname had violated the right to property because it failed to investigate a massacre that had forced the surviving community members to flee in November 1986. This failure to investigate and punish the perpetrators remained the cause of substantial fear that precluded the victims from re-establishing their community in their traditional lands.<sup>171</sup> Suriname was ordered to adopt legislative, administrative and other necessary measures to ensure the community's property rights and its right to return "in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories."<sup>172</sup> It further ordered that the "State shall take these measures with the participation and informed consent of the victims" and neighbouring indigenous peoples.<sup>173</sup>

The Court has especially recognized the linkages between violations of indigenous peoples' territorial rights and diminished development opportunities in its reparations orders. These orders provide remedies of a collective nature when the harm is experienced by the collective. The first ruling to this effect was the *Plan de Sánchez Massacre Case*, which involved a series of massacres committed against an indigenous people.<sup>174</sup> In this case, the Court observed that the proven facts demonstrated that the Achí Mayan people's identity and values were seriously affected and, therefore, "a significant component of the remedy should be reparations to the communities as a whole."<sup>175</sup>

In *Moiwana Village*, the Court ruled that additional reparations over and above an award of moral and material damages were required and that these "measures have special significance in the instant case, given the extreme gravity of the facts and the collective nature of the damages suffered."<sup>176</sup> Among others things, the Court ordered that "Suriname shall establish a developmental fund, to consist of US\$1,200,000 ... which will be directed to health, housing and educational programs for the Moiwana community members."<sup>177</sup> This fund is to be implemented by a Committee composed of one person chosen by the victims, one by the State and one person chosen by mutual agreement. Similar funds were ordered in *Yakye Axa* and *Sawhoyamaxa*, in the case of the latter to pay for education, housing, agricultural support, health, the provision of potable water and the construction of sanitary facilities.<sup>178</sup>

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<sup>170</sup> *Id.* at para. 140.

<sup>171</sup> *Moiwana Village v. Suriname*, *supra*, para. 128-35.

<sup>172</sup> *Id.* at para. 209, 233.

<sup>173</sup> *Id.* at para. 210.

<sup>174</sup> This case is discussed in detail in, I. Madriaga Cuneo, *The Rights of Indigenous Peoples and the Inter-American System*, 22 *Arizona J. Int'l & Comp. Law* 65 (2005).

<sup>175</sup> *Plan de Sánchez Massacre Case, Reparations*, 19 November 2004. Series C No. 105, para. 86.

<sup>176</sup> *Moiwana Village*, *supra*, at para. 201.

<sup>177</sup> *Id.* at 214.

<sup>178</sup> *Sawhoyamaxa Indigenous Community*, *supra*, para. 224.

The jurisprudence of the Court has also been incorporated by reference into the 2006 Inter-American Development Bank's Operational Policy 7-65 on Indigenous Peoples.<sup>179</sup> This policy requires special safeguards for indigenous peoples in projects that directly or indirectly affect their traditional lands, territories and resources, and specifies that "one of those safeguards is respect for the rights recognized in accordance with the applicable legal norms."<sup>180</sup> The definition of 'applicable legal norms' includes ratified international treaties "as well as the corresponding international jurisprudence of the Inter-American Court of Human Rights or similar bodies whose jurisdiction has been accepted by the relevant country."<sup>181</sup>

## **5. African Human Rights Law**

The African Charter on Human and Peoples Rights (1981) guarantees a range of individual and collective rights, including the right of peoples to freely dispose of their natural wealth and resources in Article 21.<sup>182</sup> In May 2002, the African Commission on Human and Peoples' Rights unambiguously recognized that the Ogoni people, one of the constituent peoples of Nigeria, are holders of this right in relation to oil extraction within its territory:<sup>183</sup>

Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.<sup>184</sup>

The African Commission's Working Group on Indigenous Populations/Communities has addressed African indigenous peoples' rights in detail.<sup>185</sup> Its primary report on indigenous peoples' rights explains that extractive industries coupled with a failure to guarantee and secure indigenous peoples' property and other rights have displaced and severely impoverished indigenous peoples throughout Africa.<sup>186</sup> According to the Working Group, the preceding constitutes "a serious violation of the African Charter (Article 20, 21 and 22), which clearly states that all peoples have the right to existence, the right to their natural resources and property, and the right to the economic, social and cultural development."<sup>187</sup>

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<sup>179</sup> Inter-American Development Bank, *Operational Policy 7-65 on Indigenous Peoples*, adopted 22 February 2006. Available at: [http://www.iadb.org/sds/ind/site\\_401\\_e.htm](http://www.iadb.org/sds/ind/site_401_e.htm).

<sup>180</sup> *Id.* at p. 8.

<sup>181</sup> *Id.* at p. 5.

<sup>182</sup> To date, 53 African States have ratified the Charter.

<sup>183</sup> The Ogoni self-identify as indigenous and have played an active role in UN fora relating to indigenous peoples.

<sup>184</sup> Ogoni Case, at para. 58.

<sup>185</sup> See, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Submitted in Accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights at its 28<sup>th</sup> ordinary session.

<sup>186</sup> *Id.* p. 26-9.

<sup>187</sup> *Id.* at p. 108.

Finally, the Working Group explains that the African Charter must be interpreted with regard to universal human rights instruments and there is “therefore an obligation on African States to honour rights granted to indigenous peoples under Common Article 1 of the ICCPR and the ICESCR as well as Article 27 of the ICCPR.”<sup>188</sup>

## **6. European Human Rights Law**

The European Court of Human Rights has yet to issue a judgment in a case involving indigenous peoples’ rights to lands, territories and resources. However, three cases are presently pending – against Russia, Denmark and Sweden – and it is expected that judgments will be issued in the near future. With the exception of a decision on admissibility, the former European Commission on Human Rights did not address indigenous peoples’ rights. The one exception was a case against Norway involving the construction of a dam – declared inadmissible – in which the Commission observed that under Article 8 of the European Convention of Human Rights (respect for private life, family life or home), “a minority group ... [is] in principle entitled to claim the right to respect for the particular lifestyle it may lead.”<sup>189</sup>

Indigenous peoples’ rights are addressed in relation to the European Framework Convention for the Protection of National Minorities, primarily through the opinions of the Advisory Committee rather than formal cases.<sup>190</sup> This includes highlighting the human rights aspects of indigenous peoples’ property rights and relationships with traditional lands and resources. In its 2003 opinion on Norway, for example, the Committee explained that “Given the importance of reindeer herding, fishing and hunting to the Sami as an indigenous people, the issue of land rights in the traditional areas of Sami is of central relevance to the protection of their culture and identity.”<sup>191</sup> In its opinion on Sweden, the Advisory Committee stressed the urgent need to resolve Sami land rights issues, including ownership rights,<sup>192</sup> and highlighted Sami rights to effectively participate in decision making.<sup>193</sup> The Advisory Committee has also expressed serious concern about the rights of indigenous peoples’ in Russia:

due to the fact that many features of their traditional culture, such as reindeer herding, fishing and hunting, are closely linked to the use of their territories and that many of these territories are simultaneously subject to competing interests and exploitation by gas, oil and other industries, which in practice frequently prevail and contribute also to the large-scale environmental problems threatening many of the territories concerned.<sup>194</sup>

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<sup>188</sup> *Id.* at 112

<sup>189</sup> *G and E v. Norway*, Applications Nos. 9278/81 and 9415/81 (1984) 35 *Eur. Comm. H.R. Decisions & Reports* 30, at 35.

<sup>190</sup> See, [http://www.coe.int/T/E/Human\\_Rights/Minorities](http://www.coe.int/T/E/Human_Rights/Minorities)

<sup>191</sup> *Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities: Norway*. ACFC/INF/OP/I(2003)003, at para. 32.

<sup>192</sup> *Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities: Sweden*. ACFC/INF/OP/I(2003)006, para. 31.

<sup>193</sup> *Id.* para. 32.

<sup>194</sup> *Opinion of the Advisory Committee on the Framework Convention for the Protection of National Minorities: Russian Federation*. ACFC/INF/OP/I(2003)005, at para. 49.

## **B. The Right to Free Prior and Informed Consent**

In contemporary international law, indigenous peoples' have the right to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation, free, prior and informed consent. In recent years, the United Nations Permanent Forum on Indigenous Issues<sup>195</sup> and the United Nations Working Group on Indigenous Populations have both devoted considerable energy to analyzing and explaining indigenous peoples' right to free, prior and informed consent.<sup>196</sup>

### **1. United Nations Instruments**

In 2006, the HRC "stress[ed] the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them..."<sup>197</sup> Similarly, observing that indigenous peoples have and continue to suffer from discrimination, and "in particular that they have lost their land and resources to colonists, commercial companies and State enterprises,"<sup>198</sup> in 1997, the CERD called upon States-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>199</sup> The Committee later recognized indigenous peoples' right to "effective participation ... in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples."<sup>200</sup>

In 2003 and 2006, the CERD Stated, respectively, that

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<sup>195</sup> *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*. United Nations Permanent Forum on Indigenous Issues, (New York, 17-19 January 2005). UN Doc. E/C.19/2005/3.

<sup>196</sup> *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation*. UN Doc. E/CN.4/Sub.2/AC.4/2004/4; and *Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*. UN Doc. E/CN.4/Sub.2/AC.4/2005/2

<sup>197</sup> *Concluding Observations of the Human Rights Committee: Canada*. UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, at para. 22.

<sup>198</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples, supra*, at para. 3.

<sup>199</sup> *Id.* at para. 4(d).

<sup>200</sup> *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*. 24/03/2000. CERD/C/56/Misc.42/rev.3, at para. 9. See, also, among others, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Costa Rica*. 20/03/2002 and, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*. 14/08/2001.

As to the exploitation of the subsoil resources located subjacent to the traditional lands of indigenous communities, the Committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in the Committee's General Recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured;<sup>201</sup>

The Committee notes with concern that mining licences have been granted by the Ministry of Energy and Mines to concession enterprises and regrets that indigenous peoples were not consulted or informed that the permission to exploit the subsoil of their territory had been awarded to such enterprises. ... The Committee recommends that when taking decisions having a direct bearing on the rights and interests of indigenous peoples the State party endeavour to obtain their informed consent, as stipulated in paragraph 4 (d) of its general recommendation 23;<sup>202</sup> and,

that the representatives of indigenous communities be consulted, and their informed consent sought, in any decision-making processes directly affecting their rights and interests, in accordance with the Committee's General Recommendation No. 23;<sup>203</sup> [and that] the State party undertake environmental impact assessments and seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities.<sup>204</sup>

Further, in 2001, the CESCR noted "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem."<sup>205</sup> It then recommended that the State "ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned ...."<sup>206</sup>

While not strictly requiring consent, ILO 169 requires that States "establish or maintain procedures through which [they] shall consult these peoples" to determine the extent to which indigenous peoples' "interests would be prejudiced" prior to engaging in, or allowing resource exploitation (Art. 15(2)). This provision should be read conjunctively with Article 6(2)'s general requirement that consultation be undertaken "in good faith . . . in a form appropriate to the circumstances, with the objective of achieving

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<sup>201</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador. 21/03/2003. CERD/C/62/CO/2, at para. 16.*

<sup>202</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala. UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 19.*

<sup>203</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana, supra, at para. 14.*

<sup>204</sup> *Id.* at para. 19.

<sup>205</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001. E/C.12/Add. 1/74, at para. 12*

<sup>206</sup> *Id.* at para. 33. See, also, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador. 07/06/2004. UN Doc. E/C.12/1/Add.100, para. 35.*



agreement or consent.” Respect for indigenous peoples’ right to give their free and informed consent is nevertheless required if a state party has ratified one of the instruments noted above or below because, pursuant to Article 35, application of ILO 169 “shall not adversely affect the rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, customs or agreements.”

Other UN standards also require free and informed consent. Article 30(1) and (2) of the UN Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council in June 2006, for instance, provide that

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
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 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 their mineral, water or other resources.

## **2. Inter-American Human Rights Law**

In line with the UN human rights treaty bodies, the IACHR has consistently held that indigenous peoples’ informed consent is required in relation to activities that affect their traditional territories.<sup>207</sup> As a general principle, it has observed that Inter-American human rights law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.”<sup>208</sup> In the same vein, it has emphasized that

Articles XVIII and XXIII of the American Declaration specially oblige a member State to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.<sup>209</sup>

In its decision in the *Mayagna Case*, the IACHR held that Nicaragua was responsible for violations of the right to property “by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.”<sup>210</sup> In the *Maya Indigenous Communities Case*, it stated that the obligation to obtain indigenous peoples’ consent is “applicable to decisions by the State that will have an impact upon

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<sup>207</sup> These issues are discussed in greater detail in S.J. Anaya, *Indigenous Peoples Participatory Rights in Relation to Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources*, 22 *Arizona J. Int’l & Comp. Law* 7 (2005).

<sup>208</sup> *Mary and Carrie Dann Case*, *supra*, at para. 131.

<sup>209</sup> *Id.* at para. 140.

<sup>210</sup> Report No. 27/98 (Nicaragua), at para. 142, cited in, *The Mayagna (Sumo) Awas Tingni Community Case, Judgment on the Preliminary Objections of 1 February 2000*, Series C, No. 66.

indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”<sup>211</sup>

Most recently, in the *Twelve Saramaka Clans Case*, a case involving logging and mining concessions, the Commission confirmed, “in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people’s consent to natural resource exploitation activities on their traditional territories is always required by law.”<sup>212</sup>

Additionally, the IACHR has explained that “general international legal principles applicable in the context of indigenous human rights” include:

where property and user rights of indigenous peoples arise from rights existing prior to the creation of a State, recognition by that State of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.<sup>213</sup>

In addition to prohibiting unilateral extinguishment of indigenous peoples’ land and resource rights, the property and user rights governed by this principle should include subsoil minerals.

The Court has required indigenous peoples’ consent in relation to delimitation, demarcation and titling of traditional lands in the *Moiwana Village case*.<sup>214</sup> In *Yakye Axa*, when traditional lands cannot be returned to indigenous peoples, the Court required that indigenous peoples’ consent be obtained with regard to the provision of compensation or alternative lands and “in accordance with their own consultation processes, values, uses and customary law.”<sup>215</sup>

The Court has also ordered that states “refrain from actions – either of State agents or third parties acting with State acquiescence or tolerance – that would affect the existence, value, use or enjoyment” of indigenous peoples’ property at least until such time as their property rights are secured in law and fact.<sup>216</sup> Similar orders have been issued in the Court’s provisional measures jurisprudence.<sup>217</sup> This includes provisional

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<sup>211</sup> Maya Indigenous Communities, *supra*, at para. 142 (footnotes omitted).

<sup>212</sup> Twelve Saramaka Clans Case, *supra*, at para. 214.

<sup>213</sup> Mary and Carrie Dann Case, *supra*, at para. 130. (footnotes omitted).

<sup>214</sup> *Moiwana Village*, *supra*, para. 210.

<sup>215</sup> *Yakye Axa*, *supra*, para. 151 and; *Sawhoyamaya*, *supra*, para. 135.

<sup>216</sup> *Moiwana Village Case*, *supra*, at para. 211; and *Mayagna (Sumo) Indigenous Community Case*, *supra*, para. 164.

<sup>217</sup> See, for instance, *Mayagna (Sumo) Indigenous Community Case*, Provisional Measures of 6 Sept. 2002, at Decisions, at para. 1 (“To order the State to adopt, without delay, whatever measures are necessary to protect the use and enjoyment of property of lands belonging to the Mayagna Awas Tingni Community, and of natural resources existing on those lands, specifically those measures geared toward avoiding immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory of the Community or who exploit the natural resources that exist within it, until the definitive delimitation, demarcation and titling ordered by the Court are carried out.”)

measures issued in the *Sarayaku Indigenous Community Case*,<sup>218</sup> which concerns oil extraction operations in an indigenous people's territory in Ecuador.<sup>219</sup>

As noted above, the IACHR and Court's jurisprudence with regard to the right to consent is partly reflected in the operating policies of the Inter-American Development Bank as they pertain to indigenous peoples. The IDB's 1998 Involuntary Resettlement policy requires that indigenous peoples' informed consent be obtained prior to any resettlement.<sup>220</sup> Its newly adopted policy on indigenous peoples requires indigenous peoples' "agreement" in "cases of significant potential adverse impacts" and where there is commercial development of "indigenous culture and knowledge resources."<sup>221</sup>

### **3. The International Finance Corporation and the Equator Principles**

On 21 February 2006, the Board of the World Bank Group approved the adoption of the new International Finance Corporation's ("IFC") Policy on Social and Environmental Sustainability and 8 new Performance Standards (PSs) to replace the general World Bank policies previously used by the IFC.<sup>222</sup> Performance Standard 7 directly addresses indigenous peoples. On 1 July 2006, the so-called Equator Principles Banks ("EPBs") adopted the IFC's Performance Standards, which will apply to any project that they finance above the amount of US\$10 million.<sup>223</sup> The EPBs alone financed US\$125 billion of direct foreign investment in 2005, around 80% of global private sector project finance.

These standards are relevant in the context of this paper and the preceding discussion on FPIC in international law because: 1) both the IFC and the EPBs have recognized that human rights issues are particularly pertinent in relation to TNCs as they affect indigenous peoples; 2) they represent standards of required conduct for TNCs that are accepted by a significant part of the international financial community; 3) because the IFC is an intergovernmental organization and its agreed policy standards contain evidence of international standards and state practice;<sup>224</sup> and 4) because the IFC and EPBs recognize that mere consultation is not an adequate standard of engagement in the case of indigenous peoples.

The objectives of the IFC's Performance Standard 7 include fostering "full respect for the dignity, human rights, aspirations, cultures and natural resource-based

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<sup>218</sup> This case was declared admissible by the IACHR in 2004 and is still pending before that body. See, *Report No. 62/04, Admissibility*, Pueblo Indígena Kichwa de Sarayaku y sus Miembros (Ecuador), 12 October 2004.

<sup>219</sup> *Sarayaku Indigenous Community Case*, Provisional Measures of 17 May 2005, Resolution 1(b).

<sup>220</sup> Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4

<sup>221</sup> Inter-American Development Bank, *Operational Policy 7-65 on Indigenous Peoples*, *supra*, secs. IV.B.4.4.a.iii (the Borrower must provide, "no later than by the date of consideration of the operation by the Board", evidence of the agreements reached with the affected people. (V.5.3.c)) and IV.B.4.4.e.

<sup>222</sup> The new IFC policies are available at: <http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards>

<sup>223</sup> See, <http://www.equator-principles.com>

<sup>224</sup> See, B. Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*. In, *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* (G.S. Goodwin-Gill & S. Talmon eds., Clarendon Press 1999).

livelihoods of Indigenous Peoples;” and, to “foster good faith negotiation with and informed participation of Indigenous Peoples when projects are to be located on traditional or customary lands under use by the Indigenous Peoples.” In connection with the reference to human rights in the objectives, the associated Guidance Notes provide that:

IFC recognizes that the rights of Indigenous Peoples are being addressed under both national and international law. Under international law, key UN human rights conventions ... form the core of international instruments that provide the rights framework for the world’s indigenous peoples. In addition, some countries have passed legislation or ratified other international or regional conventions for the protection of Indigenous Peoples (for example, ILO Convention 169, ratified by 17 countries)... While such legal instruments establish responsibilities of States, it is increasingly expected that private sector companies conduct their affairs in a way that would uphold these rights and not interfere with States’ obligations under these instruments. It is in recognition of this emerging business environment that IFC expects that private sector projects financed by IFC foster full respect for the dignity, human rights, aspirations, cultures and customary livelihoods of Indigenous Peoples.<sup>225</sup>

With regard to engagement with indigenous peoples, PS7 requires that IFC clients will conduct ‘free, prior and informed consultation’ with indigenous peoples and seek their informed participation,<sup>226</sup> and, for ‘high risk’ projects or activities, enter into and successfully conclude good faith negotiations (see below). The Guidance Notes further provide that, before presenting a project to its Board for approval, the IFC will determine that: the client’s community engagement has involved free, prior and informed consultation; this process has enabled indigenous peoples’ informed participation; and, this process has lead to broad community support for the project.<sup>227</sup>

High risk projects (which clearly include all extractive and agro-industrial projects; indeed, the definition would cover most projects affecting indigenous peoples) are defined as:

- projects that may be on, or commercially develop natural resources within, indigenous peoples’ “traditional or customary lands under use, and adverse impacts can be expected on the livelihoods, or cultural, ceremonial, or spiritual use that define the identity and community of the Indigenous Peoples...”,<sup>228</sup>

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<sup>225</sup> International Finance Corporation, *Guidance Notes to Performance Standard 7*, Guidance Note 1.

<sup>226</sup> International Finance Corporation, *Performance Standard 7*, para. 9.

<sup>227</sup> *Guidance Notes to Performance Standard 7*, Guidance Note 19.

<sup>228</sup> *Performance Standard 7*, para. 13. Guidance Note 23 explains that

Customary use of land and resources refers to patterns of long-standing community land and resource use in accordance with Indigenous Peoples’ customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State. Cultural, ceremonial and spiritual uses are an integral part of Indigenous Peoples’ relationships to their lands and resources, are embedded within their unique knowledge and belief systems, and are key to their cultural integrity. Such uses may be intermittent, may take place in areas distant from population centers, and may not be site specific. Any potential adverse impacts on such use must be documented and addressed within the context of these belief systems.

- involving physical relocation;<sup>229</sup>
- involving ‘economic displacement’ due to land acquisition/compulsory takings for project purposes;<sup>230</sup> and,
- commercial use of cultural resources, and traditional knowledge, innovations and practices.<sup>231</sup>

While there is no definition of the term ‘good faith negotiation’, the Guidance Notes explain that it, at a minimum:

generally involves: (i) willingness to engage in a process and availability to meet at reasonable times and frequency; (ii) provision of information necessary for informed negotiation; (iii) exploration of key issues of importance; (iv) mutual[ly] acceptable procedures for the negotiation; (v) willingness to change initial position and modify offers where possible; and (vi) provision for sufficient time for decision making.<sup>232</sup>

There is similarly no definition of a ‘successful outcome’ of the good faith negotiations in PS7. However, it would be perverse to interpret the successful outcome of a negotiation to be anything other than some form of agreement. This is reflected in the Guidance Notes which provide that documentation indicating a successful outcome includes: “a memorandum of understanding, a letter of intent, a joint statement of principles, and written agreements.”<sup>233</sup> Therefore, while the IFC’s standards do not use the term ‘consent’ or ‘free, prior and informed consent’, in the case of high risk projects, including extractive industries, indigenous peoples’ agreement or consent is nonetheless a prerequisite for financing from the IFC or EPBs. This is also a standard that the governments represented on the World Bank Group’s Board of Executive Directors agree is appropriate in relation to indigenous peoples affected by TNC operations.

Finally, the International Finance Corporation’s Social and Environmental Review Procedure (“Micro-Finance Exclusion List”) contains the requirement of ‘informed consent’ in relation to indigenous peoples. It provides that IFC funds may not be used to finance “Production or activities that impinge on the lands owned, or claimed under adjudication, by indigenous peoples, without full documented consent of such peoples.”<sup>234</sup>

#### **4. Others**

The approach adopted pursuant to the international instruments discussed above is consistent with the observations of the UN Centre for Transnational Corporations in a

<sup>229</sup> *Id.* para. 14 and *Performance Standard 5*, para. 19.

<sup>230</sup> *Performance Standard 5*, para. 21. According to PS5, para. 1, ‘economic displacement’ includes “loss of assets or access to assets that leads to loss of income sources or means of livelihood ... as a result of project-related land acquisition.”

<sup>231</sup> *Performance Standard 7*, para. 15.

<sup>232</sup> *Guidance Notes to Performance Standard 7*, Guidance Note 25.

<sup>233</sup> *Id.*

<sup>234</sup> *Procedure for Environmental and Social Review of Projects*. International Finance Corporation, December 1998, at p. 36. Available at: [http://www.ifc.org/ifcext/enviro.nsf/e11ffa331b366c54ca2569210006982f/ESRP/\\$FILE/Env&SocReviewProc.pdf](http://www.ifc.org/ifcext/enviro.nsf/e11ffa331b366c54ca2569210006982f/ESRP/$FILE/Env&SocReviewProc.pdf)

series of reports that examine the investments and activities of TNCs in indigenous territories.<sup>235</sup> The fourth and final report concluded that TNCs' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development..."<sup>236</sup>

A 2001 UN workshop on indigenous peoples and natural resources development reiterated and elaborated upon this conclusion, stating in its conclusions that the participants (which included industry representatives):

recognized the link between indigenous peoples' exercise of their right to self determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.<sup>237</sup>

The Sub-Commission's Norms additionally provide that TNCs shall "respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects."<sup>238</sup> Similar statements on FPIC have been made by UN Special Rapporteurs on indigenous land rights, on treaties concluded between states and indigenous peoples, and on indigenous peoples' intellectual and cultural heritage, as well as by the Commission on Human Rights' Special Rapporteur on situation of the rights and fundamental freedoms of indigenous people.<sup>239</sup>

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<sup>235</sup> The CTC reported to the Working Group four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples ( UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40)

<sup>236</sup> *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations*. UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

<sup>237</sup> *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy, Mining Companies and Human Rights*. Geneva, 5-7 December 2001. E/CN.4/Sub.2/AC.4/2002/3, 17 June 2002, at 3.

<sup>238</sup> *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, at para. 10.

<sup>239</sup> See, *Indigenous people and their relationship to land. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/2001/21; *Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Final report prepared by Miguel Alfonso Martinez, Special Rapporteur*. UN Doc. E/CN.4/Sub.2/AC.4/1998/CRP.1 (1998); *Study on the protection of the cultural and intellectual property of indigenous peoples*, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities and Chairperson of the Working Group on Indigenous Populations. UN Doc. E/CN.4/Sub.2/1993/28; *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97.

The Final Report of the World Bank's three year-long Extractive Industries Review concluded that

Where there is unresolved conflict between indigenous peoples asserting rights over ancestral lands, territories, and resources and a national government that in law or in practice fails to acknowledge the distinct identity of these peoples and their rights, the conflict needs to be resolved in a consensual way. Otherwise it will continue and will jeopardize the potential for development and poverty alleviation from the extractives sector. Structural reforms and legal codes that provide for automatic approval of exploration and development concessions on indigenous lands, territories, and resources without the participation and the free prior and informed consent of these peoples and communities only exacerbate the problem.<sup>240</sup>

The EIR further explained that indigenous peoples “have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a ‘social license to operate’ and hence is a major tool for deciding whether to support an operation.”<sup>241</sup>

Extractive industry groups such as the International Petroleum Industry Environmental Conservation Association and the International Association of Oil & Gas Producers have also recognized that “it is important for communities to be able to give free and informed consent.”<sup>242</sup> Anglo-American, one of the world's largest mining companies, has publicly stated in relation to exploration and mining in indigenous territories that “we seek to do so with the co-operation and informed consent of local communities.”<sup>243</sup> Similarly, the International Council on Mining and Metals 2006 draft Position Statement on Mining and Indigenous Peoples Issues provides that “ICMM members seek to gain and maintain broad community support for their activities throughout the project cycle by:

Developing relationships with Indigenous Peoples based on their identified interests and the project impacts, which may include:

Seeking consent for activities. For example, where Indigenous Peoples have formal title to the affected land, or are owners of recognised legal interests in land or resources they must, at least, be afforded the same right as any other land owner;

Negotiating agreements, such as for access and benefit sharing, participation, land use etc., to specify the processes, roles and outcomes which form the basis of a relationship.”<sup>244</sup>

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<sup>240</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003, at p. 41.

<sup>241</sup> *Id.* at p. 21.

<sup>242</sup> IPIECA/OGP, *Key Questions in Managing Social Issues in Oil and Gas Projects*. Report No. 2.85/332, 2002. See also, IPIECA and OGP, *The Oil and Gas Industry: From Rio to Johannesburg and Beyond, Contributing to Sustainable Development*. Oxford: Words and Publications, 2002.

<sup>243</sup> Anglo-American PLC, *Towards Sustainable Development. Report to Society 2002*, at 38.

<sup>244</sup> ICMM, *Draft Position Statement, Indigenous Peoples and Mining Issues*, March 2006, at Commitment 5. Available at: [http://www.icmm.com/library\\_pub\\_detail.php?rcd=190](http://www.icmm.com/library_pub_detail.php?rcd=190)

A number of intergovernmental development agencies have incorporated FPIC language into their policies and programmes on indigenous peoples (all of which represent evidence of state practice). The United Nations Development Programme's official policy on indigenous peoples provides unequivocally that the "UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them."<sup>245</sup> This policy grounds UNDP's support for FPIC in international human rights law.

The Inter-American Development Bank's 1990 *Strategies and Procedures on Socio-Cultural Issues as Related to the Environment* provides that "In general the IDB will not support ... projects affecting tribal lands, unless the tribal society is in agreement...."<sup>246</sup> Further, as noted above, Inter-American human rights jurisprudence with regard to the right to consent is incorporated by reference in the 2006 operating policy of the Inter-American Development Bank on indigenous peoples. This policy also explicitly requires indigenous peoples' "agreement" in "cases of significant potential adverse impacts" and where there is commercial development of "indigenous culture and knowledge resources."<sup>247</sup>

The European Union Council of Ministers' 1998 Resolution entitled, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* provides that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas."<sup>248</sup> The EU interprets this language to be the equivalent of FPIC.<sup>249</sup> Additionally, in October 2003, the European Council and Commission approved, as part of the *Second Northern Dimension Action Plan*, the following language: "Strengthened attention to be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industry, with a view to protecting inherited rights of self-determination, land rights and cultural rights of indigenous peoples of the region."<sup>250</sup> As noted above, FPIC is implicit in and fundamental to the right to self-determination.

Finally, as discussed in detail in the next section, both general and treaty-based international law requires indigenous peoples' free and informed consent in connection with relocation.

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<sup>245</sup> UNDP and Indigenous Peoples: *A Policy of Engagement*, paras. 26-30 (2001).

<sup>246</sup> Inter-American Development Bank, *IDB Resource Book On Participation*, Annex, Strategies and Procedures on Socio-Cultural Issues as Related to the Environment. (1990)

<sup>247</sup> Inter-American Development Bank, *Operational Policy 7-65 on Indigenous Peoples*, adopted 22 February 2006, secs. IV.B.4.4.a.iii (the Borrower must provide, "no later than by the date of consideration of the operation by the Board", evidence of the agreements reached with the affected people. (V.5.3.c)) and IV.B.4.4.e. Available at: [http://www.iadb.org/sds/ind/site\\_401\\_e.htm](http://www.iadb.org/sds/ind/site_401_e.htm).

<sup>248</sup> European Union, Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998).

<sup>249</sup> T. Griffiths, *A Failure of Accountability. Indigenous peoples, human rights and development agency standards: A reference tool and comparative review*. Forest Peoples Programme, Moreton-in-Marsh 2003, 28, 29, 46, 62. Available at: [www.forestpeoples.org/](http://www.forestpeoples.org/)

<sup>250</sup> European Union, *Second Northern Dimension Action Plan 2004-06*, 18 October 2003, at 21 Available at: [http://europa.eu.int/comm/external\\_relations/north\\_dim/ndap/ap2.htm](http://europa.eu.int/comm/external_relations/north_dim/ndap/ap2.htm)



### **C. Involuntary Resettlement**

Involuntary or forcible resettlement “is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities.”<sup>251</sup> This is also recognized in a World Bank study on resettlement, which states that “[t]he potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity. ... Carrying out resettlement in a manner that respects the rights of affected persons is not just an issue of compliance with the law, but also constitutes sound development practice.”<sup>252</sup>

For indigenous peoples, forcible relocation can be disastrous, severing entirely their various relationships with their ancestral lands.<sup>253</sup> As observed by the UN Sub-Commission, “where population transfer is the primary cause for an indigenous people’s land loss, it constitutes a principal factor in the process of ethnocide;”<sup>254</sup> and, “[f]or indigenous peoples, the loss of ancestral land is tantamount to the loss of cultural life, with all its implications.”<sup>255</sup>

Due to the importance attached to indigenous peoples’ cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples’ free and informed consent must be obtained.<sup>256</sup> Additionally, relocation may only be considered as an exceptional measure in extreme

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<sup>251</sup> *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur.* UN Doc. E/CN.4/Sub.2/1993/8, at 10. See, also, *Forced evictions: Analytical report compiled by the Secretary-General.* UN Doc. E/CN.4/1994/20, for an enumeration of the various human rights implicated by resettlement; and, *Report of the Representative of the Secretary-General on legal aspects relating to the protection against arbitrary displacement.* UN Doc. E/CN.4/1998/53/Add.1

<sup>252</sup> *Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement 1986-1993.* The World Bank, Environment Department: Washington D.C. 1994, at ¼.

<sup>253</sup> For an extensive overview of the impact on indigenous peoples of relocation caused by dams, see, *Dams, Indigenous Peoples and Ethnic Minorities. Indigenous Affairs*, Vol. 3-4, International Work Group on Indigenous Affairs and Forest Peoples Programme (1999), especially, M. Colchester, Introduction, p. 4-55.

<sup>254</sup> *The human rights dimensions of population transfer, including the implantation of settlers. Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano.* UN Doc. E/CN.4/Sub.2/1993/17\*, at para. 101.

<sup>255</sup> *Id.* at para. 336.

<sup>256</sup> Among others, ILO 107, art. 12; ILO 169, art. 16(2); UN Declaration, art. 10, Proposed American Declaration, art. XVIII(6), and Committee on the Elimination of Racial Discrimination, General Recommendation XXIII. See, also, *Progress report prepared by the Special Rapporteur on the human rights implications of population transfer, including the implantation of settlers.* UN Doc. E/CN.4/Sub.2/1994/18, at paras. 24-5.

and extraordinary cases. The implicit statement contained in these standards is that forcible relocation is prohibited as a “gross violation of human rights.”<sup>257</sup>

The report of the Representative of the UN Secretary General on this issue concluded that “an express prohibition of arbitrary displacement is contained in humanitarian law and in the law relating to indigenous peoples”<sup>258</sup> and,

[e]fforts should be made to obtain the free and informed consent of those to be displaced. Where these guarantees are absent, such measures would be arbitrary and therefore unlawful. Special protection should be afforded to indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.<sup>259</sup>

Another UN report found that, with regard to indigenous peoples and relocation, the principle of consent has obtained the status of a binding general principle of international law.<sup>260</sup> This right is further affirmed in the UN Declaration on the Rights of Indigenous Peoples, as approved by the Human Rights Council. Article 10 of the Declaration provides that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

Given the fundamental physical, cultural, spiritual and other relationships that indigenous peoples have with their lands and resources, forcible resettlement amounts to a gross violation of a series of human rights. In the jurisprudence of the IACHR, forcible relocation amounts to a violation of human rights “essential to the right to life of peoples.”<sup>261</sup> It certainly constitutes a violation of Article 27 of the ICCPR and Article 30 of the Convention on the Rights of the Child in that, in most cases, it amounts to a *denial* of the right of indigenous persons and children, respectively, to enjoy their culture. Addressing this issue, the HRC stated that

the Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. *Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant.* Therefore: When planning actions that affect

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<sup>257</sup> UN Commission on Human Rights resolution 1993/77 States that the practice of forced evictions constitutes a “gross violation of human rights” and urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice.

<sup>258</sup> *Internally displaced persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39* UN Doc. E/CN.4/1998/53

<sup>259</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* UN Doc. E/CN.4/1998/53/Add.1, at Sec. IV, para. 4.

<sup>260</sup> *Progress report prepared by the Special Rapporteur on the human rights population transfer, including the implantation of settlers.* UN Doc. E/CN.4/Sub.2/1994/18, at para. 25.

<sup>261</sup> Third Report on the Situation of Human Rights in The Republic of Guatemala, *supra*, at 114.

members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them.<sup>262</sup> (emphasis added)

The Committee on Economic, Social and Cultural Rights frequently expresses concern about forcible relocation and has urged states to abandon the practice as incompatible with the obligations assumed under the Covenant.<sup>263</sup> In its *General Comment on the Right to Adequate Housing*, the Committee explained that it “considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”<sup>264</sup> As discussed above, in the case of indigenous peoples, the relevant principles of international law include the right to free, prior and informed consent. Concern has also been expressed about forcible relocation in connection with mining on a number of occasions. In its concluding observations on Bolivia in 2001, for instance, the Committee highlighted its concerns about “the incidence of forced evictions with respect to peasants and indigenous populations in favour of mining and lumber concessions ....”<sup>265</sup>

In General Comment No. 7, which exclusively addresses forced evictions, the Committee noted that indigenous peoples suffer disproportionately from the practice of forced eviction.<sup>266</sup> Observing that forcible relocation often occurs in relation to “large-scale development projects, such as dam-building and other major energy projects,”<sup>267</sup> the Committee further stated that it

is aware that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which States, *inter alia*, that “international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.”<sup>268</sup>

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<sup>262</sup> *Concluding observations of the Human Rights Committee: Chile*. 30/03/99. CCPR/C/79/Add.104. (*Concluding Observations/Comments*) CCPR/C/79/Add.104, 30 March 1999, at para. 22

<sup>263</sup> General Comment No. 4, The Right to Adequate Housing (Art. 11(1) of the Covenant), adopted at the Committee’s Sixth session, 1991. In, *Compilation of General Comments/Recommendations*, *supra*, pps. 22-27.

<sup>264</sup> *Id.* at para. 18. See, also, General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions, *supra*, at para. 1.

<sup>265</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bolivia*. 21/05/2001. UN Doc. E/C.12/1/Add.60, at para. 21. See, also, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama*. 24/09/2001, *supra*, at para. 12.

<sup>266</sup> General Comment No. 7, The Right to Adequate Housing (Art. 11(1) of the Covenant): forced evictions, *supra*, at para. 10.

<sup>267</sup> *Id.* at para. 18.

<sup>268</sup> *Id.* at para. 17.

In the Inter-American system, the IACHR concluded as early as 1984 that “The preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.<sup>269</sup> In the *Moiwana Village* case, the Court held<sup>270</sup> that the many of the *United Nations Guiding Principles on Internal Displacement*<sup>271</sup> “illuminate the reach and content of Article 22 of the Convention [the right to freedom of movement and residence], in the context of forced displacement.”<sup>272</sup> One of the Guiding Principles emphasized by the Court as part of state parties’ obligations under Article 22 provides that, “States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”<sup>273</sup>

The Court counted the Moiwana community’s forced displacement and prolonged separation from its traditional lands as one of the three bases for finding that the respondent state had additionally violated the right to mental and moral integrity guaranteed in Article 5(1) of the American Convention. It observed that, “in order for the culture to preserve its very identity and integrity, the Moiwana community members must maintain a fluid and multidimensional relationship with their ancestral lands.”<sup>274</sup> Displacement also figured prominently in the Court’s determination of moral and material damages.<sup>275</sup> With regard to material damages, the Court presumed material harm on the grounds that “the Moiwana community members were violently forced from their homes and traditional lands into a situation of ongoing displacement, whether in French Guiana or elsewhere in Suriname. Moreover, they have suffered poverty and deprivation since their flight from Moiwana Village, as their ability to practice their customary means of subsistence and livelihood has been drastically limited.”<sup>276</sup>

<sup>269</sup> Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, *supra*, 120.

<sup>270</sup> See, also, *Case of the Massacres of Ituango v. Colombia*, Judgment of 1 July 2006. Series C No. 148; *Kankuamo Indigenous Community v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of July 5, 2004, at Resolution 3 (requiring immediate measures to protect the right to freedom of movement including those to permit displaced indigenous persons to return to their traditional lands); *Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of March 6, 2003, at para. 9 (an Afro-Colombian tribal community who “are all in a situation of equal risk of ... being forcibly displaced from their territory, a situation that prevents them from exploiting the natural resources necessary for their subsistence;”); and *Jiguamiandó and the Curbaradó Communities v. Colombia (Provisional Measures)*, Order of the Inter-American Court of Human Rights of February 7, 2006, para. 9, 12.

<sup>271</sup> UN Doc. E/CN.4/1998/53/Add.2. February 11, 1998.

<sup>272</sup> *Moiwana Village*, *supra*, at 111.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at para. 101, 102-03.

<sup>275</sup> On the relevance of territorial rights to immaterial damages, see, also, the Sawhoyamaya Indigenous Community Case, *supra*, para. 221.

<sup>276</sup> *Id.* at para. 186-7. See, also, G. Handl, Indigenous Peoples’ Subsistence Lifestyle as an Environmental Valuation Problem. In, M. Bowman and A. Boyle (eds.), ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW. PROBLEMS OF DEFINITION AND VALUATION. (Oxford: OUP, 2002), 85-110, (explaining the bases in international and comparative law for cultural and subsistence lifestyle damage claims by indigenous peoples.)

From the preceding, it is clear that, in the case of indigenous peoples, both general and conventional international law require that consent be obtained prior to resettlement. It is also clear that international law accords indigenous peoples, given their unique connection with their lands and resources, a higher standard of protection than applies to others. This higher standard in part entails a substantial, if not complete, limitation on the exercise of eminent domain powers by the state, at least to the extent that forcible relocation is involved. For these reasons, the European Union, the Inter-American Development Bank, the International Finance Corporation and the World Commission on Dams also prohibit relocation without indigenous peoples' consent.<sup>277</sup>

#### **D. Indigenous Peoples' Rights in Customary International Law**

Indigenous peoples' rights to lands and resources have crystallized into norms of customary international law binding on all states. This is confirmed by the Inter-American Commission on Human Rights. In the *Mary and Carrie Dann Case*, the IACHR stated that "general international legal principles"<sup>278</sup> applicable in the context of indigenous human rights" include:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a State, recognition by that State of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.
- This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>279</sup>

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<sup>277</sup> European Union: Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998) ("indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas"); Inter-American Development Bank, *Operational Policy 710 on Involuntary Resettlement* (1998), Section IV, para. 4; International Finance Corporation, Performance Standard 7 on Indigenous Peoples, *supra*, para. 14 and Performance Standard 5 on Resettlement, para. 19, and; World Commission on Dams: DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING. THE REPORT OF THE WORLD COMMISSION ON DAMS. London: Earthscan (2000), at 112, see, also, 267, 271, 278 ("The scope of international law has widened and currently includes a body of conventional and customary norms concerning indigenous peoples, grounded on self-determination. In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.")

<sup>278</sup> General principles of international law refer to "rules of customary law, to general principles of law as in Article 38(1)(c) [of the Statute of the International Court of Justice], or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and municipal analogies." PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra*, at 19.

<sup>279</sup> *Mary and Carrie Dann Case*, *supra*, at para. 130. (footnotes omitted).

This conclusion is supported by a number of scholars.<sup>280</sup> Professors Anaya and Williams, for instance, state that “the relevant practice of States and international institutions establishes that, as a matter of customary international law, States must recognize and protect indigenous peoples’ rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns.”<sup>281</sup> Professor Siegfried Wiessner concludes that state practice and *opinio juris* permit the “identification of specific rules of a customary international law of indigenous peoples.” These rules relate to the following areas:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own systems of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.<sup>282</sup>

Additionally, Anaya persuasively asserts that much of ILO 169 reflects customary international law.<sup>283</sup> This assertion is supported by Lee Swepston, head of the Equality and Human Rights Branch of the ILO, who describes the influence of the Convention on state practice, including in non-ratifying states, and intergovernmental organizations.<sup>284</sup> Finally, indigenous land and resource rights are protected under customary international law in connection with the principal provisions of CERD<sup>285</sup> and Article 27 of ICCPR.<sup>286</sup>

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<sup>280</sup> Among others, see, S.J. Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford and New York: OUP, 1996), at 49-58 and 107; S. Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Human Rights J.* 57 (1999), at 128; R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *Yale Journal Int'l Law* 127; and C. Iorns Magallanes, *International Human Rights and their Impact on Indigenous Peoples' Rights in Australia, Canada and New Zealand*, In, P. Havemann (ed.) *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND*. (Auckland: OUP, 1999), at 242 (“Further significant international legal developments provide evidence that customary international law has accepted the right of cultural self-determination for indigenous peoples and the consequent autonomous control necessary to achieve that ...”).

<sup>281</sup> S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*. 14 *Harv. Hum. Rts. J.* 33 (2001), at 55.

<sup>282</sup> *The Rights and Status of Indigenous Peoples*, *supra*, at 128

<sup>283</sup> S.J. Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, *supra*.

<sup>284</sup> L. Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years after Adoption*. In, C. Price Cohen, *HUMAN RIGHTS OF INDIGENOUS PEOPLES*. New York: Transnational (1998), pps. 17- 36, 34-6.

<sup>285</sup> T. Meron, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW*, *supra*, 21.

<sup>286</sup> Human Rights Committee, *General Comment No. 24*, *supra*, para. 8.

## **E. Environmental Rights**

This section provides a brief overview of rights related to environmental protection.<sup>287</sup> As discussed above, the understanding that protection of indigenous peoples' cultural integrity is closely linked to recognition of and respect for rights to lands, territories and resources and to protection and preservation of their physical environment is firmly entrenched in the normative structure of existing and emerging international human rights instruments. As one scholar explains "there can be little room for doubt that there exists today a general consensus among States that the cultural identity of traditional indigenous peoples and local communities warrants affirmative protective measures by States, and that such measures be extended to all those elements of the natural environment whose preservation or protection is essential for the groups' survival as culturally distinct peoples and communities."<sup>288</sup>

A major United Nations study on the intersection of human rights and the environment reached the same conclusion. Determining that, given indigenous peoples' unique relationship with their lands and territories, "all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment,"<sup>289</sup> the Special Rapporteur proposed the following principle for inclusion in a Declaration of Principles on Human Rights and the Environment:

Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional ways of life. This includes the right to security in the enjoyment of their means of subsistence.

Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.<sup>290</sup>

The IACHR has also stated, and reaffirmed numerous times, that "indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources therein – respect for which is essential to their physical and cultural survival."<sup>291</sup>

ILO 169, while not declaring a right to environment, is the first international instrument to exclusively relate environmental concerns to indigenous peoples. Article 4(1), for instance, requires state parties to take "special measures" to protect the environment of indigenous peoples. These special measures include environmental

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<sup>287</sup> See, among others, D. Shelton, Environmental Rights. In, P. Alston (ed.), PEOPLES' RIGHTS. Oxford: OUP, (2001), pps. 185-294 and; Kastrup, The Internationalization of Indigenous Rights from an Environmental and Human Rights Perspective, 32 *Tex. J. Int'l. Law* 97 (1997).

<sup>288</sup> G. Handl, Indigenous Peoples' Subsistence Lifestyle as an Environmental Valuation Problem. In, M. Bowman and A. Boyle (eds.), ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW. PROBLEMS OF DEFINITION AND VALUATION. Oxford: OUP (2002), 85-110, at 95 (footnotes omitted).

<sup>289</sup> *Human Rights and the Environment. Preliminary report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur.* E/CN.4/Sub.2/1991/8 (1991), at para. 27.

<sup>290</sup> *Human Rights and the Environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur.* E/CN.4/Sub.2/1994/9 (1994), Annex, at Principle 14.

<sup>291</sup> Report on the Situation of Human Rights in Ecuador, *supra*, at 106.

impact studies of proposed development activities (art. 7(3)), recognition and protection of subsistence rights (art. 23), safeguarding of natural resources (art. 15(1)), and measures to protect and preserve the territories of indigenous peoples (art. 7(4)). Article 7(1) contains one of the most important principles of the Convention, providing that “[t]he people 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.” This article is one of the general principles of the Convention and provides a framework within which other articles are to be interpreted.

Indigenous peoples’ rights to environmental protection have also been addressed under instruments of general application. In *Ominayak and the Lake Lubicon Band v. Canada*, the HRC found that oil and gas exploitation and pollution generated thereby threatened the way of life and culture of the Band and therefore constituted a violation of Article 27 of the ICCPR.<sup>292</sup> In 1985, the IACHR examined the rights of the Yanomami people in the context of the construction of the Trans-Amazonia highway in Brazil, invasion of their territory by small-scale gold miners, environmental degradation and devastating illnesses brought in by the miners. The highway forced a number of Yanomami communities located near the construction path to abandon their communities and means of subsistence. The IACHR found, due to Brazil's failure to take “timely measures” to protect the Yanomami, that violations of, *inter alia*, the right to life and the right to preservation of health and well-being under the American Declaration on the Rights and Duties of Man had occurred.<sup>293</sup>

The IACHR re-visited the Yanomami situation in its 1997 *Report on the Situation of Human Rights in Brazil*.<sup>294</sup> It concluded that although the Yanomami people have obtained recognition of their right to ownership of their land, “[t]heir integrity as a people and as individuals is constantly under attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration.”<sup>295</sup> It recommended that Brazil “institute federal protection measures with regard to Indian lands threatened by invaders, with particular attention to those of the Yanomami ... including an increase in controlling, prosecuting and imposing severe punishment on actual perpetrators and architects of such crimes, as well as State agents who are active or passive accomplices.”<sup>296</sup>

In its *Ecuador Report*, the IACHR again relates the right to life to environmental security stating that “[t]he realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a

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<sup>292</sup> *Ominayak v. Canada*, *supra*, para. 1

<sup>293</sup> *Case 7615 (Brazil)*, OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33.

<sup>294</sup> *Report on the Situation of Human Rights in Brazil*. OEAA/Ser.L/V/II.97 Doc 29 rev. 1 (1997).

<sup>295</sup> *Id.* at 112.

<sup>296</sup> *Id.*



persistent threat to human life and health, the foregoing rights are implicated.”<sup>297</sup> With regard to implementation of state obligations concerning resource exploitation, the IACHR “considers that the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which could translate into violations of human rights protected by the American Convention.”<sup>298</sup>

Building upon principles adopted at the United Nations Conference on Environment and Development and various articles of the American Convention, the IACHR highlighted the right to participate in decisions affecting the environment.<sup>299</sup> An integral part of this right is access to information in an understandable form. Emphasizing procedural guarantees and state obligations to adopt positive measures to guarantee the right to life, the IACHR stated that

In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guarantee against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.<sup>300</sup>

The African Commission found that the right to life had been violated in connection with environmental pollution in the Ogoni case:

The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole.<sup>301</sup>

It also found a violation of article 24 of the African Charter, which guarantees the right of *peoples*’ to a healthy environment. The Commission Stated that Article 24 “imposes clear obligations upon a government” and “requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>302</sup> Among the measures proposed to remedy violations, the Commission recommended “a comprehensive cleanup of lands and rivers damaged by oil operations.”<sup>303</sup>

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<sup>297</sup> Report on the Situation of Human Rights in Ecuador, *supra*, at 88.

<sup>298</sup> *Id.* at 89.

<sup>299</sup> *Id.* at 92-5.

<sup>300</sup> *Id.* at 93.

<sup>301</sup> Ogoni Case, *supra*, at para. 67.

<sup>302</sup> *Id.* at para. 52.

<sup>303</sup> *Id.* at p. 13.

## **F. Economic, Social and Cultural Rights**

A range of economic, social and cultural rights are implicated and may be adversely affected by resource exploitation. As is apparent from the preceding and as illustrated below, indigenous peoples' enjoyment of economic, social and cultural rights is fundamentally related to recognition of and respect for rights to own and control their lands, territories and resources traditionally owned or otherwise occupied and used. Also, while it is correct to say that economic, social and cultural rights are subject to progressive realization determined by the availability of resources, it is incorrect to argue on this basis that states have no obligations in relation to these rights. On the contrary, "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."<sup>304</sup>

In the Ogoni case, the African Commission found Nigeria in violation of the right to housing and protection against forced eviction – a "right enjoyed by the Ogonis as a collective right"<sup>305</sup> – the right to health and the right to food: "[w]ithout touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves."<sup>306</sup>

The Committee on Economic, Social and Cultural Rights has also raised the issue of violations of the right to health, to food and to culture:

The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.<sup>307</sup>

The Committee deplores the discrimination against indigenous people, particularly with regard to access to land ownership, housing, health services and sanitation, education, work and adequate nutrition. The Committee is particularly concerned about the adverse effects of the economic activities connected with the exploitation of natural resources, such as mining in the Imataca Forest Reserve and coal-mining in the Sierra de Perijá, on

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<sup>304</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (1990). In, *Compilation of General Comments/Recommendations*, *supra*, pps. 18-21, at para. 10 (explaining that "[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*").

<sup>305</sup> Ogoni Case, *supra*, at 62-3.

<sup>306</sup> *Id.* at 65.

<sup>307</sup> General Comment 14, *The right to the highest attainable standard of health: 11/08/2000*. UN Doc. E/C.12/2000/4, 11 August 2000, at para. 27.

the health, living environment and way of life of the indigenous populations living in these regions.<sup>308</sup>

The Committee has also observed that indigenous peoples are especially vulnerable to violations of the right to food in cases where “access to their ancestral lands may be threatened.”<sup>309</sup> In this respect, and in similar terms to those employed by the African Commission,<sup>310</sup> Asbjorn Eide, whose work has had enormous influence on economic, social and cultural rights, states that

In light of evolving practice at the international level, there is now a broad consensus that human rights impose three types or levels of obligations on State parties: the obligations to *respect*, to *protect* and to *fulfil*. ... States must, at the primary level, *respect* the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources – alone or in conjunction with others – to satisfy his or her own needs. With regard to the latter, *collective* or group rights can become important: the resources belonging to a collective of persons, such as indigenous populations, must be respected in order for them to be able to satisfy their needs. Consequently, as part of the obligation to respect these resources the State should take steps to recognise and register the land rights of indigenous peoples and land tenure of smallholders whose title is uncertain.<sup>311</sup>

The IACHR has addressed indigenous peoples’ economic, social and cultural rights on a number of occasions, particularly in its country situation reports. A general principle is that states have the obligation “to respect indigenous cultures and their organizations and to ensure their maximum development in accordance with their traditions, interests, and priorities.”<sup>312</sup> This language clearly indicates that realisation of economic, social and cultural rights should be consistent with indigenous traditions, interests and priorities, all of which presuppose and require a substantial measure of indigenous participation in and agreement to development activities.

The IACHR also recognizes that states should provide resources directly to indigenous peoples as well as incorporate traditional knowledge and practices with regard to the provision of certain services. In its *Fifth Report on the Situation of Human Rights in Guatemala*, for instance, the IACHR recommended that the state, “Adopt, as soon as possible, the measures and policies necessary to establish and maintain an effective preventive health and medical care system, to which all members of the different indigenous communities have access, take advantage of the medicinal and health

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<sup>308</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Venezuela. 21/05/2001.* UN Doc. E/C.12/1/Add.56, at para. 12.

<sup>309</sup> General Comment No. 12, The Right to Adequate Food (Art. 11 of the Covenant), adopted at Committee’s Twentieth session, 1999. In, *Compilation of General Comments/Recommendations, supra*, pps. 66-74, at para. 13 (see, also, para. 20 explaining the human rights responsibilities of the private sector in relation to the right to food).

<sup>310</sup> Ogoni Case, *supra*, para. 45.

<sup>311</sup> A. Eide, *Promoting economic, social and cultural rights: Obligations of States and accountability of non-State actors*. Paper presented at Second Global Forum on Human Development, Candido Mendes University, Rio de Janeiro, Brazil, 9-10 October 2000, at p. 11-12. Available at: <http://www.undp.org/hdro/events/rioforum/eide.pdf>

<sup>312</sup> Report on the Human Rights Situation in Mexico, *supra*, at para. 577.

resources of indigenous cultures, and provide these communities with resources to improve their environmental health conditions, including drinking water and sewage services.”<sup>313</sup>

In the *Third Report on Paraguay*, the IACHR noted the inadequacy of Paraguay’s efforts to resolve indigenous peoples’ land and resource rights and stressed that “While the territory is fundamental for development of the indigenous populations in community, it must be accompanied by health, education, and sanitary services, and the protection of their labor and social security rights, and, especially, the protection of their habitat.”<sup>314</sup> Consequently, not only must sufficient lands and resources be legally recognized and secured, the states must further ensure that indigenous peoples enjoy adequate health, education and other services, presumably of at least the same quality as those enjoyed by non-indigenous persons.

In its 2000 report on human rights in Peru, the IACHR condemned the severe impact of resource extraction operations on the indigenous peoples of the Amazon region, observing that “The actions of the lumber and oil companies in these areas, without consulting or obtaining the consent of the communities affected, in many cases lead to environmental degradation and endanger the survival of these peoples.”<sup>315</sup> As part of mitigating the negative impacts, it recommended that Peru “improve access to the public services, including health and education, for the native communities, to offset the existing discriminatory differences, and to provide them dignified levels in keeping with national and international standards;”<sup>316</sup> and, “[t]hat it help strengthen the role of the indigenous populations so that they may have options and be able to retain their cultural identity, while also participating in the economic and social life of Peru, with respect for their cultural values, languages, traditions, and forms of social organization.”<sup>317</sup>

The Court addressed indigenous peoples’ economic, social and cultural rights in the *Yakye Axa* case in relation to alleged violations of the right to life. In doing so, the Court stated that the right to life includes the right to be free from conditions that prevent or impede a dignified existence.<sup>318</sup> Turning to the *Yakye Axa* situation, the Court explained that it must assess whether the state generated or tolerated conditions detrimental to a dignified life for the *Yakye Axa* and whether it adopted any appropriate positive measures to remedy their situation. These measures must take into account the *Yakye Axa*’s

special vulnerability arising from their different way of life (systems of understanding of the world different from those of western culture, that includes/understands the fundamental relationship they maintain with the land) and their project of life, in its

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<sup>313</sup> *Fifth Report on the Situation of Human Rights in Guatemala*. OEA/Ser.L/V/II.111 doc. 21 rev., 6, (2001), at para. 66.

<sup>314</sup> *Third Report on the Human Rights Situation in Paraguay*, OEA/Ser.L/V/II.110 Doc.52 (2001), at Chapter IX, para. 47.

<sup>315</sup> Second Report on the Human Rights Situation in Peru, *supra*, Ch. X, at para. 26.

<sup>316</sup> *Id.* at para. 39(2).

<sup>317</sup> *Id.* at para. 39(7).

<sup>318</sup> *Yakye Axa Indigenous Community Case*, *supra*, para. 161.

individual and collective dimensions, in the light of the international *corpus juris* concerning the special protections which they require as members of indigenous communities....<sup>319</sup>

In its analysis, the Court highlighted the General Comments of the UN Committee on Economic, Social and Cultural Rights as they pertain to indigenous peoples, particularly those on the right to health, quoted above, and the right to water,<sup>320</sup> and reiterated the Committee's conclusion that indigenous peoples are particularly vulnerable to violations of the rights to food and water when their "access to their ancestral lands may be threatened."<sup>321</sup>

Observing that the proven facts demonstrated that the Yakye Axa lived in a state of extreme deprivation due to the failure of the state to secure their territorial rights, the Court held that Paraguay was responsible for violating the right to life of the members of the community as they had lost access to their traditional means of subsistence and because Paraguay had failed to adopt special measures to improve their situation, which, together, had deprived of them of the conditions necessary for a life with dignity.<sup>322</sup> The Court also observed that Paraguay had failed to satisfy its obligations to provide special protections for children and the elderly, who had suffered disproportionately, and noted that care for the elderly was especially important given their role in the transmission of culture to younger generations.<sup>323</sup>

Finally, various economic, social and cultural rights are also addressed in other binding treaties.<sup>324</sup> Article 24 of the Convention on the Rights of the Child, for instance, obliges state parties to recognize "the right of the child to the enjoyment of the highest attainable standard of health" and to provide all children with "adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution."

Article 14(2)(h) of the Convention on the Elimination of Discrimination Against Women ("CEDAW") obliges States to "ensure to women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply ...."<sup>325</sup> Article 12 of CEDAW requires state parties to eliminate discrimination in provision of health care so as to ensure that women are able to meet their health goals and

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<sup>319</sup> *Id.* at para. 163.

<sup>320</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, para. 16.

<sup>321</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Adequate Food (art. 11 of the International Covenant on Economic, Social and Cultural Rights)*. U.N. Doc. and/C.12/1999/5, at para. 13.

<sup>322</sup> Yakye Axa Indigenous Community Case, *supra*, para. 168.

<sup>323</sup> *Id.* para. 172-75. The Court reached similar conclusions in its judgment on reparations in the Plan de Sánchez Massacre Case, *supra*, at para. 49.12-49.16.

<sup>324</sup> See, also, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988), entered into force November 16, 1999, *OAS TREATY SERIES*, No. 69.

<sup>325</sup> CEDAW is in force for 185 States as of November 2006.

needs. In this context, the UN Committee on the Elimination of Discrimination Against Women has advised States that “special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, [including] ... indigenous women.”<sup>326</sup>

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<sup>326</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women - women and health (1999). In, *Compilation of General Comments/Recommendations, supra*, pps. 244-51, at para. 6.