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**Agenda Item : Study on State Exploitation of Procedural Rules that Devalue the *UN Declaration***

**Conference Room Paper**

**Study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration and other international human rights law<sup>1</sup>**

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<sup>1</sup> This conference paper is an expanded version of the study formally submitted to the Permanent Forum on Indigenous Issues.

Pursuant to a decision of the Permanent Forum on Indigenous Issues at its fourteenth session [see E/2015/43 and in particular, p. 12, paragraph 45 of E/C.19/2015/10] Dalee Sambo Dorrough and Edward John, members of the Forum, undertook a study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration and other international human rights law.

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## **Study on How States Exploit Weak Procedural Rules in International Organizations to Devalue the United Nations Declaration and Other International Human Rights Law**

### **I. Introduction**

1. The Permanent Forum on Indigenous Issues [PFII] continues to examine various impacts of State actions in an array of intergovernmental processes, since the adoption of the *UN Declaration on the Rights of Indigenous Peoples*<sup>2</sup> [*UN Declaration*]. There appears to be an alarming trend concerning the behavior of States to diminish the human rights standards affirmed in the *UN Declaration* as well as actions attempting to devalue Indigenous peoples' status and rights, as well as related State obligations.
2. Indigenous peoples fought hard to achieve the human rights standards in the *UN Declaration* and remain proactive to ensure maximum compliance in their implementation. Pursuant to Articles 38, 41 and 42, States, the United Nations, its organs, bodies and specialized agencies are required to respect and fully apply the *Declaration* and take appropriate measures to achieve its ends.
3. Regressive actions have been observed in such international organizations and processes as the UN Framework Convention on Climate Change, the Convention on Biological Diversity, the Food and Agricultural Organization, the World Intellectual Property Organization, UNESCO and the World Bank. Such actions have numerous adverse impacts upon Indigenous peoples as well as the work of each UN Indigenous specific mandate, including the PFII, and other UN bodies.
4. It is important to examine this matter further through the present study to advise international organizations and member States that such legal and political impacts are inconsistent with the purposes and principles of the *Charter of the United Nations* [UN Charter], as well as the rights affirmed in the *UN Declaration* and other international human rights law.
5. The preamble of the *UN Declaration* invokes the UN Charter and reiterates the need for States to act in "good faith in the fulfilment of the obligations assumed by States in accordance with the Charter." Furthermore, the preamble recognizes the "urgent need to respect and promote the inherent rights of indigenous peoples" and that such recognition "will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, and respect for human rights, non-discrimination and good faith." The responsibilities that States have assumed by adoption of, and reiteration of support for, these human rights standards have now been recognized as

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<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by General Assembly Resolution 61/295 on 13 September 2007.

a key measure of State compliance by treaty bodies, special rapporteurs and other independent experts.

6. The preamble of the *UN Declaration* encourages “States to comply with and effectively implement all their obligations as they apply to Indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned.” The preamble also emphasizes that the United Nations “has an important and continuing role to play in promoting and protecting the rights of indigenous peoples.”
7. To date, rather than ensure consistency with the legal, political and moral imperatives enshrined in the *UN Declaration*, many States have acted with little respect for or recognition of its spirit and intent or the human rights norms it affirms. Such dishonourable actions are even more stunning since, for more than twenty years, States influenced the drafting of every provision of the *UN Declaration*.

## **II. Legal Status and Effects of *UN Declaration***

8. The adoption of the *UN Declaration* served as a historical turning point within the United Nations and its human rights regime. A new international human rights instrument was created relating to Indigenous peoples, which are among the world’s most vulnerable and disadvantaged peoples.
9. Rather than implement the *UN Declaration* as a principled framework for justice, reconciliation, healing and peace,<sup>3</sup> some member States have sought to undermine its legal status and effects, focusing upon the term “declaration.” However, the UN Office of Legal Affairs, at the request of the then Commission on Human Rights, has advised that “in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”.<sup>4</sup> As affirmed in the preamble, interpretation of the provisions of the *UN Declaration* is “guided by the purposes and principles” of the UN Charter.
10. Former UN Special Rapporteur on rights of indigenous peoples, James Anaya, emphasized: “... even though the Declaration itself is not legally binding in the same way that a treaty is,

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<sup>3</sup> Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-E/C.19/2015/10, para. 33: “implementation of the United Nations Declaration provides a common framework for reconciliation, justice, healing and peace. Each State has a prime responsibility and duty to protect, promote and implement all human rights, consistent with the Charter of the United Nations and international human rights law.”

<sup>4</sup> Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. 1), para. 105, 18th Session, 19 March – 14 April 1962.

the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law.”<sup>5</sup>

11. Anaya adds: “The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.”<sup>6</sup>
12. Thus, Anaya concluded: “the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.”<sup>7</sup>
13. In *Brownlie's Principles of Public International Law*, James Crawford underlines: “Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules. Examples of important 'law-making' resolutions include ... the UN Declaration on the Rights of Indigenous Peoples”.<sup>8</sup>
14. Provisions in the *UN Declaration* reflect diverse State obligations in both conventional and customary international law. The International Law Association (ILA) in its expert commentary states that “the relevant areas of indigenous peoples’ rights with respect to which the discourse on customary international law arises are self-determination; autonomy or self-government; cultural rights and identity; land rights as well as reparation, redress and remedies.”<sup>9</sup> The ILA emphasized that “it would be inappropriate to deal with these areas separately...the rights just listed are all strictly interrelated...to the extent that ‘the change of one of its elements affects the whole’.”<sup>10</sup>
15. The ILA concludes: “States must comply – pursuant to customary and, where applicable, conventional international law – with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources”.<sup>11</sup>

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<sup>5</sup> General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 62.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para. 63.

<sup>8</sup> James Crawford, *Brownlie's Principles of Public International Law*, 8<sup>th</sup> ed. (Oxford: Oxford University Press, 2012), at 42.

<sup>9</sup> International Law Association, “Rights of Indigenous Peoples”, Interim Report, The Hague Conference (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> at 43.

<sup>10</sup> *Ibid.* (references omitted)

<sup>11</sup> International Law Association, “Rights of Indigenous Peoples”, Final report, Sofia Conference (2012), (Conclusions and Recommendations), at 30, para. 8.

16. The *UN Declaration* calls for a just and comprehensive human rights-based approach to safeguard and promote the distinct legal status and human rights of Indigenous peoples globally, responsive to their unique historical and cultural contexts. Working group experts, States, and Indigenous peoples played a critical, direct and influential role in the drafting of this pivotal legal instrument. This collaboration significantly enhances the legitimacy of the Declaration.<sup>12</sup>
17. Member State involvement is evidence of a collective shift away from a State-dominated dialogue toward a more inclusive and democratic framework aimed at promoting the effective realization of Indigenous peoples' human rights. Significantly, such State-Indigenous participation has fostered the progressive development of international law that has had a positive effect on a wide range of international and regional intergovernmental processes and institutions. These include the International Labour Organization (ILO),<sup>13</sup> the International Fund for Agricultural Development (IFAD)<sup>14</sup> and the Organization of American States (OAS).<sup>15</sup> It is critical that this development continues.
18. The human rights records of UN member States are regularly scrutinized under the Human Rights Council's Universal Periodic Review process in relation to their respective international treaty obligations. In this context, the *UN Declaration* is increasingly being raised by diverse States in interpreting State obligations in relation to the Indigenous peoples concerned.

### III. Key standards of the *UN Declaration*

19. Since this study is examining how States are using international organizations to devalue the *UN Declaration*, it is useful to first highlight some of the key standards.

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<sup>12</sup> Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, A/65/264, August 9, 2010 at para. 86: "The Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function of not only the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves."

<sup>13</sup> International Labour Organization, "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", [http://www.ilo.org/indigenous/Resources/Publications/WCMS\\_100792/lang--en/index.htm](http://www.ilo.org/indigenous/Resources/Publications/WCMS_100792/lang--en/index.htm), at 2: "The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing."

<sup>14</sup> IFAD (International Fund for Agricultural Development), *Improving access to land and tenure security: Policy* (December 2008), <http://www.ifad.org/pub/policy/land/e.pdf>, at 16-17 (Policy Objectives and Guiding Principles): "Before supporting any development intervention that might affect the land access and use rights of communities, IFAD will ensure that their free, prior and informed consent has been solicited through inclusive consultations based on full disclosure of the intent and scope of the activities planned and their implications."

<sup>15</sup> Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System", OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009), para. 19: "The IACHR and the Inter-American Court, in their elaboration of the right to indigenous property, view as relevant and important the United Nations Declaration on the Rights of Indigenous Peoples."

20. The first preambular paragraph includes the principle of equal rights and self-determination of peoples, which is enshrined in the UN Charter.<sup>16</sup> In its last preambular paragraph, the *Declaration* is proclaimed as “a standard of achievement to be pursued in a spirit of partnership and mutual respect”. The rights recognized in the *Declaration* “constitute the *minimum standards* for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>17</sup>
21. Article 3 of the *Declaration* reflects the right of self-determination, as affirmed in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The General Assembly has recognized by consensus that “universal realization of the right of all peoples ... to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights”.<sup>18</sup>
22. In regard to Indigenous peoples, “free, prior and informed consent” (FPIC) is an essential right and standard that is affirmed in the *Declaration*. FPIC is the standard required or supported by the UN General Assembly, international treaty bodies, regional human rights bodies, UN special rapporteurs and specialized agencies. The Expert Mechanism on the Rights of Indigenous Peoples concluded in 2011: “the right of free, prior and informed consent needs to be understood in the context of indigenous peoples’ right to self-determination because it is an integral element of that right.”<sup>19</sup>
23. As a minimum standard, article 38 stipulates: “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.” Article 42 of the *UN Declaration* provides: “The United Nations, its bodies ... and specialized agencies ... and *States shall promote respect for and full application* of the provisions of this Declaration and *follow up the effectiveness* of this Declaration.”
24. Article 45 of the *UN Declaration* affirms: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.
25. Article 46(2) affirms: “In the exercise of the rights enunciated in the present Declaration, human rights ... of all shall be respected.” It then sets stringent criteria for any limitations on the human rights affirmed in the *UN Declaration*:

The exercise of the rights set forth in this Declaration shall be subject only to such limitations *as are determined by law and in accordance with international human rights*

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<sup>16</sup> See also *UN Declaration*, preambular paras. 1-2, and arts. 1-3; and *UN Charter*, arts. 1(2) and 55 c.

<sup>17</sup> *UN Declaration*, article 43. [emphasis added]

<sup>18</sup> General Assembly, *Universal realization of the right of peoples to self-determination*, UN Doc. A/RES/67/157, (20 December 2012) (adopted without vote), para. 1.

<sup>19</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20.

*obligations*. Any such limitations shall be *non-discriminatory* and *strictly necessary* solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

26. Article 46(3) requires that every provision in the *Declaration* shall be interpreted in accordance with the “principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” These are the principles of the international legal system, as well as domestic legal systems worldwide.

#### IV. International Organizations and States - Obligations Relating to Human Rights Law

27. In the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, it is recognized: “the rule of law applies to all States equally, and to *international organizations* ... and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.”<sup>20</sup> Also reaffirmed is “the solemn commitment of ... States to fulfil their obligations to promote universal respect for, and the observance and protection of, *all human rights ... for all*.”<sup>21</sup>
28. This study illustrates that, when acting through international organizations, States continue to propose and agree to provisions that run counter to their commitments under the UN Charter. The obligations of international organizations include, *inter alia*, those arising from customary international law and peremptory norms. For example, the prohibition against racial discrimination is a peremptory norm or *jus cogens*,<sup>22</sup> which States and international organizations are bound to respect.
29. Where discriminatory provisions in an international agreement are adopted by consensus, such texts will lack validity.<sup>23</sup> In regard to Indigenous peoples, interpretations need to be

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<sup>20</sup> *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without vote), para. 2.

<sup>21</sup> *Ibid.*, para. 6. [emphasis added]

<sup>22</sup> *Report of the International Law Commission*, 53<sup>rd</sup> sess. (23 April-1 June and 2 July-10 August 2001) in UN GAOR, 56<sup>th</sup> sess., Supp. No. 10 (A/56/10), at 208, para. (5): “Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”

<sup>23</sup> *Report of the International Law Commission*, 58<sup>th</sup> sess. (1 May-9 June and 3 July-11 August 2006) in UN GAOR, 61<sup>st</sup> sess., Supp. No. 10 (A/61/10), at 423, para. 41:

(a) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(b) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict.

*Vienna Convention on the Law of Treaties*, article 53: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”



adopted that do not discriminate against them or where they do, the offending provisions would require amendment. Otherwise the superior human rights norms would prevail.<sup>24</sup>

30. In a 1980 Advisory Opinion, the International Court of Justice emphasized: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."<sup>25</sup>
31. Whether through joint or separate action, *States Parties cannot evade their international human rights obligations by acting through international organizations*. In the event of conflict between the obligations of States under the UN Charter and those under any other international agreement, the *Charter* obligations would prevail.<sup>26</sup> This is especially the case, since human rights "occupy a hierarchically superior position among the norms of international law".<sup>27</sup>
32. In the context of sustainable development, States reaffirmed in *The future we want* the "importance of freedom, peace and security, respect for all human rights, including the right to development".<sup>28</sup> They emphasized the "responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights ... for all, without distinction of any kind".<sup>29</sup> Also recognized was "the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies."<sup>30</sup>
33. *Transforming Our World: The 2030 Agenda for Sustainable Development*, adopted by UN consensus, resolved to "protect human rights ... and to ensure the lasting protection of the planet and its natural resources".<sup>31</sup>

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<sup>24</sup> See also *Vienna Convention on the Law of Treaties*, article 71: "1. In the case of a treaty which is void under article 53 the parties shall: (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law".

<sup>25</sup> *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20), at 88-89, para. 37.

<sup>26</sup> UN Charter, article 103. See also *Namibia Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia)* (Advisory Opinion), [1971] I.C.J. Rep. 16, at 57: "To establish ... and to enforce, distinctions, exclusions, restrictions and limitations, exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

<sup>27</sup> Olivier De Schutter, "Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of Responsibility" in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp/Oxford/Portland: Intersentia, 2010) 51 at 96.

<sup>28</sup> Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), endorsed by General Assembly, *The future we want*, UN Doc. A/RES/66/288 (27 July 2012) (without vote), para. 8.

<sup>29</sup> *Ibid.*, para. 9.

<sup>30</sup> *Ibid.*, para. 49.

<sup>31</sup> United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote), para. 3.

34. The Outcome Document of the *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, affirms by consensus: “the goal is to end poverty and hunger, and to achieve sustainable development in its three dimensions through promoting inclusive economic growth, protecting the environment, and promoting social inclusion. We commit to *respect all human rights*, including the right to development.”<sup>32</sup>
35. The Independent Expert on human rights and environment, John Knox emphasized: “because of their close relationship with the environment, indigenous peoples are particularly vulnerable to impairment of their rights through environmental harm.”<sup>33</sup> Knox concluded: “*Human rights law includes obligations relating to the environment*. Those obligations include procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and *to provide access to remedies*.”<sup>34</sup>

## V. Human Rights Must Prevail Over Consensus

36. In international organizations, States have a tendency to excessively reinforce their own sovereignty in addressing both substantive and procedural issues. Serious shortcomings in the procedural rules of such organizations continue to severely affect Indigenous peoples’ participation and their substantive rights. Indigenous self-determination is especially undermined.
37. Too often, in seeking consensus among States parties, the lowest common denominator among their positions ends up in the final text. Such a substandard outcome is inconsistent with the obligations of international organizations and States concerned. The quest for consensus has led to widespread abuses in the Indigenous context.
38. As underlined in the August 2011 report of the Expert Mechanism on the Rights of Indigenous peoples: “Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be considered, consistent with States’ obligations in the Charter of the United Nations and other international human rights law.”<sup>35</sup>
39. Similarly, James Anaya has commented on the problems generated by consensus when the lowest common denominator is a prevailing factor: “In the process of negotiation, however, the goal of consensus should not be used to impede progress on a progressive text.

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<sup>32</sup> General Assembly, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)*, UN Doc. A/RES/69/313 (27 July 2015) (adopted without a vote), para. 1. [emphasis added]

<sup>33</sup> Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report*, UN Doc. A/HRC/25/53 (30 December 2013), para. 76.

<sup>34</sup> *Ibid.*, para. 79. [emphasis added]

<sup>35</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 27.

*Consensus does not imply a veto power of every participant at every step ... Consensus does not mean perfect unanimity of opinion nor bowing to the lowest common denominator. It means coming together in a spirit [of] mutual understanding and common purpose to build and settle upon common ground.*"<sup>36</sup>

40. The procedures within international organizations require urgent redress. The extent to which States are prejudicing Indigenous peoples' human rights and disrespecting related State obligations is reaching critical levels. Indigenous rights and concerns relating to such crucial global issues, such as biodiversity,<sup>37</sup> food security,<sup>38</sup> climate change,<sup>39</sup> development,<sup>40</sup> free trade<sup>41</sup> and intellectual property,<sup>42</sup> are being addressed in a manner detrimental to Indigenous peoples.<sup>43</sup>

<sup>36</sup> S. James Anaya, Presentation, April 14, 2008, in Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, "Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)", OEA/Ser.K/XVI, GT/DADIN/doc. 339/08 (14 May 2008), Appendix III, 23 at 27. [emphasis added]

<sup>37</sup> See, e.g., Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", Expert Mechanism on the Rights of Indigenous Peoples, 4th sess., Geneva (July 2011), <http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf>.

<sup>38</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "FAO Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: Discrimination and Subjugation of Indigenous Peoples and Rights", Food and Agriculture Organization (Committee on World Food Security), Rome, Italy (April 2012), <http://quakerservice.ca/wp-content/uploads/2012/05/FAO-Natl-Food-Security-Guidelines-Governance-of-Indigenous-Tenure-Rights-GCCEI-Joint-Submission-Apr-12.pdf>.

<sup>39</sup> E.g., International Indigenous Peoples' Forum on Climate Change (IIPFCC), "Indigenous Groups Announce Grave Concern on Possible Cancun Outcome", Press release, 10 December 2010.

<sup>40</sup> General Assembly, "Statement of Special Rapporteur to UN General Assembly, 2011", Third Committee, New York (17 October 2011), <http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2011>: "I have observed the negative, even catastrophic, impact of extractive industries on the social, cultural and economic rights of indigenous peoples. I have seen examples of negligent projects implemented in indigenous territories without proper guarantees and without the involvement of the peoples concerned. I have also examined in my work several cases in which disputes related to extractive industries have escalated and erupted into violence."

<sup>41</sup> In regard to in regard to the World Trade Organization (WTO), see Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to the World Trade Organization*, (25 June 2008), UN Doc. A/HRC/10/5/Add.2 (4 February 2009), para. 33: "The human rights obligations of WTO members and the commitments they make through the conclusion of agreements under the WTO framework remain uncoordinated. ... All too often, this failure of global governance mechanisms is replicated at domestic level: trade negotiators either are not aware of the human rights obligations of the Governments they represent, *or they do not identify the implications for their position in trade negotiations.*" [emphasis added]

<sup>42</sup> World Intellectual Property Organization (Traditional Knowledge Division), "Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Comments submitted by the Grand Council of the Crees (Eeyou Istchee)", 30 November 2011, [http://www.wipo.int/tk/en/observer\\_participation.html](http://www.wipo.int/tk/en/observer_participation.html). See also Catherine Saez, "Indigenous Peoples Walk Out Of WIPO Committee On Genetic Resources", Intellectual Property Watch, 22 February 2012, <http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources/>.

<sup>43</sup> See also Forest Peoples Programme (Marcus Colchester, Director), "FPP E-Newsletter", April 2012, <http://www.forestpeoples.org/topics/environmental-governance/publication/2012/fpp-e-newsletter-april-2012-pdf>.

41. Participation in international forums is especially challenging for Indigenous peoples, since the rules are heavily weighted in favour of States. Indigenous peoples remain highly vulnerable to State discretion and are not part of any consensus<sup>44</sup> on provisions relating to Indigenous rights and concerns. With virtually no checks and balances within outdated procedural rules, States may propose and agree to discriminatory or other substandard provisions affecting present and future generations.
42. Calls for significant reforms are increasing. The UN Expert Mechanism on the Rights of Indigenous Peoples in the *Final report of the study on indigenous peoples and the right to participate in decision-making* concluded: "Reform of international and regional processes involving indigenous peoples should be a major priority and concern."<sup>45</sup>
43. Strong procedural rules are necessary to prevent the use of consensus by States to approve substandard proposals, which are inconsistent with the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. Effective compliance mechanisms would be required.<sup>46</sup> Presently, Indigenous representatives in such processes are left powerless to prevent widespread violations – even if they include peremptory norms.
44. Within international organizations, there is no absolute obligation to require consensus among the Parties. Even if such a duty existed, it could not prevail over the obligations of States to respect the UN Charter and international human rights law.
45. Consensus in decision-making can show a unity of purpose. However, it loses its significance and validity if achieved at the expense of human rights. The UN Secretary-General has described consensus as a "privilege ... [and] that this privilege comes with responsibility"<sup>47</sup> Concerns relating to consensus have also surfaced at the General Assembly:

... unfortunately, consensus (often interpreted as requiring unanimity) has become an end in itself. ... This has *not proved an effective way of reconciling the interests of Member States*. Rather, it prompts the Assembly to retreat into generalities, abandoning any

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version: "The continuous, sometimes subtle, violence of conservation and development against indigenous peoples continues, unchecked even at the highest levels by the most worthy-sounding agencies of the United Nations."

<sup>44</sup> "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

<sup>45</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 26.

<sup>46</sup> General Assembly, *Right to Food: Note by the Secretary-General*, UN Doc. A/60/350 (12 September 2005) (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 55 (Conclusions and Recommendations): "The Special Rapporteur would make the following recommendations: ... (g) International organizations, such as the World Bank, IMF [International Monetary Fund] and WTO should recognize that they do have binding responsibilities towards human rights, including the right to food. With power must come responsibility."

<sup>47</sup> Secretary-General, "Secretary-General Calls on Delegates to End Stagnation in Disarmament Conference, Seize 'Collective Opportunity to Build a Safer World', at Headquarters Meeting", Opening statement to the High-level Meeting on Revitalizing the Work of the Conference on Disarmament and Taking Forward Multilateral Disarmament Negotiations, Dept. of Public Information, News and Media Division, New York, 24 September 2010.

serious effort to take action. Such real debates as there are tend to focus on process rather than substance and *many so-called decisions simply reflect the lowest common denominator of widely different opinions.*<sup>48</sup>

## **VI. Actions within International Organizations to Devalue Indigenous Human Rights**

### **6.1 UN Framework Convention on Climate Change**

#### **6.1.1 Indigenous participation sorely inadequate**

46. The *United Nations Framework Convention on Climate Change* (UNFCCC)<sup>49</sup> employs strict rules of procedure to ensure a ‘party-driven process’. Such a process severely limits opportunities for interaction between Parties and Indigenous peoples. While there is a spectrum in terms of participatory rights,<sup>50</sup> Indigenous peoples face marginalization in the actual negotiations of multilateral environmental instruments. These procedural injustices directly translate into substantive injustices.
47. In view of their severe vulnerability in regard to climate change, Indigenous peoples must not be precluded from democratic and effective participation. As emphasized in an Open Letter from 27 Special Procedures mandate-holders: “The principle of free, prior and informed consent of indigenous peoples must be respected. Particular care must be taken to anticipate, prevent and remedy negative effects on vulnerable groups”.<sup>51</sup>
48. Representatives of Indigenous peoples typically attend multilateral environmental negotiations as observers. Observers have limited procedural rights to attend and participate in the negotiations. In general, observers do not have the right to speak during formal negotiations and may not even have the right to be in the room where formal negotiations

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<sup>48</sup> General Assembly, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), para. 159 [emphasis added].

<sup>49</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 U.N.T.S. 107.

<sup>50</sup> In the Convention on Biological Diversity, indigenous peoples and local communities are permitted to speak to the plenary, although only after all Parties have taken the floor and discussion has closed. An indigenous representative may also be nominated to sit on the Bureau at some CBD meetings. In general, contact groups and informals are more open to indigenous peoples at the CBD than at the UNFCCC. The UNFCCC, by contrast, severely restricts access to the negotiating rooms and generally does not permit indigenous peoples representatives the ability to speak during the negotiations – but does offer a brief statement in the opening and closing plenaries.

<sup>51</sup> Office of the High Commissioner for Human Rights, “A New Climate Change Agreement Must Include Human Rights Protections For All”, An Open Letter from 27 Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014, [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_To\\_UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf), at 3.

are being conducted.<sup>52</sup> These limitations are more pronounced once informal negotiations are commenced – such negotiations are generally closed to observers.

49. A very small number of Parties sometimes include Indigenous peoples on their delegations. Indigenous peoples' representatives 'on-delegation' attend primarily to provide the State delegation with expertise on Indigenous issues during the negotiations. Party delegates generally have better access to negotiation rooms. However, Party delegates may be enjoined from discussing substantive negotiation issues with representatives of other Parties.<sup>53</sup> Moreover, Indigenous peoples' representatives on delegation may be asked to sign confidentiality and secrecy agreements, restricting their ability to report back on their interactions with their own delegations.
50. The result of these restrictions is absurd. In the event an Indigenous representative attends such a negotiation as part of a Party's delegation, one can observe freely, but may not be able to interact with delegates – either inside or outside the meeting room. On the other hand, observers are free to interact with delegates outside the meeting room, but may be unable to access the negotiating rooms directly. There is no opportunity for any Indigenous representatives to express opinions or positions as text is being negotiated.
51. At the UNFCCC, the International Indigenous Peoples Forum on Climate Change (IIPFCC) may make statements at both the opening and closing plenaries of the meeting. Informal meetings are generally closed and accessible to Party delegates only. This means that the only source of information Indigenous peoples receive on the state of negotiations comes from Party delegates. It is not uncommon for representatives of Indigenous peoples to be told one thing by Party delegates outside the room, only to have States take the opposite position behind closed doors.
52. In December 2015, at the Paris climate change negotiations, the methods used by the President of the Conference of the Parties (COP21) permitted extremely limited opportunities for Indigenous peoples to engage in text-based negotiations. The negotiations were conceptual, rather than text-based. After one or more rounds of conceptual negotiations, facilitators worked to produce compromise texts. At COP21, the final stages of negotiations occurred bilaterally. This means that all discussions were Party to Party and did not necessarily even occur in negotiating rooms.
53. On an issue as complex as the rights of Indigenous peoples, a 'conceptual' negotiation proved to generate more confusion than certainty. For example, some Parties expressed concern regarding the use of the term 'peoples', and particularly with the concept of collective human rights. This concern led several Parties to suggest that human rights language should not include references to the rights of Indigenous peoples and led all Parties to attempt to negotiate human rights text, when, by their own admission, many of the

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<sup>52</sup> At the COP21 closing ceremonies, indigenous peoples were given the floor to speak only after all Parties and other major groups had taken the floor.

<sup>53</sup> This would be at the discretion of the head of delegation for the Party.

negotiators themselves lacked any meaningful knowledge or experience on international human rights law.

54. The exceptions to the general rule were those delegations, which had included substantial human rights or Indigenous expertise in their delegations. This was particularly the case for Mexico, which was a staunch and consistent supporter of human rights during the negotiations.

### **6.1.2 Indigenous peoples' human rights poorly addressed**

55. In addition to a severe lack of participation, Indigenous peoples have a wide range of human rights concerns. In its 2015 Submission relating to climate change, the UN Office of the High Commissioner for Human Rights (OHCHR) concluded: "It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life, self-determination, development, food, health, water and sanitation and housing."<sup>54</sup>
56. The OHCHR added: "climate change is a human rights problem and the human rights framework must be part of the solution."<sup>55</sup> However, in the *Paris Agreement* there is solely one reference to "human rights" in the whole text. Its preamble provides:

*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity ...

57. A previous draft had placed the "rights of indigenous peoples" and others in a separate preambular paragraph from State obligations on "human rights". The final text joined both paragraphs into one. However, it separated State obligations on "human rights" with a comma from the "rights of indigenous peoples" and other groups and individuals.
58. Some States may have insisted on inserting comma after "human rights" to suggest that the rights following the comma were not human rights. Such an interpretation would not find support in international human rights law. The right to health and the rights of Indigenous peoples, migrants, children, persons with disabilities and the right to development constitute human rights.

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<sup>54</sup> OHCHR, *Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change*, 26 November 2015, para. 6.

<sup>55</sup> *Ibid.*

59. The above-cited preambular paragraph on “human rights” is poorly drafted for other reasons. It is inaccurate to suggest that “Parties *should* ... respect, promote and *consider* their respective obligations on human rights”. State obligations on human rights are not discretionary. In international law, States have an obligation to respect, protect, promote and fulfill human rights.<sup>56</sup> In June 2007, the Human Rights Council affirmed by consensus that the “promotion and protection of all human rights” permanently includes the “rights of peoples, and specific groups and individuals”.<sup>57</sup> Such approach has been reaffirmed by the UN General Assembly.<sup>58</sup> For over 35 years, there has been the practice of addressing Indigenous peoples’ collective rights within the international human rights system. The same approach is taken in the Inter-American and the African human rights systems.
60. To deny Indigenous peoples’ collective human rights would constitute forced assimilation and racial discrimination. As affirmed in the UN Charter, the UN has a duty to promote “universal respect for, and observance of, human rights ... for all without distinction as to race” (art. 55 c). In this regard, all member States have pledged themselves to “take joint and separate action in co-operation” with the UN (art. 56).
61. Article 1 of the *Declaration* affirms: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations ... and international human rights law.” Article 8(2) adds: “States shall provide effective mechanisms for prevention of, and redress for: ... (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values ... (d) Any form of forced assimilation or integration”.
62. In his August 2012 report to the General Assembly, former Special Rapporteur on the rights of indigenous peoples, James Anaya, indicated: “Being among those most affected by climate change, indigenous peoples have for years been demanding greater protection of their human rights in the context of international discussions on climate change and for their effective participation in those discussions, in accordance with the principles of the Declaration on the Rights of Indigenous Peoples.”<sup>59</sup>

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<sup>56</sup> See, e.g., Office of the United Nations High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations, 2012), at 13; Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), Annex (General Principles) “These Guiding Principles are grounded in recognition of: ... (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms”; and International Law Association, “Rights of Indigenous Peoples”, Final report, Sofia Conference (2012), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, (Conclusions and Recommendations), at 29-31.

<sup>57</sup> Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex (Agenda and Framework for the Programme of Work, Item 3).

<sup>58</sup> General Assembly, *Report of the Human Rights Council*, UN Doc. A/RES/62/219 (22 December 2007).

<sup>59</sup> General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (13 August 2012) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 62.



63. Anaya concluded: “Processes within the United Nations system for the development of new multilateral treaties or other instruments, or for the development of new programmes or conferences, should be consistent with international standards concerning the rights of indigenous peoples, both in relation to their participation in these processes and in terms of substantive outcomes.”<sup>60</sup>
64. Anaya added: “the outcomes of these processes should reinforce the rights of indigenous peoples as affirmed in the Declaration. In no instance should a new international treaty or other instrument, or the outcome document of a conference, fall below or undermine the standards set forth in the Declaration or established in other international sources.”<sup>61</sup>

## 6.2 Convention on Biological Diversity

### 6.2.1 Undermining Indigenous peoples’ status

65. In November 2015, the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity considered the “Draft voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge”.<sup>62</sup>
66. The Working Group then adopted recommendation 9/1 requesting the Conference of the Parties to adopt these Voluntary Guidelines at its thirteenth meeting in Cancun, Mexico, 4-17 December 2016.<sup>63</sup>
67. Para. 3 of the Voluntary Guidelines provides: “Nothing in these guidelines should be construed as changing the rights or obligations of Parties under the Convention or under the Nagoya Protocol.”<sup>64</sup> This latter statement could imply that the rights or obligations of Parties, as they relate to Indigenous peoples, are frozen. That is, in relation to Indigenous peoples, the guidelines could not be interpreted in the future in a manner consistent with the

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<sup>60</sup> *Ibid.*, para. 89.

<sup>61</sup> *Ibid.*, para. 91.

<sup>62</sup> Convention on Biological Diversity, (Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, Ninth meeting, Montreal, 4-7 November 2015, UNEP/CBD/WG8J/9/1 (7 November 2015).

<sup>63</sup> Recommendation 9/1 is reproduced in Conference of the Parties to the Convention on Biological Diversity, *Report of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity on its Ninth Meeting*, Thirteenth meeting, Cancun, Mexico, 4-17 December 2016, UNEP/CBD/COP/13/3 (7 November 2015), at 4.

<sup>64</sup> The Guidelines are referring here to *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010.

progressive development of international law – whether such new law pertained to human rights or the environment.

68. Such a concern is not simply hypothetical. In October 2014, at its twelfth meeting the Conference of the Parties (COP 12) adopted Decision XII/12 F.<sup>65</sup> This Decision agreed to use the terminology “indigenous peoples and local communities” (instead of “indigenous and local communities”) in future decisions and secondary documents under the *Convention on Biological Diversity*. While this Decision refers solely to the *Convention*, the decisions and obligations of the Parties and amendment procedures in this treaty also relate to all its Protocols. At the same time, the Decision added a number of caveats.
69. Decision XII/12 F added the following conditions:
- (a) That the use of the terminology “indigenous peoples and local communities” in any future decisions and secondary documents *shall not affect in any way the legal meaning of Article 8(j) and related provisions* of the Convention;
  - (b) That the use of the terminology “indigenous peoples and local communities” *may not be interpreted as implying for any Party a change in rights or obligations* under the Convention;
  - (c) That the use of the terminology “indigenous peoples and local communities” in future decisions and secondary documents *shall not constitute a context for the purpose of interpretation of the Convention on Biological Diversity as provided for in article 31, paragraph 2, of the Vienna Convention on the Law of Treaties or a subsequent agreement or subsequent practice* among Parties to the Convention on Biological Diversity as provided for in article 31, paragraph 3 (a) and (b) or special meaning as provided for in article 31, paragraph 4, of the Vienna Convention the Law of Treaties.<sup>66</sup>
70. The effect of this Decision was to freeze the interpretation of the term “indigenous peoples and local communities” in future decisions and secondary documents so as to have no legal effect whatsoever on the *Convention on Biological Diversity* or *Nagoya Protocol* either now or in the future. In this context, COP 12 unlawfully decided that key paragraphs in article 31 of the *Vienna Convention on the Law of Treaties* could never be invoked to determine the interpretation of such term.
71. Such exclusionary actions constitute racial discrimination. They could serve to undermine the current status and rights of Indigenous peoples globally – especially in the crucial context of biodiversity, sustainable development and traditional knowledge within the CBD.

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<sup>65</sup> Conference of the Parties to the Convention on Biological Diversity, *Article 8(j) and related provisions*, Decision XII/12, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UN Doc. UNEP/CBD/COP/DEC/XII/12 (13 October 2014), at 15 (*F. Terminology “indigenous peoples and local communities”*).

<sup>66</sup> *Ibid.*, at 16, paras. 2 (a), (b) and (c).

72. Article 22(1) of the *Convention on Biological Diversity* makes clear that the *Convention* does *not* affect States Parties' obligations deriving from "existing international agreements".<sup>67</sup> Such agreements clearly include the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which include identical article 1 on the right of all peoples to self-determination.
73. UN treaty bodies have confirmed repeatedly that the right of self-determination, as provided in the international human rights Covenants, applies to the world's "indigenous peoples".<sup>68</sup> States that seek to restrict or deny Indigenous peoples' status as "peoples", in order to impair or deny their rights, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>69</sup> and the *International Covenant on Civil and Political Rights*.<sup>70</sup>
74. Recommendation 9/1 "Invites relevant international agreements, agencies, and organizations to take into consideration the guidance contained in the annex to the present decision in the implementation of their work". In the Voluntary Guidelines, use of the term "indigenous peoples and local communities" or "indigenous peoples" is intended to have no legal effect whatsoever on the *Convention on Biological Diversity* and the *Nagoya Protocol*. In other international instruments, Indigenous peoples' status as "peoples" has legal significance.
75. The Voluntary Guidelines fail to even mention the *UN Declaration* even though Indigenous peoples' right to maintain, control, protect and develop their traditional knowledge is affirmed without qualification (article 31). The Guidelines also omit any reference to the Outcome Document of the World Conference on Indigenous Peoples (WCIP),<sup>71</sup> which reaffirmed by consensus States' support of the *UN Declaration* and the rights of Indigenous youth and Indigenous peoples relating to traditional knowledge.

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<sup>67</sup> *Convention*, Art. 22(1): "The provisions of this Convention *shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement*, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." [emphasis added] Similarly, see *Nagoya Protocol*, art. 4(1).

<sup>68</sup> See, e.g., Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

<sup>69</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 (entered into force 4 January 1969), article 1.

<sup>70</sup> In regard to this Covenant, see Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37<sup>th</sup> sess., (1989), at para. 7: "the term "discrimination" as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*" [emphasis added]

<sup>71</sup> General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (without a vote).

76. It would be unreasonable to conclude that, under the *Convention on Biological Diversity* and *Nagoya Protocol*, use of the term “indigenous peoples” would have no legal significance. It is well-established that, in a wide range of international instruments that use the same term and often address similar subject matters, the status of Indigenous peoples had and continues to have a different meaning with legal effects.
77. Examples of such latter instruments that use the term “indigenous peoples” without qualification include the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*,<sup>72</sup> 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,<sup>73</sup> *UN Declaration on the Rights of Indigenous Peoples*, Rio+20 outcome document *The future we want*,<sup>74</sup> and 2005 *World Summit Outcome*.<sup>75</sup> Most recently, the same term is used in the WCIP Outcome Document and 2015 *Paris Agreement*.<sup>76</sup>

### 6.2.2 Unjust treatment of *UN Declaration*

78. In its preamble, the *Nagoya Protocol* makes specific reference to the *UN Declaration*. The International Court of Justice has affirmed the value of preambles in interpreting conventions,<sup>77</sup> as does article 31, para. 2 of the *Vienna Convention on the Law of Treaties*.
79. In regard to the matters in Decision XII/12 F, the CBD Executive Secretary sought informal advice from the United Nations Office of Legal Affairs. However, it appears that adequate information was not provided to the Office. No mention was made of the *Nagoya Protocol* and the inclusion in its preamble of the *UN Declaration*.
80. As discussed above, COP Decision XII/12 F could not validly conclude that the term “indigenous peoples”, when used in “future decisions and secondary documents”, has no legal effect whatsoever on the *Convention on Biological Diversity* and the *Nagoya Protocol*. COP Decisions XII/12 A<sup>78</sup> and XII/12 B<sup>79</sup> confirm the relevance of the *UN Declaration* in implementing articles 8(j) and 10(c) respectively of the *Convention on Biological Diversity*.

<sup>72</sup> Adopted at the General Conference of UNESCO, 32<sup>nd</sup> sess., Paris, 17 October 2003, entered into force on 20 April 2006. The objectives include protecting and ensuring respect for intangible cultural heritage of Indigenous peoples. Such heritage includes “knowledge and practices concerning nature and the universe” (art. 2(2)(d)).

<sup>73</sup> Adopted at the General Conference of UNESCO, 33<sup>rd</sup> sess., Paris, 20 October 2005. The preamble recognizes the “importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion”.

<sup>74</sup> Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), <http://sustainabledevelopment.un.org/futurewewant.html>, endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote).

<sup>75</sup> General Assembly, 2005 *World Summit Outcome*, UN Doc. A/RES/60/1 (16 September 2005) (without a vote).

<sup>76</sup> *Paris Agreement*, Draft decision -/CP.21, FCCC/CP/2015/L.9 (12 December 2015).

<sup>77</sup> See, e.g., *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. 266, at 282; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, [2006] ICJ Rep. 6, para. 64.

<sup>78</sup> Conference of the Parties to the Convention on Biological Diversity, *Article 8(j) and related provisions*, Decision XII/12, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UN Doc. UNEP/CBD/COP/DEC/XII/12 (13 October 2014), at 1 (A. *Progress report on the implementation of the programme*

81. When Decisions XII/12 A and XII/12 B highlighted the significance of the *UN Declaration*, Canada refused to join the consensus unless the footnotes referencing the *Declaration* also indicated to “note reservations put forward by Parties”.
82. In regard to the *UN Declaration*, it is inappropriate for the Parties at COP 12 to have added “reservations” in any COP decision. First, a “reservation” is solely made in regard to treaties<sup>80</sup> and the *Declaration* only included explanations of vote. Second, no reservations may be made to the *Convention on Biological Diversity* or the *Nagoya Protocol*.<sup>81</sup> Such an approach serves to undermine the *UN Declaration* and the WCIP Outcome Document, which extensively addresses the *Declaration*.
83. Since 2007, the four States that voted against this human rights instrument have all formally reversed their positions. Other States have since endorsed the *Declaration*.<sup>82</sup> It would be misleading and unjust for the CBD to even raise explanations of vote made in 2007 by States who have since changed their position. In any event, explanations of vote do not alter the status of the *Declaration* as a consensus instrument.

### 6.3 World Heritage Convention

84. Since its first session in 2002, the PFII has received numerous communications from Indigenous organizations regarding violations of Indigenous peoples’ rights in processes of UNESCO’s World Heritage Convention.<sup>83</sup> Indigenous representatives have noted that the existing participation procedures are not in accordance with international standards related to the right of Indigenous peoples to participate in decision-making in matters that would affect their rights. Moreover, only very limited and restricted procedures exist for Indigenous peoples and NGOs to participate in the World Heritage Committee’s sessions and there is no effective way for Indigenous peoples to bring concerns regarding World Heritage sites directly to the attention of the World Heritage Committee (WHC).<sup>84</sup>

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*of work on Article 8(j) and related provisions and mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention*), para. 3.

<sup>79</sup> *Ibid.*, at 3 (B. Article 10, with a focus on Article 10(c), as major component of the programme of work on Article 8(j) and related provisions of the Convention), para. 3.

<sup>80</sup> *Vienna Convention on the Law of Treaties*, *supra*, article 2(1)(d). The *Rules of Procedure of the General Assembly* (1985) include no express provisions relating to reservations.

<sup>81</sup> *Convention on Biological Diversity*, article 37; and *Nagoya Protocol*, article 34. COP does not have the authority to amend the *Convention* or *Protocol* except in accordance with articles 29 and 30 of the *Convention*.

<sup>82</sup> Colombia, Samoa and Ukraine had abstained in the 2007 vote in the General Assembly and subsequently endorsed the *UN Declaration*.

<sup>83</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its seventeenth session in Paris, 23 November 1972.

<sup>84</sup> IWGIA et al, *Joint Submission on the lack of implementation of the UN Declaration on the Rights of Indigenous Peoples in the context of UNESCO’s World Heritage Convention*, PFII, Eleventh Session, 7-18 May 2012, <http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/joint-submission-unpfii.pdf>.

85. These issues have also raised the attention of other human rights bodies and mechanisms. The African Commission on Human and Peoples' Rights (ACHPR) in 2011 adopted a specific resolution in which it notes with concern that "there are numerous World Heritage sites in Africa that have been inscribed without the free, prior and informed consent of the Indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples".<sup>85</sup>
86. The ACHPR highlighted the WHC's 2011 inscription of Lake Bogoria National Reserve (Kenya) on the World Heritage List without involving the Endorois people in the decision-making process and without obtaining their free, prior and informed consent,<sup>86</sup> emphasizing that this constituted a violation of the Endorois' right to development under Article 22 of the African Charter on Human and Peoples' Rights and contravened the ACHPR's 2009 decision in the Endorois case.<sup>87</sup> The Endorois have expressed concern that the Government of Kenya may use the World Heritage status of Lake Bogoria National Reserve as a pretext for denying the restitution of the Reserve to them, as demanded by the ACHPR's Endorois Decision.<sup>88</sup>
87. The ACHPR has urged the WHC and UNESCO
- "to review and revise current procedures and [the] Operational Guidelines... in order to ensure that the implementation of the World Heritage Convention is consistent with the UN Declaration on the Rights of Indigenous Peoples and that indigenous peoples' rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas"<sup>89</sup>
- as well as to "consider establishing an appropriate mechanism through which indigenous peoples can provide advice to the World Heritage Committee and effectively participate in its decision-making processes".<sup>90</sup> The PFII, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the UN Special Rapporteur on the rights of indigenous peoples have all made similar recommendations.<sup>91</sup>

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<sup>85</sup> *Resolution on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage site* (No. 197), 5 November 2011, Preamble.

<sup>86</sup> *Ibid*, para 1.

<sup>87</sup> Decision on Communication 276 / 2003 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Endorois Decision), adopted at the 46th Ordinary Session of the ACHPR held from 11-25 November 2009 in Banjul, The Gambia. The Endorois Decision affirms the rights of ownership of the Endorois to their ancestral lands around Lake Bogoria and calls on Kenya, *inter alia*, to "Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land".

<sup>88</sup> See the statement of Endorois Welfare Council at the thirty-ninth session of the World Heritage Committee, 1 July 2015, [http://whc.unesco.org/en/sessions/39com/records/?day=2015-07-01#trv\\_TzLFMKfE12876](http://whc.unesco.org/en/sessions/39com/records/?day=2015-07-01#trv_TzLFMKfE12876) (at 1:41:00 – 1:43:10); and UNESCO, *World Heritage Committee, Thirty-ninth session, Bonn, Germany, 28 June–8 July 2015: Summary Records*, WHC-15/39.COM.INF.19, p. 86.

<sup>89</sup> ACHPR Res. 197, para 2.

<sup>90</sup> *Ibid*, para 3.

<sup>91</sup> See, e.g., PFII, Report on the tenth session (2011), UN Doc. E/2011/43, paras 40-42; PFII, Report on the twelfth session (2013), UN Doc. E/2013/43, para 23; EMRIP, Report on the fifth session (2011), UN Doc A/HRC/21/52, 7 (Proposal 9); EMRIP, *Expert Mechanism advice No. 8 (2015): Promotion and protection of the rights of indigenous*

88. As a result, the WHC in 2015 added a provision related to the participation of Indigenous peoples in the nomination of World Heritage sites to the Operational Guidelines. The Guidelines now encourage States “to demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained, through, *inter alia* making the nominations publicly available in appropriate languages and public consultations and hearings”.<sup>92</sup> However, obtaining Indigenous peoples’ consent is still not a mandatory requirement, and the extent to which Indigenous peoples are involved in nomination processes remains at the discretion of the relevant States.
89. The same concern applies to the management of already inscribed sites. The 2015 discussions within the WHC revealed strong resistance by many States against adopting real procedural safeguards for the rights of Indigenous peoples; several States even contested the very concept of “indigenous peoples”, including some States that have endorsed the *UN Declaration*, such as France or Senegal.<sup>93</sup> The Committee also explicitly rejected a proposal to make World Heritage nomination documents publically accessible once they are received by UNESCO; unless a given State publishes the nomination documents voluntarily, they are only accessible to the Members of the Committee, not to affected Indigenous peoples or the public at large.<sup>94</sup>
90. The WHC has indicated that it will re-examine issues related to the participation of Indigenous peoples following the adoption of the UNESCO Policy on Indigenous Peoples.<sup>95</sup> Once adopted, this policy is supposed to provide “guidance to staff and committees in order to effectively implement the [UN Declaration] in all components of UNESCO’s work”,<sup>96</sup> however, very little progress on the development and adoption of the policy has been made. EMRIP has therefore called on UNESCO to strengthen its efforts to finalize the policy, in cooperation with Indigenous peoples and the three UN mechanisms with specific mandates regarding the rights of Indigenous peoples.<sup>97</sup>

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*peoples with respect to their cultural heritage*, UN Doc A/HRC/30/53, Annex; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (2012), UN Doc. A/67/301, paras 33-42; Letter of the Special Rapporteur, James Anaya, to the World Heritage Committee (18 November 2013), OTH 10/2013, UN Doc A/HRC/25/74, 127. Also see International Law Association, “Rights of Indigenous Peoples”, Final report, Sofia Conference (2012), pp 17-19.

<sup>92</sup> Doc WHC.15/01, 8 July 2015, para 123.

<sup>93</sup> Endorois Welfare Council, Saami Council and IWGIA, *Joint statement on the continued lack of protection of the rights of indigenous peoples with respect to their cultural heritage in the context of UNESCO’s World Heritage Convention*, EMRIP, Eighth Session, 20–24 July 2015, [http://www.iwgia.org/iwgia\\_files\\_news\\_files/1234\\_EMRIP\\_2015\\_Statement\\_of\\_IGIA\\_Endorois\\_elfare\\_Council\\_and\\_Saami\\_Council.pdf](http://www.iwgia.org/iwgia_files_news_files/1234_EMRIP_2015_Statement_of_IGIA_Endorois_elfare_Council_and_Saami_Council.pdf). For the French position, also see UNESCO, ‘States Parties’ comments to the Draft Policy for the integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention’ (2016), WHC-15/20.GA/13, 8-9.

<sup>94</sup> Ibid.

<sup>95</sup> World Heritage Committee Decision 39 COM 11 (2015), para 10.

<sup>96</sup> UNESCO, *Report on the achievement of the goal and objectives of the Second International Decade of the World’s Indigenous Peoples (2005-2014): Questionnaire Response*, February 2014, <http://www.un.org/esa/socdev/unpfii/documents/2014/unesco.pdf>, p 3.

<sup>97</sup> *Expert Mechanism advice No. 8 (2015)*, para 31.

## 6.4 World Intellectual Property Organization

91. Member States have undertaken action within WIPO to diminish Indigenous peoples' human rights. The drafting and dialogue related to the various texts being discussed within the Intergovernmental Committee (IGC) of WIPO concerning the rights of Indigenous peoples to intellectual property, genetic resources, traditional knowledge and traditional cultural expressions have been impacted.
92. One problematic procedural measure is the fact that Indigenous peoples' organization must seek member State approval in order to be accredited to participate in the WIPO inter-governmental committee if they are not already accredited. Such a measure contradicts article 18 of the *UN Declaration*.<sup>98</sup> These procedural measures deny the right to participate and subsequently impacts the protection and promotion of the basic rights of Indigenous peoples. Furthermore, there have been repeated complaints that the established and agreed upon procedural rules of negotiation of an instrument within the WIPO IGC have not been adhered to by member States.<sup>99</sup>
93. Rather than being informed by the scope of Indigenous knowledge, member States are attempting to limit such knowledge to "traditional knowledge" and "traditional cultural expressions". Indigenous peoples have countered by stating that, from an Indigenous perspective, these terms do "not mean conservation or stagnation."<sup>100</sup> Furthermore, Indigenous peoples representatives have argued that a human rights-based and integrated approach is required "to avoid contradictions" and to guarantee "[p]articipation, consultation, consent and self-determination", which are key in developing "an instrument that recognizes the rights of indigenous peoples' cultural expressions and knowledge".<sup>101</sup>
94. Member States are also arguing that they should be "beneficiaries of protection" rather than establishing Indigenous controlled institutions when the proprietors of knowledge are not known. States have also pursued broad recognition of the notion of Indigenous knowledge

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<sup>98</sup> Leaflet No. 12, World Intellectual Property Organization, see generally <http://www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf> which provides: "The Inter-governmental Committee will be open to all Member States of WIPO. Relevant intergovernmental organizations and accredited international and regional NGOs will be invited to participate as observers. Other organizations, including indigenous organizations, may also seek accreditation to participate as observers in Committee sessions, but such accreditation is subject to Member State approval."

<sup>99</sup> Intellectual Property Watch, reporting on May 14, 2011 session of WIPO Inter-Governmental Committee "rules were not being followed when proposals were struck from the text in the absence of governments that had proposed them....The indigenous groups have been relegated by the negotiating governments to an observer-only role, and are concerned that the international instrument will not reflect their concerns or respect their rights. The only way they can get their proposals into the text for negotiation is to convince a government to put them forward."

<sup>100</sup> *Ibid.* Pavel Sulyandziga stated: "The development of indigenous peoples is one of the most important issues for the committee and it is 'a great pity' that it is not much discussed".

<sup>101</sup> Intellectual Property Watch, reporting on March 24-April 4, 2014 session of WIPO Edith Bastidas, legal advisor for the Entidad Promotora de Salud Indígena Mallamas in Colombia, stated: "Participation, consultation, consent and self-determination" are key in developing "an instrument that recognises the rights of indigenous peoples' cultural expressions and knowledge," she said. On the issue of the meaning of "tradition," Bastidas argued that the term "ignores the fact that indigenous peoples' knowledge is changing and dynamic." Evolving and updating of knowledge cannot be excluded from protection.



that is in the “public domain” or “common heritage”, thereby denying the status of knowledge or information as Indigenous knowledge. In addition, member States have attempted to remove reference to customary law in the context of recognition of harm and benefits despite the fact that both the *UN Declaration* and *Indigenous and Tribal Peoples Convention, 1989* provide for culture and cultural rights to be protected by existing or sui generis Indigenous peoples’ laws and practices.<sup>102</sup>

95. Unfortunately, member States and the corresponding interests of pharmaceuticals, multinational corporations and others have been primarily focused upon their interests throughout these discussions. There has been little focus upon upholding international obligations related to the human rights of Indigenous peoples, including their rights to culture, cultural heritage, and ultimately their identity as distinct peoples.
96. Though some efforts have been made by WIPO to advance direct Indigenous peoples’ participation, such participation has been limited due to lack of resources.<sup>103</sup> The Permanent Forum has called “upon States, foundations and other organizations to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities” in order to advance and implement article 18 of the *UN Declaration* in relation to WIPO.
97. To date, WIPO has not focused upon establishing a regime that comprehensively responds to the unique status, conditions and rights of Indigenous peoples. Rather, they have attempted to fit Indigenous peoples into the copyright, patent, trademark, trade, and industrial design rules, policies, and laws. The outcome of the work within WIPO should be done in full collaboration with Indigenous peoples and be informed by the minimum standards of the *UN Declaration* in order to develop an innovative regime that properly safeguards their cultural heritage, cultural rights and identity.
98. Indigenous peoples should not be excluded from the existing WIPO regime of intellectual property. A framework that first upholds the minimum human rights standards affirmed by the *UN Declaration* should be complemented by additional measures to safeguard Indigenous human rights. Consistent with the right to self-determination, Indigenous peoples may choose to engage and use the existing intellectual property rights path. However, the distinct standards and rights as well as a regime must be established to fully address and safeguard the unique status and rights of Indigenous peoples.
99. In his January 2016 report, James Anaya raises serious concerns regarding the inadequacy of intellectual property-related issues in WIPO’s draft instruments on genetic resources

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<sup>102</sup> *Ibid.*, Intellectual Property Watch, reporting on March 24-April 4, 2014 session of WIPO. *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted 27 June 1989 (entered into force 5 September 1991).

<sup>103</sup> Intellectual Property Watch, reporting on March 24-April 4, 2014 session of WIPO. Pavel Sulyandziga, member of the UN Working Group on Business and Human Rights stated that he “regretted that the WIPO voluntary fund for indigenous people to attend the negotiations is has no funds, because participation and information of indigenous people is important to the process”.

(GR), traditional knowledge (TK) and traditional cultural expressions (TCE).<sup>104</sup> He underlines that the “human rights regime as applied in this context requires a wider scope of protection than follows from conventional intellectual property theory.”<sup>105</sup> The bracketed texts include “alternative formulations [that] are mostly detached from the logic of the human rights norms”.<sup>106</sup> TK and TCE “should be protected as long as such subject matter remains relevant to indigenous peoples’ cultures”.

100. Anaya indicates: “human rights standards also prohibit the various substantive and far-reaching proposals for *exceptions and limitations* found in the draft instruments. The suggestion that it be *left to national law* to determine the exceptions and limitations to the scope of protection are particularly problematic ... it leaves States with latitude to decide that certain traditional knowledge and cultural expressions should not be subject to protection at all.”<sup>107</sup> *Misappropriations* of TK and TCE are also defined as violations of national law, which could lead to a lack of protection. Anaya affirms that consistent with human rights standards, such misappropriations should be defined as occurring when someone accesses TK and TCE “without consent.”<sup>108</sup>
101. WIPO and its member States have international human rights obligations. It is wrong for States to negotiate new WIPO instruments that serve to circumvent or weaken such obligations. Indigenous peoples’ human rights must not be undermined by devising national law loopholes.

## 6.5 Food and Agriculture Organization (FAO)

102. The FAO engages in progressive positions that are supportive of Indigenous peoples’ human rights and the *UN Declaration*. The 2010 *FAO Policy on Indigenous and Tribal Peoples* highlights: “FAO activities that affect indigenous peoples will be guided by the human rights-based approach to development, premised on the notion that everyone should live in dignity and attain the highest standards of humanity guaranteed by international human rights law. It will be guided in particular by the core principles expressed in this policy document and by the UN Declaration on the Rights of Indigenous Peoples.”<sup>109</sup>

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<sup>104</sup> *Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* by Professor James Anaya, Information document submitted by the Secretariat of the United Nations Permanent Forum on Indigenous Issues, WIPO/GRTKF/IC/29/INF/10 (11 January 2016), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=325863](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=325863). See also para. 14: “the draft instrument does not go so far as to provide or require affirmative recognition of or specific measures of protection for indigenous peoples’ rights in genetic resources or associated traditional knowledge. Such *recognition and protection are largely left to the domestic legal systems of the countries of origin*”. [emphasis added]

<sup>105</sup> *Ibid.*, para. 22.

<sup>106</sup> *Ibid.*, para. 23.

<sup>107</sup> *Ibid.*, para. 24. [emphasis added]

<sup>108</sup> *Ibid.*, para. 25.

<sup>109</sup> Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010), at 13.

103. However, in negotiating international agreements under the FAO's procedural rules, States are able to take positions that fall significantly lower than existing international human rights standards – including those affirmed in the *FAO Policy on Indigenous and Tribal Peoples*.
104. The FAO 2012 *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*<sup>110</sup> fail to characterize land and resource tenure rights as human rights (paras. 3.2, 4.3) and ambiguously imply that the legal status of the *UN Declaration* may be nothing more than a “voluntary commitment” (paras. 9.3, 12.7). The Guidelines also unjustly alter the legal concept of “free, prior and informed consent” by adding “with due regard for particular positions and understandings of individual States (para. 9.9).
105. A key rationale for adopting guidelines is to encourage States and others to strive for *higher* human rights and environmental standards than they might be willing to agree to in a legally binding instrument. Yet the Guidelines appear to significantly lower expectations and unjustly favour States.
106. A central purpose of the 2012 Guidelines is to improve “responsible governance”<sup>111</sup> in the national context. However, this is unlikely to be achieved in a fair and uplifting manner. There is no overall global framework consistent with human rights that all actors are expected to respect.<sup>112</sup> Although related to governance and food security, Indigenous peoples' right of self-determination is not explicitly included in the Guidelines.
107. Instead it is provided: “These Guidelines should be interpreted and applied *in accordance with national legal systems and their institutions*.”<sup>113</sup> In the crucial context of lands and resources and food security, the Guidelines fail to address respect and protection by States of the right of Indigenous peoples to self-government, through their own decision-making institutions.<sup>114</sup>
108. The Guidelines weaken States’ “international commitments” by introducing the notion of “voluntary commitments”. Such a characterization did not exist in the 2004 *Voluntary*

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<sup>110</sup> Food and Agriculture Organization, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome, Italy, 2012, <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

<sup>111</sup> It is not certain what “responsible governance” entails. The term “good governance” is widely used in international law. See, e.g., *UN Declaration*, article 46(3).

<sup>112</sup> 2012 Guidelines, para. 5.1, where it is left to the discretion of States to provide a framework related to tenure: “States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests.”

<sup>113</sup> *Ibid.*, para. 2.5.

<sup>114</sup> *UN Declaration*, article 18: “Indigenous peoples have the right ... to maintain and develop their own indigenous decision-making institutions”; and article 38: “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

*Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*" adopted in 2004.<sup>115</sup>

109. In the 2012 Guidelines, the stark distinction of "existing obligations" vs. "voluntary commitments" fails to appreciate that differences between "hard" and "soft" law instruments are often blurred.<sup>116</sup> Further, the text fails to take into account that international instruments – that are not legally binding in the same way as treaties – can have diverse legal effects.<sup>117</sup>
110. In commenting on an earlier draft of the Guidelines, the Special Rapporteur on the right to food cautioned in 2011 that overemphasis on their "voluntary" nature could lead States to "underestimate their obligations" and lead to the undermining of existing standards.<sup>118</sup> Such concerns appear to have been ignored.
111. In view of the diverse substandard aspects in the Guidelines, Indigenous and civil society organizations made an urgent request in April 2012 that the FAO Evaluation Service assess whether the Guidelines met FAO standards.<sup>119</sup> According to the "Charter of the FAO Evaluation Service", "FAO strives for the highest international standards in its evaluation practice."<sup>120</sup> However, the FAO refused to assess the Guidelines.<sup>121</sup>

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<sup>115</sup> *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, Food and Agriculture Organization, Rome, Italy, 2004. [underline added].

<sup>116</sup> Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'" in Dinah Shelton, ed., "Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System" (Oxford/New York: Oxford University Press, 2003) 1 at 10: "Treaty mechanisms are including more 'soft' law obligations, such as undertakings to endeavor to strive to cooperate. *Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts.* Both types of procedures may have compliance procedures that range from soft to hard. ... In fact, it is rare to find soft law standing in isolation; instead, it is used most frequently as a precursor to hard law or as *a supplement to a hard law instrument. Soft law instruments often serve to allow treaty parties to authoritatively resolve ambiguities in the text or fill in gaps.*" [emphasis added]

<sup>117</sup> Office of the High Commissioner for Human Rights, "International Human Rights Law", available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>: "While international treaties and customary law form the backbone of international human rights law, *other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development.* Respect for human rights requires the establishment of the rule of law at the national and international levels." [emphasis added]

<sup>118</sup> Office of the High Commissioner for Human Rights, *Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, Olivier De Schutter, United Nations Special Rapporteur on the right to food (16 May 2011), <http://www.ohchr.org/EN/Issues/Food/Pages/Standards.aspx>, at 3: "the current emphasis on the 'voluntary' nature of the Guidelines bears the risk that *States would tend to interpret them as 'optional' and would consequently underestimate their obligations.* This risk must be avoided as it would lower existing agreed standards. The Guidelines do not create new legal obligations; but they cannot undermine existing standards." [emphasis added]

<sup>119</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "FAO Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: Discrimination and Subjugation of Indigenous Peoples and Rights", Food and Agriculture Organization (Committee on World Food Security), Rome, Italy (April 2012), para. 159.

<sup>120</sup> "Charter for the FAO Office of Evaluation" in FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations*, vol. II, 2011 ed. (Working version December 2011), Rome, Italy, ch. H, at 146.

<sup>121</sup> Kostas Stamoulis, Secretary, CFS, reply by email to Paul Joffe, Legal Counsel, Grand Council of the Crees (Eeyou Istchee), 10 May 2012.

112. Former Special Rapporteur on the rights of indigenous peoples, James Anaya, underlined in 2013: “Both substantive and procedural complaints have been made concerning the Guidelines. In particular, concern has been raised by a number of indigenous peoples and organizations that certain provisions fall below already agreed upon standards with respect to rights to lands and resources, which are core rights for indigenous peoples.”<sup>122</sup>
113. The Special Rapporteur added: “the Guidelines could be improved upon by taking more fully into account the special standards and considerations that apply to indigenous peoples. The Special Rapporteur has *consistently argued against restrictive interpretations of texts that bear upon human rights*, preferring to adopt broad and progressive understandings of written instruments when possible and also to encourage States and other actors always to *implement guidelines and policies concerning indigenous peoples in accordance with the spirit and terms of the Declaration [on the Rights of Indigenous Peoples]*.”<sup>123</sup>

## 6.6 World Bank

114. Expressing concern regarding a sustained divergence between Bank practice and the rights of Indigenous peoples, in 2013 the PFII recommended “that the World Bank brings its policy on Indigenous peoples (OP 4.10) into full compliance with the United Nations Declaration on the Rights of Indigenous Peoples. The Forum attaches particular importance to the need for the Bank to adopt the standard of free, prior and informed consent and, in general, to institutionalize and operationalize an approach based on human rights”.<sup>124</sup>
115. As States reaffirmed their commitments to Indigenous rights at the World Conference of Indigenous Peoples, the World Bank sought consensus on a proposal to allow governments to opt out of implementing the Indigenous peoples’ safeguard policy completely, in favor of an ‘alternative approach’ to the safeguard.<sup>125</sup> The Indigenous peoples’ safeguard was the only policy in which the Bank advanced an opt-out clause.
116. The World Bank has made few specific efforts to engage with Indigenous peoples on its safeguards policies. This contradicts article 18 of the *UN Declaration* and suggests a bad faith process by both the World Bank as an organization and its membership.<sup>126</sup> It is crucial

<sup>122</sup> General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (13 August 2012) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 45.

<sup>123</sup> *Ibid.*, para. 47. [emphasis added]

<sup>124</sup> Permanent Forum on Indigenous Issues, *Report on the twelfth session (20 – 31 May 2013)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2013/43-E/C.19/2013/25, at para. 56. See also Permanent Forum on Indigenous Issues, *Review of World Bank operational policies: Note by Secretariat*, UN Doc. E/C.19/2013/15 (20 February 2013) (to analyze participation mechanisms on indigenous peoples and determine to what extent those policies respect the United Nations Declaration on the Rights of Indigenous Peoples)

<sup>125</sup> The proposed ‘alternative approach’ would be a major setback for all Indigenous peoples around the globe and in particular, on continents like Africa and Asia, where many governments deny the existence of Indigenous peoples and engage in direct violations of Indigenous peoples’ rights. This “opt out” clause would likely provide cover for such repressive governments acting with World Bank funds.

<sup>126</sup> In one case, the Bank attempted to redact information from a country consultation, at the request of a State, seeking to link its safeguards policies to domestic policies requiring official development assistance to be compliant with human rights.

for the World Bank and other development banks to be responsive to PFII recommendations calling for them to adopt policies that fully conform to the *UN Declaration* and other international human rights standards.

117. In regard to safeguards policy, the World Bank has been severely criticized by Indigenous peoples and many others. For example, in a December 2014 letter to the World Bank President from 28 Special Rapporteurs and Independent Experts, it is indicated: “As the Bank seeks to revise and adapt its Safeguards approach to the challenges of the twenty-first century, ... it is imperative that the standards should be premised on a recognition of the central importance of respecting and promoting human rights. ... Instead, by contemporary standards, the document seems to go out of its way to avoid any meaningful references to human rights and international human rights law, except for passing references”.<sup>127</sup>

## **VII. Positive Examples to Implement *UN Declaration***

118. In September 2015, the International Whaling Commission [IWC] Aboriginal Subsistence Whaling Working Group, held a meeting in Maniitsoq, Greenland with one of the central objectives of “ensuring better synergy between the IWC and other international commitments, including those on the rights of indigenous peoples.”<sup>128</sup> The workshop was organized to ensure that the ASW Working Group members were better informed about the international Indigenous peoples’ human rights developments at the United Nations, the International Labour Organization, the Arctic Council and other intergovernmental regimes.<sup>129</sup>
119. The IWC Secretariat ensured that Indigenous peoples’ human rights experts and the beneficiaries of such rights were present and guaranteed direct participation in all discussions and decision-making. There was no discrimination practiced with regard to speaking and voting rights in relation to the Indigenous peoples’ representatives, either as invited experts or as the spokespersons for their respective nations and communities.

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<sup>127</sup> Letter to World Bank President Jim Yong Kim, 12 December 2014, from 28 UN Special Rapporteurs and Independent Experts, at 1-2.

<sup>128</sup> Welcoming remarks from Gitte Hundahl (IWC Commissioner for Denmark and Chair of the Workshop Steering Group “she noted that Denmark and Greenland are sending a strong signal of a joint commitment to this endeavour and emphasised four aspects: ...rebuilding trust between hunters and the IWC so that ASW communities truly feel the organisation serves their needs; and ensuring better synergy between the IWC and other international commitments, including those on the rights of indigenous peoples, on the sustainable use of natural resources, on science-based decision making and on global food security.” See [https://archive.iwc.int/pages/view.php?ref=5664&search=%21collection118&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0&restypes=](https://archive.iwc.int/pages/view.php?ref=5664&search=%21collection118&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0&restypes=)

IWC/66/ASW Rep01, Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling (ASW), p. 2.

<sup>129</sup> Supra. Opening statement by IWC Secretary, Simon Brockington, “noted that the discussions ahead would include not only examination of IWC material, but also the first formal IWC consideration of progress made on the rights of Indigenous peoples under a variety of bodies including the United Nations, the International Labour Organization...and how these Indigenous Peoples rights are recognised and implemented at the international level.”

120. The report of the ASW Working Group includes a number of important decisions that reflect a genuine desire to reform the IWC's actions to promote and protect the human rights of Aboriginal subsistence users. Specifically, the Working Group agreed that the "IWC as a whole should be informed of the recent developments in the rights of Indigenous peoples and their significance to the interpretation and application of the International Convention on the Regulation of Whaling."<sup>130</sup>
121. The Workshop "**recommends** that member States of the IWC, with the full and effective participation of the Indigenous peoples concerned, consider preparing a statement or resolution for adoption, if possible at the 2016 meeting, recognising the developments in the rights of Indigenous peoples and their relevance to the IWC. Such a document should consider the right of Indigenous peoples to self-determination as well as other civil, social, cultural, political, health, nutritional, economic and spiritual rights of Indigenous peoples and their significance in the context of the IWC."<sup>131</sup> The Workshop participants all agreed that co-management regimes were important and should be strengthened "...consistent with the rights affirmed in the UN Declaration on the Rights of Indigenous Peoples, the ILO Convention No. 169 and other international human rights instruments."<sup>132</sup>
122. They further recommended that "member States of the IWC should consider commissioning a survey of international Indigenous and general human rights instruments and intersecting international treaties, agreements, and other arrangements to further elaborate their significance to the work of the IWC in relation to ASW and the incorporation of dimensions distinct to Indigenous peoples (cf. also Article 41 UN Declaration on the Rights of Indigenous Peoples)."<sup>133</sup>
123. In addition, the Workshop recommended that the IWC "should consider exploring options concerning how the IWC and its relevant sub-groups could stay better informed of current developments in the field of Indigenous peoples' rights" including by inviting Indigenous rights experts to the next meeting of the IWC or a relevant sub-body to its future meetings. It is also important to underscore the linkage that the ASW Working Group's recognition of the impacts of climate change, economic and political pressures and other factors have upon Indigenous peoples. And, the Workshop "**draws the attention** of the IWC to the importance of the right of self-identification as part of who is and belongs to Indigenous peoples" in relation to ASW hunts. They also agreed that it would be highly useful for an IWC representative to attend the UNPFII and potentially organize a side event at the forthcoming session.
124. These key recommendations are constructive examples of how other intergovernmental fora should be addressing consistency with the *UN Declaration* and other international human rights instruments.

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<sup>130</sup> Supra, p. 21, paragraph 1.

<sup>131</sup> Supra, p. 21, paragraph 2.

<sup>132</sup> Supra, p. 21, paragraph 2.

<sup>133</sup> Supra, p. 21, paragraph 3.

## VIII. Handbooks and Reference Guides on the *UN Declaration*

125. The Inter-Parliamentary Union published a *Handbook for Parliamentarians Implementing the UN Declaration on the Rights of Indigenous Peoples*. The Handbook “aims to help MPs to take concrete action through legislation, government oversight and resource allocation in order to improve the socio-economic conditions and political marginalization of indigenous peoples.” It is a constructive and positive example for intergovernmental organizations to consider.<sup>134</sup>
126. *Know Your Rights! United Nations Declaration on the Rights of Indigenous Peoples for indigenous adolescents*<sup>135</sup> was prepared jointly by UNICEF, the Secretariat of the PFII and the Global Indigenous Youth Caucus.
127. In 2013, the UN Global Compact prepared *The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* to “help business understand, respect, and support the rights of indigenous peoples by illustrating how these rights are relevant to business activities.”<sup>136</sup>
128. Furthermore, it is worth noting the developments with regard to business and human rights and in particular, the "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", Principle 12: “The responsibility of business enterprises to respect human rights refers to *internationally recognized human rights* ...”<sup>137</sup>
129. In 2013, the Asia Pacific Forum of National Human Rights Institutions and Office of the High Commissioner for Human Rights issued *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*.<sup>138</sup> This is another constructive example of clear guidelines for implementation of the *UN Declaration*.

## IX. Conclusions and Recommendations

130. To safeguard the rights of Indigenous peoples and the international human rights system, it is imperative that procedural rules within international organizations be reformed. This should be undertaken with the full and effective participation of Indigenous peoples, in a

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<sup>134</sup> See Inter-Parliamentary Union (IPU), *Handbook for Parliamentarians No. 23*, 2014, <http://www.ipu.org/PDF/publications/indigenous-en.pdf>.

<sup>135</sup> [http://files.unicef.org/policyanalysis/rights/files/HRBAP\\_UN\\_Rights\\_Indig\\_Peoples.pdf](http://files.unicef.org/policyanalysis/rights/files/HRBAP_UN_Rights_Indig_Peoples.pdf)

<sup>136</sup> <https://www.unglobalcompact.org/library/541>

<sup>137</sup> Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), Annex. [emphasis added]

<sup>138</sup> Asia Pacific Forum of National Human Rights Institutions and Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (APF and OHCHR, 2013), <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>



spirit of partnership and mutual respect consistent with the *UN Declaration on the Rights of Indigenous Peoples*.

131. Some States and international organizations have positive policies relating to Indigenous peoples and the *UN Declaration*. Yet when States negotiate new international instruments even within such supportive international organizations, Indigenous peoples' status and rights are often adversely affected – and their participation marginalized.
132. Out-dated rules of procedure invite unlimited abuses against Indigenous peoples. With virtually no checks and balances within such rules, States appear free to propose and agree to discriminatory and substandard provisions. Procedural injustices most often generate substantive injustices.
133. In such global contexts, the practice is generally consensus-driven so that the *lowest common denominator* in States positions prevails, regardless of the prejudicial consequences for Indigenous peoples. Participating States have not formally objected.
134. The international human rights system and rule of law are weakened as a result. It is unconscionable that both the States and international organizations concerned show an ongoing lack of determination and political will to prevent or redress such injustices, as well as safeguard the international human rights system.
135. All such violations of Indigenous peoples' rights are incompatible with the obligations of States under the UN Charter and international human rights law. States cannot evade their solemn duties by exploiting weak and inadequate procedural rules within international organizations.
136. Specialized agencies and other intergovernmental organizations should reform their procedural rules on an urgent basis, in consultation and cooperation with Indigenous peoples. In no case should State proposals on any matter be permitted that would violate the UN Charter. The rules for such organizations should be fully consistent with articles 41 and 42 of the *UN Declaration*. Special rules should be adopted so that Indigenous governments are permitted to participate as governments and not as non-governmental organizations.
137. It is crucial that international organizations use the *UN Declaration* as a standard and framework, when Indigenous peoples' status and rights may be affected. The *Declaration* is increasingly relied upon by UN treaty bodies, Office of the UN High Commissioner for Human Rights and regional human rights bodies, as well as domestic courts, to interpret Indigenous peoples' human rights and related State obligations.
138. In his July 2012 report on ways and means of promoting Indigenous peoples' participation at the UN, the Secretary-General concluded that collaboration: “will be improved by further enhancement of procedures to enable indigenous peoples' participation in all relevant work of the United Nations, in a way that realizes, respects, promotes and protects their rights

under the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international human rights standards.”<sup>139</sup>

139. It is essential that international organizations and member States fully inform themselves of the distinct nature of Indigenous peoples’ status and human rights. The UN General Assembly has affirmed the importance of human rights education and training and the roles of States and other actors in implementation.<sup>140</sup>
140. Within their respective mandates, United Nations treaty bodies and regional human rights bodies have an important role to play in establishing relevant standards and jurisprudence. Similarly, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and United Nations Special Rapporteurs and other Independent Experts should play a role. The Human Rights Council’s Universal Periodic Review should also be used to encourage States to comply with their international human rights obligations.
141. The Permanent Forum should request that specialized agencies and other international organizations include, in their yearly information to the Forum, an update on measures taken to reform their procedural rules consistent with international human rights law.
142. States should refrain from using domestic law or national legislation as a way of circumventing international human rights law and their corresponding obligations. States should not require international human rights standards to be “subject to” or “in accordance with” national legislation. Rather, States, in conjunction with Indigenous peoples, should develop legislation at the national level to ensure that any and all laws and policies concerning the rights of Indigenous peoples are consistent with the *UN Declaration*.
143. In regard to environmental issues, negotiations of new international instruments can be especially challenging. States’ representatives tend to be well-informed on environmental matters, but are often much less informed on – if not also unreceptive to – related Indigenous human rights concerns. All States have a responsibility to ensure their negotiations team includes people knowledgeable on international human rights.
144. In relation to environment, development, human rights, security and other issues, international cooperation must be wholly inclusive of Indigenous peoples and in good faith. As underlined by the International Court of Justice, “One of the basic principles governing the creation and the performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming essential.”<sup>141</sup>

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<sup>139</sup> General Assembly, *Ways and means of promoting participation at the United Nations of indigenous peoples’ representatives on issues affecting them: Report of the Secretary-General*, UN Doc. A/HRC/21/24 (2 July 2012), para. 66

<sup>140</sup> *United Nations Declaration on Human Rights Education and Training*, in G.A. res. 66/137, UN Doc. A/66/137 (19 December 2011) (adopted without vote), Annex.

<sup>141</sup> *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 at 267.