



Forest Peoples Programme

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Working Group on the issue of human rights and transnational corporations and other business enterprises

United Nations,
Geneva, Switzerland
Via email: wg-business@ohchr.org

December 9th, 2011

Re: Establishment of a Work Programme for the Working Group on the issue of human rights and transnational corporations and other business enterprises

Dear members of the Working Group,

Congratulations on your election to this new and important body. We look forward to working with you during your mandate to build more tools and analysis to address the serious challenges posed by the mandate that you have been given. We consider the Guiding Principles developed by John Ruggie to be an important step towards establishing effective protections for people(s) vulnerable to harm or exploitation from both transnational and domestic business enterprises.

As you establish your first programme of work, we would like to draw two key subjects to your attention in the hope that they can be included in the inaugural programme of work and brought to the attention of the Forum on Business and Human Rights established as part of your mandate. The first issue that we would like to bring forward for your attention is the emerging consensus in some areas of private sector financing around the need for respect for the principle of free, prior and informed consent (FPIC) in business activities impacting on the lands and territories of indigenous peoples. The second issue we would like to raise is the special concerns that exist around the industry of agribusiness, including the direct threats to human rights often posed by large-scale and rapid increases in the scale and depth of agribusiness enterprises, notably to the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

Free, prior and informed consent

On the 1st of January 2011 the new Performance Standards of the International Finance Corporation will come into effect, affecting all private-sector loans made by the World Bank Group from that date forward. These Standards, developed by the private-sector arm of the World Bank Group, contain within them an acknowledgement of the need to respect the right of indigenous peoples to give, or withhold, their free, prior and informed consent to certain types of business activity that pose direct and indirect risks to them. Although more tightly restrained than we would wish, these Standards are nonetheless an important step towards further entrenching international

understandings of the importance of this key principle to the survival and futures of the world's indigenous peoples.

Adopting the standard of FPIC has brought the IFC into line with a variety of United Nations agencies, including the UN Development Programme, the International Fund for Agricultural Development and the Food and Agriculture Organisation, which all require or encourage adherence to FPIC in activities that they plan, finance or implement.¹ It also brings the IFC into line with peer financial institutions such as the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and – using the terms of prior agreement and consent – the Inter-American Development Bank (IDB).² The Equator Principles, a set of voluntary principles for corporations based on the IFC Performance Standards, have incorporated the newly revised Performance Standards by reference thereby greatly increasing the potential scope of application of a requirement for FPIC to be sought and gained by private sector actors.³

However many challenges remain in the implementation of this important principle, even in sectors which have nominally acknowledged the need for it to be practiced. We provide here in a detailed annex (Annex 1) background information regarding current practice around ensuring respect for the principle of FPIC. However we feel that there is an urgent need to “identify, exchange and promote good practices and lessons learned”, as referred to in the Working Group mandate, on the actual practice of meeting the standard of FPIC in private sector business activities. We therefore recommend that:

- The Working Group bring into its Programme of Work a theme on realizing free, prior and informed consent in the context of private sector transnational corporate activities and investments
- The Working Group conduct analysis into current practice and areas for improvement in industries that have emerging consensus regarding the principle of FPIC, including but not limited to the mining industry, dam construction and maintenance and large scale agribusiness.

Agribusiness and Human Rights

In late November 2011, a high-level workshop was convened in Bali, Indonesia, to review the state of agribusiness in Southeast Asia and its impact on the state of human rights protections in the region. The workshop was convened by the Indonesian National Commission on Human Rights (Komnas HAM) and supporting NGOs SawitWatch and Forest Peoples Programme, and involved as participants the National Human Rights Commissions of the Southeast Asian region, notable academics, representatives of indigenous peoples, as well as members of supportive national and international NGOs.

The workshop sought to lay the basis for the development of regional human rights standards for agricultural expansion in Southeast Asia with particular reference to palm oil and to identify opportunities for using plural legal approaches for securing rights, especially in land, of indigenous peoples and other customary law communities. The workshop also sought to explore the extent to which current legal, institutional and policy frameworks ensure that companies meet their agreed responsibility to observe human rights standards in line with the agreed 'Protect, Respect and Remedy' approach.

¹ UNDP Policy of Engagement with Indigenous Peoples (2001), IFAD Engagement with Indigenous Peoples: Policy (2009), FAO Policy on Indigenous and Tribal Peoples (2010)

² World Bank Operational Policy 4.10 Indigenous Peoples,

³ <http://www.equator-principles.com/index.php/all-ep-association-news/254-revised-ps>

The resulting 'Bali Declaration on Agribusiness and Human Rights', provided here in Annex II, presents a comprehensive framework of action to explore the sensitive and delicate issues regarding legal reforms of national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries' human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

We respectfully recommend that the issues raised by the expansion of agribusiness in Southeast Asia and elsewhere around the world be introduced into the programme of work of the Working Group. In particular, we feel that the Working Group and the associated Forum on Business and Human Rights would provide an effective platform for further exploring how governments, business enterprises, civil society and representatives of indigenous peoples can work together to share good practice and develop better methods of ensuring that human rights are protected and respected, and that appropriate remedies are provided at the national and international level where such rights are violated.

Kind regards,



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Annex One: Free, Prior and Informed Consent

This Annex is drawn in part from a submission to the Joint Committee on Human Rights under the UK Government, 'Business and Human Rights', 4th of May 2009

Background

It is widely recognised that the expropriation of lands and resources from indigenous peoples directly threatens their survival as peoples and an extant and expanding body of international human rights law exists to protect indigenous peoples from such destructive actions. As recognised by one of the preeminent experts on the rights of indigenous peoples, Ms Erica-Irene Daes:

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.⁴

One of the key principles that has been developed in international human rights law to protect indigenous peoples from destruction of their lives and cultures is the principle of 'free, prior and informed consent', a principle well established in law as a responsibility of states in their interaction with indigenous peoples in their territories. However this principle is also increasingly being adopted by non-state entities, notable business groups involved in enterprises that impact on indigenous peoples' lands and resources, including the extraction of sub-soil resources and the alteration of land use practices through the creation of plantations or other agricultural changes.⁵

Scope and Definition

Free, prior and informed consent ("FPIC") has been widely discussed and debated among international and national fora. The United Nations Permanent Forum on Indigenous Issues, the preeminent body for addressing issues facing indigenous peoples within the UN system, defines FPIC as a process undertaken free of coercion or manipulation, involving self-selected decision-making processes undertaken with sufficient time for effective choices to be understood and made, with all relevant information provided and in an atmosphere of good faith and trust.⁶ Notably FPIC is defined as a *process* which implies and requires an iterative series of discussions, consultations, meetings and agreements.

In the context of transnational business, including business enterprises undertaken with funding or investment by British companies or the British state, a requirement for FPIC means that prior to project being undertaken, or a licence for same being issued, which would impact on the lands and resources of indigenous peoples, that the affected indigenous peoples should be involved in the decision making process at all stages, including design and consideration of alternatives, and that any decision to undertake activities impacting on their lands and resources is only undertaken with their express consent and with any preconditions or requirements they may make being met. Any consent achieved or gained should be formalized in a legally binding document and where consent is withheld the

⁴ *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.

⁵ For non-state entities or business groupings that accept the need for FPIC or formulations similar to FPIC, see the Roundtable on Sustainable Palm Oil, the World Parks Congress, the World Commission on Dams and the Equator Banks (although the EB requirements are limited to a standard lower than true FPIC)

⁶ See Annex One. For an overview of recent developments in relation to the respect for FPIC see Free Prior Informed Consent (FPIC) – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector. Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights Moscow, 3rd - 4th December 2008 Cathal Doyle, University of Middlesex available at http://www2.ohchr.org/english/issues/indigenous/resource_companies.htm

company must withdraw its application. This process of decision-making and possible negotiation must ensure that the affected indigenous peoples have sufficient time and information to make a decision according to decision making practices that they chose, whether through traditional authorities or other frameworks.

Legal Content

The principle of FPIC stems from and relates to the right to self-determination, as protected by shared Article 1 of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have found that when a State unilaterally extinguishes indigenous peoples' rights to lands and resources that this act is in contravention of the right to self-determination, thereby acknowledging that indigenous peoples hold this right under international law.⁷

The UN Declaration on the Rights of Indigenous Peoples ("UN DRIP"), passed by the General Assembly with the support of the UK Government in 2007, restates this right to self-determination and contextualises it as requiring FPIC highlighting specific instances in which this right must be respected. These include physical relocation (Article 10), use of cultural, intellectual, religious and spiritual property (Article 11), adoption of any legislative measures impacting on them (Article 19), restitution of lands taken (Article 28), storage of hazardous materials (Article 29) and – key in the context of UK transnational corporations operating overseas – the approval of any project impacting on the lands or resources of indigenous peoples (Article 32).⁸

The main *binding* international instrument that deals explicitly and directly with the rights of indigenous peoples is ILO Convention 169 on the rights of indigenous and tribal peoples in independent countries. The UK has yet to ratify this treaty and we strongly encourage the government to consider its ratification without delay. This instrument requires under Article 16 that where 'the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent'. In contexts other than relocation, ILO 169 requires under Article 6(2) that consultation be undertaken 'in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent.' This is then further supported by Article 7(1) which requires 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.

In addition to the legal obligations established by the two International Covenants, the UN DRIP and ILO Convention 169, there is also extensive jurisprudence from the UN treaty bodies and the Inter American Court examining the obligations of States in regards to indigenous peoples and specifically in regards to the requirement for FPIC. To cite one body of jurisprudence, the Committee on the Elimination of Racial Discrimination ("CERD") has 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.'⁹ It relates the right to

⁷ Among others, *Concluding observations of the Human Rights Committee: Canada*. 07/04/99, para. 8. UN Doc. CCPR/C/79/Add.105. (*Concluding Observations/Comments*) (1999) and *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*. 10/12/98. E/C.12/1/Add.31, para. 18.

⁸ UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, September 2007

⁹ *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. 4(d).

informed consent to the right to participate found in article 5(c) of the Convention and has made repeated reference to the preceding language in its decisions and concluding observations.¹⁰

The Convention on Biological Diversity (CBD), Article 8(j), requires that the traditional knowledge of indigenous and local communities may only be used with their 'approval', which has subsequently been interpreted to mean with their prior informed consent or their FPIC.¹¹ This principle has also found its way into ongoing CBD work on Access and Benefit Sharing,¹² CBD guidelines on environmental and social impact assessment¹³ as well as regional standards on access and benefit sharing adopted by the African Union¹⁴ and the Andean Community.¹⁵ Similar language is also found in the Convention to Combat Desertification.¹⁶

FPIC and business enterprises

It is recognized that the experience of indigenous peoples with extractive industries has included many examples where the rights of indigenous peoples have been eroded and the standard of living of affected peoples has been diminished.¹⁷ Indeed the UN Special Rapporteur responsible for addressing threats to the rights of indigenous peoples concludes that it is 'one of the major human rights problems faced by [indigenous peoples] in recent decades'.¹⁸

The UN Centre for Transnational Corporations has undertaken a series of studies examining the investments and activities of multinational corporations on indigenous territories.¹⁹ The

¹⁰ See, for instance, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/200*; *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001*.

¹¹ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, at 11.

¹² See *Seventh Conference of Parties to the Convention on Biological Diversity*, Decision V/26A, para. 11

¹³ See *Seventh Conference of Parties to the Convention on Biological Diversity, Decision VII/16F, Annex: The Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* note 70.

¹⁴ Organization of African Unity / Scientific, Technical and Research Commission, *Declaration and Draft Legislation on Community Rights and Access to Biological Resources* (Addis Ababa, Ethiopia, 1998).

¹⁵ Andean Community, Decision 391, *Common Regime of Access to Genetic Resources, of the Commission of the Cartagena Agreement*, July 1996.

¹⁶ *Convention to Combat Desertification, particularly in Africa* 1994, Article 16(g).

¹⁷ 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. (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).

¹⁸ *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.

¹⁹ 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

final report concluded that multinational companies' '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....'²⁰ Further to the conclusions of UN bodies, multi-sectoral processes and industry-led processes have reached similar conclusions. The World Commission on Dams, a multi-sectoral, multi-year study into the impacts of dams on development hosted by the World Bank and involving the dam construction industry, highlighted the need for inclusive decision making processes for all dam construction and noted that when dams may impact on indigenous peoples "such processes are guided by their free, prior and informed consent".²¹ The Roundtable on Sustainable Palm Oil, an industry fora which establishes best practice principles and criteria for the palm oil industry, includes a requirement for FPIC prior to any new plantations being established, prior to any action which may impact on resource use and prior to any action that may impact on the legal status of the land under use.²²

Doc. E/CN.4/Sub.2/1992/54) ; 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)

²⁰ *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.

²¹ *Dams and Development: A new Framework for Decision-Making*, A Report of the World Commission on Dams, November 2000. at p. 215

²² *Roundtable on Sustainable Palm Oil (RSPO) Principles and Criteria for Sustainable Palm Oil Production* Public release version, 17 October 2005

Annex Two: Bali Declaration on Agribusiness and Human Rights

Bali Declaration on Human Rights and Agribusiness in Southeast Asia

The international meeting of South East Asian Human Rights Institutions on '*Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform*' hosted by the Indonesian National Human Rights Commission (KOMNASHAM) was held in Bali, Indonesia, from 28th November to 1st December 2011. It was attended by 58 participants from the national human rights institutions of the Southeast Asian region, notable academics, representatives of indigenous peoples, as well as members of supportive national and international NGOs. The meeting focused on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of a rapid expansion of agribusiness, notably the palm oil sector, while recognising the right to development and the need to improve the welfare and situation of indigenous peoples and rural communities.

The participants expressed their thanks to the Indonesian Commission on Human Rights (KOMNASHAM), as represented by Ifdhal Kasim and Nur Kholis, Chairman and Vice-Chairman of the Commission respectively, for inspiring and hosting this meeting: and also convey their warm appreciation to SawitWatch, the Forest Peoples Programme, the Centre for Peoples and Forests, the Samdhana Institute and the Rights and Resources Initiative for co-organising and supporting this meeting. They welcomed the Statements of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, and the Member of the UN Permanent Forum on Indigenous Issues, Raja Devasish Roy.

The International Conference adopted the following Declaration to be known as the:

Bali Declaration on Human Rights and Agribusiness in Southeast Asia:

Recalling the inherent dignity, equal and inalienable rights of all human beings, the need for universal and effective recognition of human rights and fundamental freedoms, and the promotion of social progress and better standards of life in larger freedoms, as expressed in the Universal Declaration of Human Rights;

Recalling the universality, indivisibility, interdependence and interrelatedness of all human rights;

Emphasising the importance of respecting the collective rights of peoples and the development aspirations of people in developing countries, as set out in *inter alia* the UN Declaration on the Rights of Indigenous Peoples and the UN Declaration on the Right to Development;

Taking account of the Edinburgh Declaration which encouraged the International Coordinating Committee (ICC) of National Human Rights Institutions (NHRI) and individual National Human Rights Institutions to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuses, greater

accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches;

Welcoming the UN Human Rights Council's continuing engagement with the business and human rights agenda, particularly through the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, which follows the work of the UN Secretary General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises; the greater understanding and clarity about the appropriate roles and responsibilities of States and business with regard to human rights and the right of victims to access remedy emanating from the "Protect, Respect, Remedy" Framework;

Recognising that the right to food implies that States take measures to ensure the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within their own cultures and that access to such food must be achieved in ways that are sustainable and do not interfere with the enjoyment of other human rights;²³

Emphasising the findings of the UN Special Rapporteur on the Right to Food which highlight the threat to the right to food from large-scale land investments and show that because of inequitable access to land and capital, smallholders and agricultural labourers make up a combined 70% of those who are unable to feed themselves today and recommend that States and the private sector adopt enforceable laws, policies and procedures that respect the rights of indigenous peoples and rural communities to their lands and livelihoods and protect the rights and interests of smallholders, workers and women;²⁴

Taking into consideration the recommendations of the UN Permanent Forum on Indigenous Issues, which note the need for corporations to adopt special measures to ensure that their operations respect the collective rights of indigenous peoples, especially where national legal frameworks are deficient;²⁵

Recalling the report of the UN Expert Mechanism on the Rights of Indigenous Peoples on 'indigenous peoples and the right to participate in decision-making' which stresses the importance of State parties ensuring that corporations respect the rights of indigenous peoples to give or withhold their free, prior and informed consent to operations that may affect their rights;²⁶

Noting with grave concern the numerous reports from the UN, the World Bank, the International Finance Corporation (IFC), National Human Rights Institutions (NHRIs), the media and civil society organisations which show that accelerated investment and poor governance is leading to the ill-regulated expansion of agribusiness in the region, especially oil palm, which is: causing serious violations of human rights; prompting the massive takeover of indigenous peoples' and rural communities' lands without consultation or consent; provoking serious long term land conflicts and outbreaks of violence; leading to exploitative relations and other abuses of the rights of smallholders, migrants, workers, women, children, the elderly and detainees; the impoverishment of previously self-

²³ E/C.12/1999/5, 12th May 1999

²⁴ A/HRC/13/33, 22nd December 2009

²⁵ E/C.19/2007/CRP.6, 7th May 2007

²⁶ A/HRC/18/42, 17th August 2011

provisioning communities and peoples; and; leading to the destruction of forests and peatlands and high emissions of greenhouse gases.

Recognising the efforts of financial institutions, development agencies, investors and sectoral bodies to develop voluntary standards consistent with international norms to improve corporate performance, including the Food and Agriculture Organisation (FAO) ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests’; the FAO, the International Fund for Agricultural Development (IFAD), the World Bank and the United Nations Conference on Trade and Development (UNCTAD) ‘Principles for Responsible Agricultural Investment that Respects Rights Livelihoods and Resources’; the ‘Farmland Principles’ of major global investors and; the Principles and Criteria of the Roundtable of Sustainable Palm Oil (RSPO);

Considering, however, that such measures must be complemented by actions by States to comply fully with their human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of the means of subsistence;

Considering that, while in the Americas there is a full functioning human rights system, including the Inter-American Commission and Court of Human Rights and that in Africa the African Union, African Development Bank and the Economic Commission for Africa have adopted a ‘Framework and Guidelines on Land Policy in Africa- a framework to strengthen land rights, enhance productivity and secure livelihoods’ consistent with the African Union’s ‘African Charter on Human and Peoples’ Rights’, in (Southeast) Asia there is lack of a dedicated regional human rights system or regional norms on land development;

Acknowledging that the majority of States in Southeast Asia have ratified the core human rights treaties and / or have constitutional and other national legal provisions, which recognise that custom is a source of rights, and these plural legal regimes need to be strengthened to give greater protection of rights;

Concerned by the lack of respect of peoples’ rights by corporations, the fact that in many countries indigenous peoples’ rights remain weakly recognised or unprotected and that government capacity to defend these peoples’ rights is lacking;

Concludes therefore that there is an urgent need for States in Southeast Asia to protect, respect and secure the rights of indigenous peoples and rural communities whose rights are being violated by agribusiness investment and the operations of palm oil corporations.

The Conference therefore resolves:

To work with governments, legislatures and corporations in Southeast Asia to ensure that they take urgent steps to reform or reinforce national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries’ human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

We therefore recommend the following.

Right to food:

States need to accept that the right to food may be violated when people are denied access to land, fishing or hunting grounds, or are deprived of access to adequate and culturally acceptable food or by the contamination of food and water sources.

States therefore need to take measures to protect people's rights in land and allow land owners to decide on the use of their lands taking into account their own livelihoods and environments.

Recognising that peoples have diverse cultures and may relate to land in very different ways, States therefore have an obligation to respect collective property rights over lands, territories and resources, the right to culture and the right to self determination (including the right to pursue their own economic, cultural and social development)

States likewise have an obligation to protect certain activities that are essential to obtaining food (e.g. agriculture, hunting, gathering, fishing) and an obligation to provide or ensure a minimum level of essential food that is culturally appropriate.

Land rights:

In reviewing their land tenure regimes, national governments and legislatures need to review and revise or reinforce their national policies and laws on agricultural development and land acquisition to ensure that they respect the rights of indigenous peoples and rural communities and do not facilitate the denial of people's rights to food, to land and to free, prior and informed consent.

In revising their tenure systems, State should recognise that, while security of tenure is indeed crucial, individual titling, poverty eradication and the creation of a market for land may not be the most appropriate means to achieve it.

Instead, States should, where relevant strengthen, customary land tenure systems and review or reinforce tenancy laws to improve the protection of land users.

Drawing on the lessons learned from decades of agrarian reform, States must pay renewed attention to policies and procedures of land redistribution to ensure that they respect peoples' rights to food, livelihood, cultural identity and self-determination. These reforms must be accompanied by measures to support smallholder farmers, indigenous people, and women to promote food security.

Land development schemes/programmes/mechanisms/projects must be designed in ways that do not lead to evictions, disruptive shifts in land rights and increased land concentration in the hands of corporations.²⁷

While many land development programmes and policies focus on areas considered to be 'empty', 'marginal' or 'degraded', States should recognize that there are few areas truly unoccupied or unclaimed, and that frequently land classified as such is in fact subject to long-

²⁷ Report of the Special Rapporteur on the Right to Food to the UN General Assembly A/65/281, 11th August 2010.

standing rights of use, access and management based on custom. Failure to recognize such rights will deprive local communities and indigenous peoples of key resources on which their wealth and livelihoods depend.

Free, Prior and Informed Consent:

States must ensure respect for the right, of those with customary rights to lands and other resources, to give or withhold their free, prior and informed consent to operations planned on their lands. Such consent should be conveyed through their own freely chosen representative institutions. Any written agreements should be credible, transparent, fully implemented and agreed to by all parties involved.

Where rural communities have individualised rights in land through statutory law, land administration schemes, agrarian reforms and court decisions, all transactions in land should be regulated by impartial State agencies to ensure adherence to the 'willing buyer/ willing seller' principle.

States must exercise a Human Rights-based Approach (HRBA) to agribusiness expansion, limit the exercise of their power of eminent domain, and only forcibly acquire lands where: there is compelling justification in the national interest;²⁸ the gains expected are proportional to the losses; where sanctioned by previously existing law; where the development option is the least restrictive of human rights and; where such measures do not endanger peoples' very survival.²⁹

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.

Right to personal integrity and security:

States must ensure that there is rule of law, humane treatment and a peaceful environment in agribusiness development areas, and must secure people against violence and arbitrary arrest and prohibit the use by agribusiness ventures of mercenaries, privately contracted police and para-militaries.

²⁸ With reference to the plans of the Indonesian Government to establish a 1.8 m ha. palm oil plantation in the centre of Borneo, the UN Committee on the Elimination of Racial Discrimination recommended that: *State party should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee's general recommendation No. 23 (1997) on indigenous peoples* (UN Doc. CERD/C/IDN/CO/3 15th August 2007).

²⁹ According to human rights law, the term 'survival' must be understood as the ability of indigenous peoples "to preserve, protect and guarantee the special relationship that they have with their territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. That is, the term survival in this context signifies much more than physical survival." See, inter alia, United Nations Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009; Inter-American Court of Human Rights, *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185; African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (February 2010).

Smallholders and community options:

States must also balance policies and laws which allow corporate investment in land development, with laws and policies which promote indigenous peoples' customary management systems, community-based initiatives and smallholders' participation.

To achieve this balance, States must take measures to ensure that smallholders: capture a fair proportion of the value of their products; are able to represent themselves through their own freely chosen representatives or organisations; are able to organise freely as cooperatives or other farmers' organisations to improve their access to capital, technical assistance and markets and; are able to choose the terms on which they agree or not to sell their produce to larger enterprises. Effective measures are also needed to identify and prohibit unfair practices and to reinforce the bargaining power of smallholders in order to equalize their relationships with the agribusiness sector. This can be achieved by prohibiting practices that constitute an undue exercise of buyer power and by combating excessive concentration in the food chain and abuses of dominant positions (including through competition regimes sensitive to excessive buyer power and competition authorities with effective complaints mechanisms).

Effective measures are also needed to avoid conditions conducive to debt slavery and other contemporary forms of slavery. Therefore, where companies provide credit, technical assistance and/ or markets for smallholders and workers, whether through contracts or informal arrangements, it is essential that there is full transparency and an absence of coercion in all transactions affecting smallholders and workers.

Workers:

States must improve the protection of local and indigenous agricultural workers by ratifying and fully complying with all ILO conventions and the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers relevant to the agrifood sector, and seeing these are implemented through national laws and regulations, and by ensuring that legislation sets a minimum wage.

Women:

In accordance with the principles of the Committee on the Elimination of Discrimination against Women (CEDAW), given that women are often disadvantaged in agricultural development schemes, States must take measures to combat discrimination and provide equal opportunities to women and strengthen women's access to, and control over, land while respecting family and other social networks, and cultural diversity and increase their participation in decision-making processes.

Children:

In accordance with the UN Convention on the Rights of the Child, States should adopt measures to ensure that children are; raised in a context of non-discrimination; have their best interests secured; afforded protection and opportunities for development, and; participate in all matters which affect them so that their views are taken into account, in accordance with the General Recommendation of the Committee on the Rights of the Child on indigenous children. States must take urgent action to recognise the rights of, and provide identity and support for, Stateless children born out of wedlock in plantations due to unjust laws which prevent plantations workers to marry.

Dispute Resolution:

Considering that protracted land disputes between expanding agricultural development projects and rural communities and indigenous peoples are prevalent throughout the region, there is an urgent need for strengthened dispute resolution mechanisms in line with international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples.³⁰ As recommended by the UN Permanent Forum on Indigenous Issues, these should be tripartite processes which include indigenous peoples or rural communities, represented through their own freely chosen representative institutions and/or mediators and alternative dispute resolution mechanisms, the companies with which they are in dispute and government agencies with responsibility to regulate land issues.

Access to Justice:

Affected people also need access to justice and States must ensure the integrity and proper functioning of law enforcement agencies, courts and the independence of the judiciary. Due provision needs to be made for indigenous peoples to exercise their customary law, but also have access to effective conflict resolution mechanisms, including local and national courts where needed. States must ensure transparency and access to information, freedom of expression and freedom of assembly.

Impact Assessments:

States must also ensure that companies and investors carry out through public participation, publish and share with implicated parties participatory social and environmental impact assessments taking into account the Akwe:Kon Guidelines of the Convention on Biological Diversity;³¹

States must also strengthen their regulatory and monitoring mechanisms for land investments in agri-business through requiring human rights impact assessments. National Human Rights Institutions should develop robust systems both for assessing licences for agribusiness against human rights standards and for exacting sanctions.

Right to Development and Human Rights:

States must ensure that in taking steps to secure people's right to development,³² they recognize that, in conformity with the 1993 Vienna World Conference on Human Rights, while 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'.³³

Ratification of Human Rights Instruments:

States must ratify all relevant international human rights treaties and relevant optional protocols, and take steps to harmonise them with domestic laws.

Adopted by acclamation in Bali, 1st December 2011

³⁰ It is a norm of international law that violations of human rights give rise to a right of reparation for victims, which may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Theo Van Boven, 1993, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report 1993 in UN doc. E/CN.4/Sub.2/1993/8).

³¹ The Akwe: Kon Guidelines may be found at <http://www.biodiv.org/doc/publications/akwe-brochureen.pdf>

³² *UN Declaration on the Right to Development*. UN Doc. A/RES/41/128 4th December 1986

³³ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993.