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**PREVENTION OF DISCRIMINATION**

**PREVENTION OF DISCRIMINATION AND PROTECTION  
OF INDIGENOUS PEOPLES**

**Indigenous peoples' permanent sovereignty over natural resources**

**Final report of the Special Rapporteur, Erica-Irene A. Daes\* \*\***

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\* The endnotes are reproduced as received, in the original language only.

\*\* This document is submitted late pending approval of a waiver of the page limit imposed by the General Assembly.

## **Summary**

This document constitutes the final report of the study on indigenous peoples' permanent sovereignty over natural resources. It should be read in conjunction with the Special Rapporteur's final working paper on indigenous peoples and their relationship to land (E/CN.4/Sub.2/2001/21). It contains a discussion of the principle of permanent sovereignty over natural resources as applied to indigenous peoples and takes into consideration, among other things, additional comments made by Governments and members of the Sub-Commission and data received from representatives of indigenous communities and organizations.

Annexes, contained in the addendum, contain information that it was impossible to include in the main document owing to the limitations on length. Annex I contains examples of legal regimes regarding indigenous peoples and natural resources in various parts of the world. Annex II is an analysis of international law concerning permanent sovereignty over natural resources and indigenous peoples. Annex III contains relevant conclusions, guiding principles and recommendations of the final working paper on indigenous peoples and their relationship to land (E/CN.4/Sub.2/2001/21). Annex IV contains a selected bibliography, excerpts from relevant United Nations resolutions, a list of relevant cases and a compilation of relevant international legal standards.

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\* Contained in document E/CN.4/Sub.2/2004/30/Add.1.

## Introduction

1. In its resolution 2001/10, the Sub-Commission on the Promotion and Protection of Human Rights requested Mrs. Erica-Irene A. Daes to prepare a working paper on indigenous peoples' permanent sovereignty over natural resources, which was relevant to her study on indigenous peoples and their relationship to land, the final working paper for which is contained in document E/CN.4/Sub.2/2001/21. Mrs. Daes submitted her working paper (E/CN.4/Sub.2/2002/23) to the Sub-Commission at its fifty-fourth session.
2. At that session, the Sub-Commission decided to propose to the Commission on Human Rights the appointment of Mrs. Daes as Special Rapporteur to undertake a study on the subject based on her working paper (resolution 2002/15), requesting her to submit a preliminary report to the Sub-Commission at its fifty-fifth session and a final report at its fifty-sixth session. The Commission endorsed Mrs. Daes' appointment in its decision 2003/110, and this was approved by the Economic and Social Council in its decision 2003/267. Mrs. Daes submitted her preliminary report (E/CN.4/Sub.2/2003/20) to the Sub-Commission at its fifty-fifth session.
3. The present final report is submitted in accordance with Sub-Commission resolution 2002/15. It includes four annexes, contained in the addendum, containing information that it was impossible to include in the main report owing to limitations on length. Annex I contains examples of legal regimes regarding indigenous peoples and natural resources in various parts of the world. Annex II is an analysis of international law concerning permanent sovereignty over natural resources and indigenous peoples. Annex III contains relevant conclusions, guiding principles and recommendations of the final working paper on indigenous peoples and their relationship to land (E/CN.4/Sub.2/2001/21). Annex IV contains a selected bibliography, excerpts from relevant United Nations resolutions, a list of relevant cases and a compilation of relevant international legal standards.
4. Information relevant to the preparation of this final working paper was gratefully received by the Special Rapporteur from the Government of Colombia, along with helpful comments and observations. Very useful comments were received from Mr. Yozo Yakota, a member of the Sub-Commission and of the Working Group on Indigenous Populations. In addition, information and materials were received from the Indian Law Resource Center, the Ermineskin Indian Band and Nation, the First Nations Forum and the Movimiento Indígena en Jujuy, a member of the Consejo Indio de Sud América. A very useful paper, "The Right of Indigenous Peoples to Permanent Sovereignty Over Genetic Resources and Associated Indigenous Knowledge", was submitted by Na Koa Ikaika a Ka Lahuy Hawai'i and the Indigenous Peoples Council on Biocolonialism.
5. Many reports and statements made by indigenous peoples and States since the appearance of indigenous peoples at the United Nations in the 1970s have highlighted the importance of lands and resources to indigenous peoples. The importance and usefulness of a study on indigenous peoples' permanent sovereignty over natural resources has been further emphasized by the ongoing debates about indigenous peoples' right to self-determination and the adverse impacts of natural resource exploitation in indigenous territories.<sup>1</sup> Consequently, the reconciliation of the legitimate interests of States with the prior rights of indigenous peoples to their natural resources has been recognized by many as a critical and necessary step for the advancement of the rights of indigenous peoples.

6. The interest in the application of this principle to indigenous peoples follows from the similarity of their circumstances to the situation of the peoples to whom the principle was first applied. The principle of permanent sovereignty over natural resources in modern law arose from the struggle of colonized peoples to achieve political and economic self-determination after the Second World War. The principle is this: Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation. Since the early 1950s, the principle has been advocated as a means of securing for peoples emerging from colonial rule the economic benefits derived from the natural resources within their territories and to give newly independent States the legal authority to combat and redress the infringement of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements orchestrated by other States and foreign companies.<sup>2</sup> The principle was and continues to be an essential precondition to a people's realization of its right of self-determination and its right to development.<sup>3</sup>

7. Given the principle's origins and intent and the international community's acknowledgment of the problems faced by indigenous peoples today, it is no surprise that discussions relating to indigenous peoples' permanent sovereignty over natural resources have continued in the context of the Working Group on Indigenous Populations, the Working Group on the Draft United Nations declaration on the rights of indigenous peoples, at the Permanent Forum on Indigenous Issues and, most recently, in the context of the World Bank and its review of the impact and value of extractive industry projects. In the past two decades, in the United Nations, Member States, representatives of specialized agencies and departments of the Secretariat, independent experts and indigenous representatives have been engaging regularly in an attempt to resolve long-standing land and resource disputes, to reach understandings regarding self-determination under international law, and to establish new mechanisms and methods for cooperating on matters relating to the sustainable development of indigenous lands and resources.

8. As a result, it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having the legal authority to exercise control over their lands and territories. Moreover, these exchanges have led to a growing recognition that an appropriate balance can be reached between the interests of States and the interests of indigenous peoples in the promotion and protection of their rights to self-determination, to their lands, territories and resources, and to economic development.

## **I. THE HISTORY OF THE CONCEPT OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES WITHIN THE UNITED NATIONS SYSTEM**

9. The United Nations was the birthplace of this principle and the main forum for its development and implementation. Relevant resolutions were first adopted by the General Assembly in the early 1950s, giving initial recognition to this concept as applied to peoples and nations.<sup>4</sup> In 1958, the General Assembly established the Commission on Permanent Sovereignty Over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a "basic constituent of the right to self-determination".<sup>5</sup> But it was General Assembly resolution 1803 (XVII) in 1962 that gave

the principle momentum under international law in the decolonization process. In this historic resolution the Assembly declared that “peoples and nations” had a right to permanent sovereignty over their natural wealth and resources and that violation of this right was contrary to the spirit and principles of the Charter and hindered the development of international cooperation and the maintenance of peace.

10. While the principle originally arose as merely a political claim by newly independent States and colonized peoples attempting to take control over their resources, and with it their economic and political destinies, in 1966 permanent sovereignty over natural resources became a general principle of international law when it was included in common article 1 of both International Covenants on Human Rights. Common article 1 provides in pertinent part:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

“2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

11. Article 47 of the International Covenant on Civil and Political Rights and article 25 of the Covenant on Economic, Social and Cultural Rights further state that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” This provision was inserted into each of the Covenants very late in the drafting process and shortly before their adoption in 1966.<sup>6</sup> The references in paragraph 2 of common article 1 to international economic cooperation, mutual benefit and international law can be read as limitations on a State’s ability to arbitrarily and without compensation nationalize or confiscate foreign property in its efforts to freely dispose of its natural wealth and resources.<sup>7</sup> It appears, however, that the provisions of articles 47 and 25 were intended to strike a balance by also ensuring that States did not invoke paragraph 2 to impose or support “imperialist policies and practices tending to control the economy of developing countries and ... impair thereby their political independence”.<sup>8</sup>

12. The United Nations has adopted more than 80 resolutions relating to permanent sovereignty over natural resources,<sup>9</sup> and the principle has been incorporated into a number of multilateral treaties.<sup>10</sup> The debates and discussions around the inclusion of permanent sovereignty over natural resources in these various resolutions and instruments have addressed State concerns regarding the rights of States to nationalize economic activities, the rights of “developing countries” as against “developed countries”, the extent to which a people must consider in the exploitation of its resources the scarcity of the resources, their optimal use, and the larger needs and aspirations of the international community as a whole, and the obligations of successor States to honour existing economic agreements and arrangements.<sup>11</sup>

13. Despite these ongoing concerns, the right of permanent sovereignty over natural resources was recognized because it was understood early on that without it, the right of self-determination would be meaningless. In many ways, this point was confirmed by

a 1955 report of the Secretary-General.<sup>12</sup> In describing the debates surrounding the drafting of common article 1, he noted that while delegates made reference to the concerns stated above, it was also acknowledged that “the right of self-determination certainly included the simple and elementary principle that a nation or people should be master of its own natural wealth or resource”, and therefore the proposed language “was not intended to frighten off foreign investment by a threat of expropriation or confiscation; it was intended rather to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence”.<sup>13</sup>

14. In recent years, the substance of this principle has been implicitly incorporated into the Draft United Nations declaration on the rights of indigenous peoples,<sup>14</sup> and it has become the subject of considerable debate.

15. The subject of permanent sovereignty over natural resources is also present in the discussions surrounding the parallel provisions relating to self-determination and lands and territories that appear in the Organization of American States (OAS) Draft American declaration on the rights of indigenous peoples.<sup>15</sup>

16. In addition to United Nations and OAS standard-setting activities related to indigenous peoples, there are also ongoing deliberations associated with the development, revision and application of indigenous peoples policies within the various agencies within the United Nations itself - in particular, the World Bank and the United Nations Development Programme (see below). Each of these entities has an indigenous peoples policy. For these reasons, there is a growing need for the United Nations to take the lead in fostering a dialogue about the nature of this right as applied to indigenous peoples and the impact that such a right might have on the duties and obligations of States.

## II. GENERAL CONSIDERATIONS

17. There is a growing and positive trend in international law and practice to extend the concept and principle of self-determination to peoples and groups within existing States.<sup>16</sup> While understood to no longer include a right to secession or independence (except for a few situations or under certain exceptional conditions), nowadays the right to self-determination includes a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance. In order to be meaningful, this modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources. The considerations that lie behind this observation must now be examined.

18. To begin, it might be useful to examine why the term “sovereignty” can appropriately be used in reference to indigenous peoples and their natural resources within independent States. A few States and one indigenous organization have expressed concern about whether two “sovereigns” can exist within one State or share in the same resources.<sup>17</sup> The meaning of the term in relation to the principle of permanent sovereignty over natural resources can be generally stated as legal, governmental control and management authority over natural resources, particularly as an aspect of the exercise of the right of self-determination. During

the decolonization period newly emerging States sought to be free of unfair exploitation of their natural resources, which could make self-determination meaningless. As one modern writer has stated:

“After the Second World War, this situation compelled the developing countries and the newly de-colonized states into promoting the development of a new international principle which recognized and protected their rights over their natural resources and wealth in their own countries.”<sup>18</sup>

In this context, it is apparent that the term “sovereignty” refers not to the abstract and absolute sense of the term, but rather to governmental control and authority over the resources in the exercise of self-determination. Thus it does not mean the supreme authority of an independent State. The use of the term in relation to indigenous peoples does not place them on the same level as States or place them in conflict with State sovereignty.

19. In the sixteenth century, the term “sovereignty” referred to the supreme power within a State without any restriction whatever. However, by the time of the influential French jurist Emmerich de Vattel’s *The Law of Nations* in the early nineteenth century, the term no longer had this absolute sense, and it was recognized in international law that a “sovereign” could be under the protection of another, greater sovereign without losing its “sovereignty”.<sup>19</sup>

20. In modern times it is commonplace to observe that no State enjoys unfettered sovereignty, and all States are limited in their sovereignty by treaties and by customary international law.<sup>20</sup> In fact, it is common practice for States to enter into international agreements that not only reflect certain limits to their sovereignty, but also acknowledge certain benefits that can be derived when sovereigns cooperate in their management and use of natural resources.<sup>21</sup> Thus, in legal principle there is no objection to using the term sovereignty in reference to indigenous peoples acting in their governmental capacity, although that governmental capacity might be limited in various ways. In fact, indigenous peoples have long been recognized as being sovereign by many countries in various parts of the world.

21. In the United States, Indian tribes have been recognized as sovereign political entities since the formative years of the Federal Government. These principles were first completely expressed in *Worcester v. Georgia*.<sup>22</sup> That case arose when the State of Georgia imprisoned several missionaries who were living on Cherokee Nation territory in violation of a State law requiring non-Indians to obtain a licence from the governor. Justice John Marshall set forth what is still the law today in the United States when he found that Indian nations have always been recognized as “distinct, independent, political communities” and are, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but by reason of their original tribal sovereignty.<sup>23</sup> Justice Marshall declared in *Worcester* that:

“[T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self-government - by associating with a stronger, and taking its protections. A weak state ... may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.”<sup>24</sup>



Justice Marshall supports his position by calling attention to European examples, and indeed he cites Vattel in his opinion:

“‘Tributary and feudatory states’, says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state’.”<sup>25</sup>

22. Justice Marshall’s decision in *Worcester* is consistent with the views he expressed initially in *Cherokee Nation v. Georgia*,<sup>26</sup> which arose when Georgia enacted a series of laws which would have abolished the Cherokee government. In that case Justice Marshall wrote:

“So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.”<sup>27</sup>

The court went on to find that tribes that reside within the boundaries of the United States are not “foreign nations” with a constitutional grant to sue in the Supreme Court.<sup>28</sup> But Justice Marshall did in *Cherokee* lay down the principles of the doctrine of tribal sovereignty.

23. In the United States, the law today recognizes many attributes of sovereignty on the part of Indian and Alaskan Native governments, including the right of sovereign immunity from suit. This right of sovereign immunity has been consistently upheld by the United States Supreme Court.<sup>29</sup> The term “sovereignty” is entirely accepted in United States law today in regard to Indian and Alaskan Native governments.

24. In the recent *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*,<sup>30</sup> the Inter-American Court of Human Rights, in interpreting the right to property as found in article 21 of the American Convention on Human Rights, made clear in its judgement that indigenous peoples’ rights to their lands include rights to the resources there (para. 153) and that these rights of ownership are held by the community in their collective capacity and according to their own customary law, values, customs and mores (paras. 148, 151, 153). Though the Court did not use the term “sovereignty”, there is no question that the decision found that international law protects the governmental or collective right of the community to the land and resources. The following portion of the judgement will help to make this clear:

“Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”<sup>31</sup>

25. The law of Nicaragua has long provided for autonomy in the Indian regions of the country.<sup>32</sup> The Constitution of Nicaragua has also clearly recognized indigenous forms of social organization as well as the right of indigenous peoples to manage their local affairs, maintain their communal forms of ownership, and their right to the use and enjoyment of their lands.<sup>33</sup> Recently, the Government of Nicaragua passed legislation regarding the demarcation and titling of indigenous lands. This new law further recognizes the governance authority of local Indian communities over their lands, territories and resources along the Atlantic Coast.<sup>34</sup> These are specific examples of one form of “sovereignty” as that term is used in modern legal discourse.

26. In New Zealand, the concept of sovereignty as applied to the indigenous Maori peoples is a part of the accepted legal framework of the State. The Treaty of Waitangi between the British Crown and Maori is regarded as the foundational document of New Zealand, and this treaty explicitly and implicitly testifies to the sovereignty of Maori.<sup>35</sup> The concept of Maori sovereignty is known by a Maori term, *tino rangatiratanga*. Though the term and its application are often debated there, the meaning can be roughly given as “chiefly authority”. This is another example of a form of sovereignty on the part of indigenous peoples that is recognized and operative within a State.

27. In Canada and in many other countries, indigenous self-government is provided for, in the case of Canada by the Indian Act,<sup>36</sup> including various degrees of control over natural resources. Such regimes of control over resources by indigenous governance institutions provide many more examples of various forms of indigenous sovereignty over natural resources within sovereign States.

28. Finally, the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169), now ratified by 17 countries, contains important provisions for control over natural resources by indigenous peoples in their collective capacity as peoples.<sup>37</sup> In particular, article 15 provides for the rights of “peoples” to their natural resources. Paragraph 1 reads as follows:

“1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”

This limited guarantee of control and management authority on the part of indigenous and tribal peoples within States is another form of sovereignty as that term is now understood. This authority is further recognized in article 7, which guarantees, among other things:

“1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”

29. Articles 2, 4, 5 and 6 also refer to the “institutions” and “representative institutions” of indigenous and tribal peoples. This further reinforces the understanding that indigenous and tribal peoples within States ratifying Convention No. 169 enjoy at least limited forms of sovereignty or management authority.

30. Thus, we may conclude that the term “sovereignty” may be used in reference to indigenous peoples without in the least diminishing or contradicting the “sovereignty” of the State. The well-established use of the term in many areas of the world rules out any such implication.

31. Finally, it is useful to bear in mind that this study has the purpose of examining the application or relevance of the established principle of permanent sovereignty over natural resources to indigenous peoples. It would create conceptual and definitional problems to remove the concept of “sovereignty” from the long-established principle of permanent sovereignty over natural resources. For this reason, the Special Rapporteur would suggest that as laws, mechanisms and measures are developed to address this issue, States and indigenous peoples should concern themselves less with what the right might be named, and more with whether indigenous peoples’ ownership of and governing authority over all their natural resources are adequately recognized and protected.

32. With an understanding of how the concept of sovereignty is applied to indigenous peoples, it becomes further apparent that, when examining their right of self-determination, the principle of permanent sovereignty over natural resources should also apply to indigenous peoples. There are a number of reasons for this. They include the following:

(a) Indigenous peoples are colonized peoples in the economic, political and historical sense;

(b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;

(c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;

(d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this; and

(e) The natural resources originally belonged to the indigenous peoples concerned and were not, in most situations, freely and fairly given up.

33. The recently published independent study for the World Bank, the *Extractive Industries Review*,<sup>38</sup> gave detailed attention to the matter of indigenous peoples’ rights to natural resources and reached a number of important conclusions relevant to this study. The crucial importance of natural resources to indigenous peoples was one such conclusion:

“For indigenous peoples, secure, effective, collective ownership rights over the lands, territories, and resources they have traditionally owned or otherwise occupied and used are fundamental to economic and social development, to physical and cultural integrity, to livelihoods and sustenance. Secure rights to own and control lands, territories, and resources are also essential for the maintenance of the worldviews and spirituality of indigenous peoples - in short, to their very survival as viable territorial communities.

Without secure and enforceable property rights, indigenous peoples' means of subsistence are permanently threatened. Loss or degradation of land and resources results in deprivation of the basics required to sustain life and to maintain an adequate standard of living. Failure to recognize and respect these rights undermines efforts to alleviate indigenous peoples' poverty and to achieve sustainable development."<sup>39</sup>

34. Other important reasons for recognizing and respecting indigenous resource rights were also identified:

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

"Indeed, increased extractive activities on indigenous peoples' traditional lands, territories, and resources without guarantees for their rights often create public disorder, health concerns, political and social instability, and legal uncertainty."<sup>40</sup>

35. Further reasons for applying a principle such as that of permanent sovereignty over natural resources were also identified, and attention was called to the importance of recognizing the authority of indigenous peoples to grant or withhold their consent to resettlement:

"Involuntary resettlement of indigenous peoples should be strictly prohibited. Resettlement should only be allowed if the indigenous community has given free, prior and informed consent, there are guarantees of a right to return once the reason for resettlement ceases to exist, and subsequent to agreement on resettlement benefits. Moreover, the WBG [World Bank Group] should not support extractive industry projects that affect indigenous peoples without prior recognition of and effective guarantees for indigenous peoples' rights to own, control, and manage their lands, territories, and resources."<sup>41</sup>

36. The unfairness and adverse impacts of the misappropriation of indigenous peoples' genetic and other biological resources, sometimes termed "biopiracy", were described in materials submitted by two indigenous organizations. The inadequacy and unfairness in present legal regimes regarding bioprospecting, patents, and other intellectual property laws have deprived indigenous peoples of valuable economic resources and have resulted in damage to indigenous cultures as well.<sup>42</sup>

37. In certain countries, such as Canada and the United States, some or all indigenous resources are held and managed by the State under a system of trusteeship. Submissions by indigenous groups have documented charges of mismanagement and abuses of these systems of trusteeship.<sup>43</sup> Such systems of trusteeship are reminiscent of abuses that were typical of overseas colonies in the past century.<sup>44</sup>

### III. NATURE AND SCOPE OF THE RIGHT OF INDIGENOUS PEOPLES TO OWN, USE, CONTROL, AND MANAGE THEIR LANDS, TERRITORIES, AND RESOURCES

38. The analysis of relevant international law (see annex II) shows that there have been substantial developments in international law and State practice with respect to the rights of indigenous peoples to own, use, control, and manage their lands, territories, and resources. Moreover, every year new norms, jurisprudence, and policies are being considered and articulated at both the international and domestic levels. In most instances, these developments reflect greater recognition of indigenous peoples' rights to authority over their lands, territories, and resources and to their own decision-making power regarding their use and development. Logically arising from these property rights, as well as their right to self-determination and the right to development, there is also an increased recognition of indigenous peoples' right to give or withhold their prior and informed consent to activities within their lands and territories and to activities that may affect their lands, territories, and resources.<sup>45</sup>

39. To recapitulate, the developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories. It remains to state if possible the content and scope of this right as well as its possible limitations.

40. Indigenous peoples' permanent sovereignty over natural resources might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.

41. What are these interests? In general, these are ownership interests, including all the normal incidents of ownership. The interests involved may vary depending on the particular circumstances, but in general these would be the interests normally associated with ownership: the right to use or conserve the resources, the right to manage and to control access to the resources, the right to freely dispose of or sell the resources, and related interests. It may be that in some situations, an indigenous people's interest may be something less than full ownership, such as a right of use, or a right of hunting and fishing, or a shared right to use a resource.

42. What are indigenous peoples' natural resources? In general these are the natural resources belonging to indigenous peoples in the sense that an indigenous people has historically held or enjoyed the incidents of ownership, that is, use, possession, control, right of disposition, and so forth. These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories. There appears to be widespread understanding that natural resources located *on* indigenous lands or territories, resources such as timber, water, flora and fauna, belong to the indigenous peoples that own the land or territory. For example, the *Awás Tingni* case decided by the Inter-American Court of Human Rights was fundamentally a case about the right of an indigenous people to own and protect the timber resources on their land, and there was no doubt that the obligation of the State to respect and demarcate the land embraced the obligation to respect the indigenous ownership of the timber resources on the

land as well. The *Maya Indigenous Communities* case discussed above also was a case aimed at preventing the State's granting of concessions for timber (among other resources) on the Maya lands in southern Belize. The Commission found that the State was obligated by the American Declaration of the Rights and Duties of Man to refrain from granting timber and mineral concessions on land until the Maya lands were recognized and demarcated. ILO Convention No. 169, article 15, provides for indigenous rights to surface resources although to a more limited extent. The land where the resources are located may be land or territory owned by an indigenous people by reason of historic right pre-dating the State, or it may be land acquired in more recent times by purchase, grant, or otherwise. The international law and jurisprudence that has developed in the *Awás Tingni* case, in the *Maya Indigenous Communities* case, in Convention No. 169, and elsewhere, is the law that must be applied by States to determine what land and territories, and therefore what resources, belong to indigenous peoples.

43. There is not such agreement concerning subsurface resources despite the fact that several domestic and international cases have recognized such a right.<sup>46</sup> Indeed, as noted above, in many countries, subsurface resources are declared by law to be the property of the State. Such legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State. Other property owners in the State never owned such resources and thus were never deprived of them. Thus, the system of State ownership of subsurface resources is distinctly discriminatory in its operation as regards indigenous peoples. The result of these legal regimes is to transfer ownership of indigenous peoples' resources to the State itself. Of course, in some situations, the ownership of the resources in question was transferred freely and lawfully by the indigenous people who held it. These situations do not concern us here. However, as a general matter it is clear that indigenous peoples were not participants in the process of adopting State constitutions and cannot be said to have consented to the transfer of their subsurface resources to the State. The exclusion of indigenous peoples from constitution-making has been noted by this Special Rapporteur in a previous work.<sup>47</sup>

44. As noted above, the recent decision of the Constitutional Court of South Africa in *Alexkor Limited and the Government of South Africa v. The Richtersveld Community and Others* is very useful for its legal reasoning on the question of an indigenous people's ownership of subsurface resources, in this case diamonds. The Court ruled that ownership of the subsurface resources was vested in the indigenous community not only because such ownership was established by the indigenous law of the community, but also because the resources could not have belonged to anyone else, if they did not belong to the indigenous community.

45. The legal reasoning of the Constitutional Court of South Africa in *Richtersveld* on the question of indigenous ownership of the subsurface resources is logically and legally sound, and it is just in its result. Though situations and historical events relevant to indigenous ownership of subsurface resources are quite varied around the world, it is the judgement of this Special Rapporteur that this reasoning and this outcome are appropriate in the great majority of situations and States. To be sure, it is necessary to make a particularized inquiry in each situation to determine if the resources in question are or were owned by the particular indigenous

people and whether those resources may have been fairly and lawfully transferred by the indigenous people. Nevertheless, in the great majority of situations, the indigenous peoples must be regarded as owning the subsurface resources pertaining to their lands and territories.

46. What is meant by “permanent sovereignty”? As discussed above, this term is one that was created in the context of decolonization and referred to the rights and powers of former colonies that were becoming independent States. Of course, all States have this authority. When this term is used in reference to indigenous peoples within States, it does not, of course, imply that the indigenous peoples have the status of independent States. The principle of territorial integrity is to be respected. As discussed earlier, the term sovereignty is not limited to independent States, and is widely used in reference to various governing authorities within States, without in any way diminishing the sovereign status of the State. It is in this sense that the term “sovereignty” is used here. The term refers to the right to manage, govern, or regulate the use of the resources by the indigenous people itself, by individuals, or by others.

47. This authority or “sovereignty” is said to be “permanent” because it is intended to refer to an inalienable human right of indigenous peoples. As discussed earlier, this right arises out of the right of self-determination, the right to own property, the right to exist as a people, and the right to be free from discrimination, among other rights, all of which are inalienable. The word “permanent” is also intended to emphasize particularly that indigenous peoples are not to be deprived of their resources as a consequence of unequal or oppressive arrangements, contracts or concessions, especially those that are characterized by fraud, duress, unfair bargaining conditions, lack of mutual understanding, and the like. This is not to say that the indigenous people that own the resources can never sell or dispose of them. Rather it is to say that the indigenous peoples have the permanent right to own and control their resources so long as they wish, free from economic, legal, and political oppression or unfairness of any kind, including the often unequal and unjust conditions of the private marketplace. The urgency and the difficulty of guarding against such unjust conditions and protecting indigenous peoples’ ownership of resources that are coveted by others call for the creation of international mechanisms and bodies capable of preventing the unjust loss of indigenous resources. This is discussed elsewhere in this paper.

48. Are there any qualifications or limitations on this right? Few if any rights are absolute. Limitations, if any, on this right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the State. For example, article 4 of the International Covenant on Civil and Political Rights provides for limitations on some rights only “in time of public emergency which threatens the life of the nation and which is officially proclaimed”. Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people. The principal question is whether under any circumstances a State should exercise the State’s powers of eminent domain to take natural resources from an indigenous people for public use while providing fair and just compensation. Indigenous peoples’ representatives have argued in the working group on the draft United Nations declaration of the Commission on Human Rights that States should never compulsorily take indigenous lands or resources even with payment of compensation.<sup>48</sup> States already have taken far too much of indigenous lands and resources, and, it is argued, States rarely or never have a truly urgent or compelling need to take indigenous lands or resources. States have not yet provided comments

or suggestions for this paper that relate to this critical issue. As a result it may be premature to reach a conclusion on the question of States' authority to compulsorily take indigenous resources with fair and just compensation.

49. Whether or not State authority exists that limits indigenous resource rights, one principle is clear: all State authority over resources, even resources the State clearly owns, must be exercised in a manner consistent with the human rights of indigenous peoples. In its *Ogoni* decision, the African Commission on Human and Peoples' Rights found that the Government of Nigeria had violated the collective human rights of the Ogoni people through activities associated with the development of oil resources belonging to the State.<sup>49</sup> The African Commission found that the African Charter of Human and Peoples' Rights requires that States exercise their powers and rights in a manner that protects and respects the human rights of peoples, in this case the local Ogoni people (see paras. 54-58 of the decision). Although the State admittedly had the right to produce oil, the "destructive" and "repressive" actions of the military government along with the lack of material benefits to the local Ogoni population constituted a violation of (among others) article 21 of the African Charter on Human and Peoples' Rights. Article 21 states in pertinent part:

"1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

"2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

"...

"5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources."

50. The principle of this case, that even lawful State authority must be exercised in a manner that protects and respects human rights, is a general and widely understood principle in the field of human rights. Its application in regard to indigenous peoples' rights to natural resources suggests that States' legal authority over lands and resources of indigenous peoples may be sharply limited where these lands and resources are critical to the human rights of the indigenous peoples.

51. The Government of Colombia provided another example of this principle, noting that in Colombia, under its law, exploitation of natural resources on indigenous lands should be done without negatively affecting the cultural, social, and economic integrity of the communities, and that all related decisions should be made with the participation of the representatives of the communities.<sup>50</sup>



#### **IV. PRINCIPAL CONCLUSIONS AND BASIC RECOMMENDATIONS**

52. Many of the conclusions, recommendations and guiding principles contained in the final working paper on “Indigenous peoples and their relationship to land” (E/CN.4/Sub.2/2001/21) are relevant (see annex I). This section contains the conclusions and recommendations resulting from the present study of indigenous peoples’ permanent sovereignty over natural resources.

##### **A. Principal conclusions**

53. Since the completion of the final working paper, international law has developed substantially concerning the legal obligations of States to recognize, demarcate and title indigenous peoples’ rights to lands and associated resources. Legal standards now exist in international law that direct or guide States in determining what lands, territories, and resources belong to indigenous peoples.

54. As a general matter, in the absence of any prior, fair and lawful disposition of the resources, indigenous peoples are the owners of the natural resources on or under their lands and territories. In the case of shared lands and territories, a particularized inquiry is necessary to determine the extent and character of the indigenous ownership interests.

55. Though indigenous peoples’ permanent sovereignty over natural resources has not been explicitly recognized in international legal instruments, this right may now be said to exist. That is, the Special Rapporteur concludes that the right exists in international law by reason of the positive recognition of a broad range of human rights held by indigenous peoples, most notably the right to own property, the right of ownership of the lands they historically or traditionally use and occupy, the rights to self-determination and autonomy, the right to development, the right to be free from discrimination, and a host of other human rights.

56. The right of indigenous peoples to permanent sovereignty over natural resources may be articulated as follows: it is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.

57. The right of permanent sovereignty over natural resources is critical to the future well-being, the alleviation of poverty, the physical and cultural survival, and the social and economic development of indigenous peoples.

58. Indigenous peoples, if deprived of the natural resources pertaining to their lands and territories, would be deprived of meaningful economic and political self-determination, self-development, and, in many situations, would be effectively deprived of their cultures and the enjoyment of other human rights by reason of extreme poverty and lack of access to their means of subsistence.

59. **Laws and legal systems that arbitrarily declare that resources which once belonged to indigenous peoples are now the property of the State are discriminatory against the indigenous peoples, whose ownership of the resources predates the State, and are thus contrary to international law.**

60. **State laws and policies that arbitrarily deny or limit indigenous peoples' interests in the natural resources pertaining to their lands appear to be vestiges of colonialism that ought to be abandoned.**

61. **States' powers to take resources for public purposes (with compensation) must be exercised, if at all, in a manner that fully respects and protects all the human rights of indigenous peoples. In the generality of situations, this would appear to mean that States may not take indigenous resources, even with fair compensation, because to do so could destroy the future existence of the indigenous culture and society and possibly deprive it of its means of subsistence.**

62. **Laws and policies affecting natural resources pertaining to indigenous lands and territories are varied and complex, reflecting the various circumstances and situations in each State and the indigenous peoples living within it. Accordingly, achieving respect for indigenous peoples' permanent sovereignty over natural resources will require a wide range of possible measures appropriate to the particular needs and circumstances of indigenous peoples and States in many highly diverse situations.**

63. **New mechanisms and measures are needed at the international level, at least on an interim basis, to assist States in their efforts and to encourage, monitor, and examine their progress in implementing indigenous peoples' permanent sovereignty over natural resources.**

64. **Further study is needed of legal and practical measures that may be useful for resolving issues of ownership and control over natural resources, especially subsurface resources, which are owned or claimed by indigenous peoples.**

65. **Conditions of grossly unequal bargaining power can result in unjust transactions between indigenous peoples and others and may result in exploitation of resources in a manner very harmful to the indigenous people concerned. Accordingly, mechanisms and measures at the international level are particularly needed to assure that oppressive, fraudulent, and other unjust arrangements are avoided, consistent with the freedom of indigenous peoples to manage and develop their own resources.**

66. **Further study is needed of possible measures that can effectively protect against oppressive and unjust transactions concerning indigenous peoples' natural resources, without diminishing indigenous peoples' rights to use and govern their lands, territories, and resources.**

## **B. Basic recommendations**

67. **In consultation with indigenous peoples, States must amend their laws and constitutions and take all necessary legislative and administrative measures to assure that indigenous peoples enjoy ownership of and benefits from the natural resources on or under or otherwise pertaining to the lands they historically occupy and use.**
68. **As concern has been expressed about the use of the term “sovereignty”, the Special Rapporteur suggests that in the development of these laws and measures parties should concern themselves less with what the right might be named, and more with whether the language employed fully protects the rights of indigenous peoples over their natural resources.**
69. **States must also recognize the authority of indigenous peoples to manage, conserve, and develop their resources according to their own institutions and laws.**
70. **In situations where indigenous peoples, for valid legal reasons, do not own or control the natural resources pertaining to all or a part of their lands or territories, the indigenous peoples concerned must nevertheless share in the benefits from the development or use of these resources without any discrimination and must be fairly compensated for any damage that may result from development or use of the resources.**
71. **The draft United Nations declaration on the rights of indigenous peoples should be amended to include express recognition of indigenous peoples’ permanent sovereignty over natural resources. At a minimum, articles 25 and 26 of the draft should include an express reference to subsurface resources and should include additional language that protects aboriginal property rights as well as rights to lands, territories and resources otherwise occupied, used, or lawfully acquired by indigenous peoples. The Organization of American States should consider whether such an express recognition would be appropriate in the draft American declaration on the rights of indigenous peoples.**
72. **Consistent with the findings and recommendations of the World Bank’s independent Extractive Industries Review, multilateral development banks should take a clear position on upholding and supporting the human rights of indigenous peoples in relation to the extractive industry sector and should abstain from supporting extractive industry projects that affect indigenous peoples without prior recognition of and effective guarantees for indigenous peoples’ rights to own, control, and manage their lands, territories, and resources.**
73. **The Sub-Commission should recommend to its parent body the creation of an ad hoc committee with the task of studying, implementing and promoting indigenous peoples’ permanent sovereignty over natural resources, and mandated to encourage and monitor the progress of States in recognizing and implementing this right. This committee should be given the necessary resources to assist States and indigenous peoples to reach constructive arrangements to resolve disputes or problems concerning natural resources. The mandate and structure of such a committee should be studied by the Sub-Commission in full consultation with indigenous peoples in order to develop a complete plan for such a committee.**

**74. The Permanent Forum on Indigenous Issues should give regular attention to indigenous peoples' permanent sovereignty over natural resources and to the steps taken by United Nations bodies, programmes, funds and agencies to implement and protect this right.**

**75. The Secretariat should be requested to convene an expert seminar in order to give further attention to the many matters in this study that have been noted as needing further research and consideration.**

**76. Because so few responses have been received from States, the Sub-Commission should request the Special Rapporteur to prepare an updated and consolidated study to be submitted to the fifty-seventh session of the Sub-Commission in 2005 giving particular attention to the views of States, indigenous peoples and non-governmental organizations in regard to indigenous peoples' permanent sovereignty over natural resources.**

**77. In addition, States should take all necessary domestic and international measures to carry out the recommendations and consider the conclusions and guiding principles previously articulated in the Special Rapporteur's final working paper on indigenous peoples and their relationship to land. These include, but are not limited to those restated in annex I contained in the addendum to this document.**

#### Notes

<sup>1</sup> For a thoughtful description of the negative impacts on indigenous peoples so often caused by extractive industry projects, see generally, *Striking a Better Balance*, Volume 1, Final Report of the World Bank Independent Extractive Industries Review (15 January 2004). In describing the resulting violations of indigenous rights to their lands, territories, and resources, threats to their means of subsistence, the devastating effects of forced resettlement, the fostering of "public disorder, health concerns, political and social instability, legal uncertainty", and more (p. 41), the report concludes that the failure to respect the human rights of indigenous peoples in the context of extractive industries seriously undermines any underlying efforts to reduce poverty or achieve sustainable development (pp. 4-6, 18-23, 36-46, 50, 60).

<sup>2</sup> As one scholar wrote: "The principle was originally articulated in response to the perception that during the colonial period inequitable and onerous arrangements, mainly 'concessions', had been imposed upon unwary and vulnerable governments." Hossain, Kamal and Chowdhury, Subrata Roy, *Permanent Sovereignty Over Natural Resources in International Law*, St. Martin's Press, p. IX (1984). See also *United Nations Action in the Field of Human Rights*, United Nations, Centre for Human Rights, pp. 262-263 (Geneva 1994) (noting that General Assembly resolution 3171 (XXVIII) of 17 December 1973 "resolutely supported the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their *struggle to regain effective control over their natural resources ...*") (emphasis added).

<sup>3</sup> Declaration on the Right to Development, General Assembly resolution 41/128 of 4 December 1986.

<sup>4</sup> Like many of the United Nations resolutions regarding permanent sovereignty over natural resources, these earlier resolutions focused on the need for international economic cooperation and relations between developed and underdeveloped countries. See General Assembly resolution 523 (VI) of 12 January 1952, “Integrated economic development and commercial agreements” (noting that “*underdeveloped countries* have the right to determine freely the use of their natural resources ...” and making several recommendations to foster commercial agreements with these countries to assist them in developing their resources for both domestic use and international trade) (emphasis added); General Assembly resolution 626 (VIII) of 21 December 1952, “Right to exploit freely natural wealth and resources” (recognizing the rights of “*peoples*” and all United Nations “*Member States*” to freely “use and exploit their natural wealth and resources” and calling upon States, in their efforts to assist underdeveloped countries, “to have due regard, consistently, with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations” and to “refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any *State* over its natural resources”) (emphasis added). See also General Assembly resolution 837 (IX) of 14 December 1954, “Recommendations concerning international respect for the right of peoples and nations to self-determination” (recognizing the right of “*peoples and nations* to self-determination, including ... their permanent sovereignty over their natural wealth and resources ...” and recommending “due regard to the rights and duties of States under international law and to the importance of encouraging international cooperation in the economic development of under-developed countries”) (emphasis added).

As evidenced by just the few resolutions mentioned above, over the years the subject of the right to permanent sovereignty over natural resources has not always been consistently identified in United Nations resolutions. At times the right was vested in “underdeveloped countries”, “peoples”, “peoples and nations” and at other times it was more expressly vested in just the “State”. Compare the resolutions cited above with more recent resolutions such as: General Assembly resolution 3281 (XXIX) of 12 December 1974, “Charter of Economic Rights and Duties of States” (concerning the “development of international economic relations on a just and equitable basis”, putting forth the various provisions of the Charter which focus more specifically on the rights of “States”, and affirming in article 2 that: “[e]very *State* has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities”) (emphasis added). See also General Assembly resolution 3202 (S-VI) of 1 May 1974, “Programme of Action on the Establishment of a New Economic Order” (referring in Part VII (1) (b) to the right of “*developing countries*” to “their inalienable right to permanent sovereignty over natural resources”) (emphasis added); General Assembly resolution 38/144 of 19 December 1983 “Permanent Sovereignty over natural resources in the occupied Palestinian and other Arab territories (emphasizing “the right of the Palestinian and other Arab *peoples* whose territories are under Israeli occupation to full and effective permanent sovereignty and control over their natural and all other resources, wealth and economic activities”) (emphasis added); General Assembly resolution 41/128 of 4 December 1986, “Declaration on the Right to Development” (affirming in article 1 (2) “the right of *peoples*, which includes, subject to the

relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”) (emphasis added).

<sup>5</sup> The Commission was established by General Assembly resolution 1314 (VI) of 12 December 1958, “Recommendations concerning international respect for the right of peoples and nations to self-determination”, was composed of nine member States, and was instructed to include recommendations “where necessary” for the “strengthening” of permanent sovereignty over natural resources. While the Commission no longer exists, there is currently a Special Committee on Decolonization, otherwise known as “Special Committee of 24” that still addresses similar matters with respect to the right of peoples to self-determination in non-self-governing territories. See General Assembly resolution 1654 (XVI) of 27 November 1961 (establishing the Committee) and [www.un.org/Depts/dpi/decolonization/main.htm](http://www.un.org/Depts/dpi/decolonization/main.htm).

<sup>6</sup> United Nations document A/6545, at p. 18, paras. 95-101 (1966) (discussing the introduction of article 25 to the draft International Covenant on Economic, Social, and Cultural Rights).

<sup>7</sup> Allan Rosas, “The Right of Self-Determination”, in *Economic, Social and Cultural Rights*, A. Eide, C. Krause, A. Rosas (eds.), Martinus Nijhoff, p. 84 (1995).

<sup>8</sup> United Nations Document A/6545, op. cit., para. 98 (observing that the Covenant should not condone “treaties allowing for such exploitation ... concluded under duress or other inadmissible conditions”). See also Matthew C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development*, Clarendon Press, p. 147 (1995).

<sup>9</sup> See Nico Schrijver, *Sovereignty over Natural Resources*, Cambridge University Press, Appendix I “United Nations resolutions and other decisions” (1997) (providing a list of resolutions and decisions addressing permanent sovereignty over natural resources adopted within the United Nations system from 1952 to 1990). See also resolutions, supra note 4.

<sup>10</sup> See e.g. African Charter on Human and Peoples’ Rights, art. 21, adopted 27 June 1981, entered into force 21 October 1986; Convention on Biological Diversity, art. 3 (5 June 1992); Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment) (A/CONF.48/14), principle 21 (16 June 1972); Framework Convention on Climate Change, preamble, para. 8 (9 May 1992); Rio Declaration (A/CONF.151/26) (vol. I), principle 2 (12 August 1992); Vienna Convention on the Succession of States in Respect of Treaties (A/CONF.80/31), art. 13 (22 August 1978), as corrected by A/CONF.80/31/Corr.2 (27 October 1978), entered into force 6 November 1996. See annex IV for text of provisions cited in this endnote.

<sup>11</sup> See “Draft international covenant on human rights; annotation”, report of the Secretary-General (A/2929), paras. 19-21 (1 July 1955); “Draft international covenants on human rights”, report of the Third Committee (A/3077), paras. 44-51, 57-77 (8 December, 1955); *United Nations Action in the Field of Human Rights*, supra note 2, pp. 262-263, para. 2173. See generally, Schrijver, supra note 9, pp. 4-7.

<sup>12</sup> A/2929, *ibid.*, paras. 19-21.

<sup>13</sup> At this time in the drafting, article 1 (3) read “The right of peoples to self-determination shall also include permanent sovereignty over natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the ground of any rights that may be claimed by other States.” *Ibid.*, para. 19.

<sup>14</sup> Approved by the Sub-Commission for the Prevention of Discrimination and Protection of Minorities in its resolution 1994/45. The most relevant articles are cited in annex IV and include those which affirm the rights of indigenous peoples to own, develop, control, use, protect and conserve their lands, territories and resources, as well as their right to self-determination.

<sup>15</sup> Approved by the Inter-American Commission on Human Rights (26 February 1997). It should be noted that for purposes of this paper, the Special Rapporteur shall make reference to the Draft American declaration as adopted by the Inter-American Commission. However, she is aware that in the last two years, the former Chair of the OAS Working Group to Elaborate the Draft American Declaration has developed another working draft, often referred to as the “Consolidated Text” of the Chair. See OEA/Ser.K/XVI, GT/DADIN/doc.139/03 (17 June 2003). Because of its prominence in ongoing State and indigenous peoples’ discussions, the relevant provisions of this Consolidated Text are included in the annex.

<sup>16</sup> See, for example, the discussion in A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1994) pp. 348-364.

<sup>17</sup> During the fifty-fifth session of the Sub-Commission, it was expressed that the term implies the exercise of exclusive authority. This was echoed to a certain extent by a communication received from the Movimiento Indígena en Jujuy, a member of the Consejo Indio de Sud América. In its submission the organization offered a number of reasons why the right at issue might be better expressed as “the right of indigenous peoples to the full and permanent authority to manage and use their natural resources” (*unofficial translation*).

<sup>18</sup> Janeth Warden-Fernandez, “The Permanent Sovereignty Over Natural Resources: How It Has Been Accommodated Within the Evolving Economy”, art. 4, *CEPMLP Annual Review* (2000).

<sup>19</sup> Emmerich de Vattel, *The Law of Nations*, American ed. (1805), Bk. I, Ch. 1, p. 60.

<sup>20</sup> This subject is discussed at length in Antonio Cassese’s *International Law* (2001) at pp. 91 ff.

<sup>21</sup> This is evidenced by the various international agreements between States that provide for joint use of natural resources and address matters such as transboundary resource use, transboundary pollution, conservation and sustainable development. See Treaty of Rome of the European Union, article 1, *Common Market Law Reports* 1992, Titles XVI and XVII (25 March 1957), entry into force 1 January 1958 (creating the European Economic Community and stressing, among other things, “harmonization” among Member States, development cooperation, and “prudent and rational utilization of natural resources”, and providing that “[e]nvironmental

protection requirements” of States be “integrated into the definition and implementation of other Community policies”); Agreement between the Government of the United States of America and the Government of Canada on Air Quality, 30 I.L.M. 678, arts. III and IV (31 March 1991) (aimed at controlling transboundary air pollution and requiring the States parties to undertake environmental assessments, prior notification, consultation, and as appropriate, mitigation measures when any proposed actions, activities or projects within their jurisdiction would likely cause significant transboundary air pollution); Convention on the Protection and Use of Transboundary Water Courses and International Lakes (Water Convention) <http://www.unece.org/env/water/text/text.htm>, Helsinki (17 March 1992), entered into force 6 October 1996 (signed by 35 States and calling for various levels of cooperation in regard to the use and protection of transboundary waters through the elaboration of agreements, cooperative exchanges, joint research, development and monitoring, consultation, mutual assistance, and the reduction of adverse impacts from activities arising from within the jurisdiction of the parties); Vienna Convention for the Protection of the Ozone Layer, 26 I.L.M. 516 (1987) (recognizing in the preamble the right of States to “exploit their own resources”, yet observing that “international cooperation and action” would be needed to protect the ozone, and calling upon States to take appropriate measures to avoid human activities which would modify the ozone and to engage in various cooperative international activities such as information exchanges and joint scientific research and study); Antarctic Treaty, [http://www.scar.org/Treaty/Treaty\\_Text.htm](http://www.scar.org/Treaty/Treaty_Text.htm) (31 December 1995) (allowing the 43 Antarctic Treaty nations to jointly use - for peaceful means - the resources of the Antarctic for purposes of scientific investigations and conservation).

<sup>22</sup> 31 U.S. (6 Pet.) 515 (1832)

<sup>23</sup> Ibid., pp. 519, 559-561.

<sup>24</sup> Ibid., p. 520.

<sup>25</sup> Ibid.

<sup>26</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>27</sup> Ibid., p. 16.

<sup>28</sup> Ibid., p. 20.

<sup>29</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

<sup>30</sup> Judgement of the Inter-American Court of Human Rights in the *Case of the Mayagna (Sumo) Community of Awas Tingni v. the Republic of Nicaragua*, IACHR, Series C, No. 79 (31 August 2001).

<sup>31</sup> Ibid., para. 159.

<sup>32</sup> Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, Law No. 28, *Gaceta Oficial* No. 238 (30 October 1987).



<sup>33</sup> Political Constitution of Nicaragua (1987), reformed in 1995 and 2000, arts. 5, 89, 180, <http://www.georgetown.edu/pdba/Constitutions/Nica/nica95.html>.

<sup>34</sup> See generally Law 445 (*Ley del Régimen de la Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica y de los Ríos Coco, Bocay, Indio y Maíz*), published in *La Gaceta Diario Oficial*, No. 16 (23 January 2003).

<sup>35</sup> Treaty of Waitangi (6 February 1840), <http://www.govt.nz/en/aboutnz/?id=a32f7d70e71e9632aad1016cb343f900>.

<sup>36</sup> Indian Act (R.S. 1985, c. I-5), at <http://laws.justice.gc.ca/en/I-5/>.

<sup>37</sup> Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, entry into force 5 September 1991. The countries which have ratified the Convention are: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, the Netherlands, Norway, Paraguay, Peru and Venezuela.

<sup>38</sup> *Striking a Better Balance*, op. cit.

<sup>39</sup> Ibid., p. 40.

<sup>40</sup> Ibid., p. 41.

<sup>41</sup> Ibid., p. 60.

<sup>42</sup> “The Right of Indigenous Peoples to Permanent Sovereignty Over Genetic Resources and Associated Indigenous Knowledge”, paper submitted by Na Koa Ikaika a Ka Lahui Hawai’i and Indigenous Peoples Council on Biocolonialism.

<sup>43</sup> Copies of legal papers submitted by the Ermineskin Band and Nation provide one example of alleged mismanagement of trust responsibilities by Canada. In the United States, long-running litigation against the Government charging mismanagement of Indian trust funds, such as *Cobell v. Norton*, provides another example of problems relating to systems of trusteeship. *Cobell v. Norton*, U.S. District Court, Washington, D.C.

<sup>44</sup> A resolution of the International Conference on Conflict Resolution, Peace-Building, Sustainable Development and Indigenous Peoples (Manila, 6-8 December 2000) provides another statement of the destructive effect of the lack of legal protection for indigenous natural resources.

<sup>45</sup> A member of the Sub-Commission, Mr. Yozo Yakota, at the fifty-fifth session, on 12 August 2003, pointed out the need for the free, prior, informed consent of indigenous peoples for development projects affecting their lives, environment, and other interests. In her final report, “Protection of the heritage of indigenous peoples”, this Special Rapporteur called for the free, prior and informed consent of indigenous peoples in the context of a number of

“principles and guidelines” regarding indigenous heritage (E/CN.4/Sub.2/1995/26, annex, paras. 9, 26, 28, 35, 46) (21 June 1995). Free, prior and informed consent, or variations thereon, can also be seen articulated in the following: ILO Convention No. 169, articles 6 and 15 (referring to obligation of States to consult with indigenous peoples on measures which “may affect them directly”, including where States retain rights over resources, and a clarification that such consultations should be carried out “with the objective of achieving agreement or consent”); Inter-American Commission Report No. 27/98 (finding violation of right to property where Nicaragua granted logging concessions on indigenous lands without the consent of the community); *Case of Maya Indigenous Community*, para. 152 (finding violation of right to property when State granted logging and oil concessions to third parties within indigenous lands “without effective consultation with and the informed consent of the Maya people”); CERD general recommendation XXIII (51), para. 5 (calling upon States to take steps to return “their lands and territories traditionally owned or otherwise inhabited or used” when they have been taken “without their free and informed consent”); Report of the World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, London: Earthscan, p. 112 (2000); *Striking a Better Balance*, p. 50 (“The WBG should ensure that borrowers and clients engage in consent processes with indigenous peoples and local communities directly affected by oil, gas, and mining projects, to obtain their free prior and informed consent. For indigenous peoples, this is an internationally guaranteed right ... .”); Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/38/Rev.2), sect. 10 (c) (2003) (providing that “[T]ransnational corporations and other business enterprises shall respect the rights of local communities affected by their activities ... respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources ... [and] respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects”).

<sup>46</sup> See discussions regarding *Maya Indigenous Communities; Delgamuukw; Ogoni*, and *Alexkor Ltd.*

<sup>47</sup> Erica-Irene A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination”, 3 *Transnational Law and Contemporary Problems* 1 (1993).

<sup>48</sup> See the report of the Working Group (E/CN.4/2004/81) (7 January 2004).

<sup>49</sup> Communication No. 155/96.

<sup>50</sup> Letter to the Office of the High Commissioner for Human Rights, 8 January 2004.

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