



Information on recent activities of the Office of the High Commissioner for Human Rights related to the rights of indigenous peoples

Contribution of OHCHR's Indigenous Peoples and Minorities Section to the Eleventh session of the UN Permanent Forum on Indigenous Issues

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I. INTRODUCTION

The promotion and protection of indigenous peoples' rights remains a key priority of the Office of the High Commissioner for Human Rights. The UN Declaration on the Rights of Indigenous Peoples (UN Declaration) serves as OHCHR's framework for action to further the advancement and protection of indigenous peoples' rights. The Office contributes to the promotion and implementation of this key instrument, along with relevant recommendations, comments and observations of UN human Rights treaty bodies, and Special Procedures. The Indigenous Peoples and Minorities Section is developing a number of initiatives to facilitate the implementation of these instruments and recommendations of the UN mechanisms, with a particular focus on country and regional activities.

This report highlights major activities on indigenous issues carried out by OHCHR since the Tenth Session of the UN Permanent Forum on Indigenous Issues in May 2011. It also responds to the request of the Under Secretary General of the UN Department for Economic and Social Affairs to provide information on follow up to recommendations of the Permanent Forum. It is important to note, however, that this report is by no means exhaustive, and there are a range of additional initiatives that OHCHR field presences have pursued to advance the implementation of the rights of indigenous peoples which are available in the Report of the UN High Commissioner on the rights of indigenous peoples to the United Nations Human Rights Council (A/HRC/18/26).

II. ACTIVITIES CARRIED OUT BY OHCHR SINCE THE TENTH SESSION OF THE PERMANENT FORUM

At the international level, OHCHR continued to service the Expert Mechanism on the Rights of Indigenous Peoples by, inter alia, supporting the preparation and organization of the 4th Session of the Expert Mechanism from 11-15 July 2011. The new composition of the Expert Mechanism consists of Vital Bambanze, Anastasia Chukhman, Jannie Lasimbang, Jose Carlos Morales Morales, and Wilton Littlechild. The session was opened by the High Commissioner and followed by opening remarks from the President

of the Human Rights Council. The Expert Mechanism held discussions on the follow up to its first study on education, and the finalisation of its study on indigenous peoples and the right to participate in decision making. The Expert Mechanism also discussed the UN Declaration on the Rights of Indigenous Peoples and the content of the Expert Mechanism's proposals to the Human Rights Council.

Since the last report, the Office continued to manage the United Nations Voluntary Fund for Indigenous Populations to support the participation of indigenous peoples' organizations in the sessions of the Permanent Forum and Expert Mechanism. It provided 30 travel grants for representatives of indigenous communities and organizations to attend the 10th session of the Permanent Forum on Indigenous Issues, and 24 travel grants to attend the Fourth session of the Expert Mechanisms on the Rights of Indigenous Peoples. Following the enlargement of the mandate of the Fund by the General Assembly in November 2010, the Board of Trustees of the Voluntary Fund also set aside funds to enable representatives of indigenous communities and organizations to attend, for up to five days, sessions of the Human Rights Council and treaty bodies taking place between September 2011 and March 2012.

Together with the Secretariat of the UN Permanent Forum on Indigenous Issues, the Office organised a validation meeting on 25-26 October 2011 in New York to review a draft of the Handbook for Parliamentarians on the UN Declaration on the Rights of Indigenous Peoples. The meeting was attended by members of the Advisory Board, and institutional partners (the Inter-Parliamentary Union and UN Development Program). A final version of the handbook is expected by middle of 2012.

A global OHCHR publication on indicators and human rights is also expected in 2012, which will provide a further framework for monitoring the implementation of key rights.

Country engagement and implementation of rights at the national level

The Office has also continued its activities in terms of informing key actors about the work of mechanisms dealing with human rights and indigenous peoples. In her report to the Human Rights Council (A/HRC/18/26), the High Commissioner highlighted OHCHR's engagement at the country level to monitor, promote and protect the human rights of indigenous peoples. The High Commissioner's report also lists various technical cooperation and capacity building activities across OHCHR's country operations. During 2011, the High Commissioner was very vocal in the defense, promotion and protection of indigenous peoples rights in various statements to the UN Human Rights Council. In addition, during her country visits she highlighted indigenous peoples' rights, including in her visit to Australia in May 2011. In her country visits to Chile, Paraguay and Uruguay, the Deputy High Commissioner gathered first-hand information on the human rights situation in the countries, and encouraged authorities at the highest level to include human rights in their policy agendas.

Supporting indigenous and other mandates

In addition to supporting human rights treaty bodies and the Human Rights Council's Universal Periodic Review which often examined issues concerning indigenous peoples, OHCHR continues to support two mandates devoted to the rights of indigenous peoples. It assists: 1) the Special Rapporteur on the rights of indigenous peoples in implementing his mandate, which includes dealing with communications and carrying out country visits; and 2) the Expert Mechanism on the Rights of Indigenous Peoples. Since the last reporting period, the Special Rapporteur issued press releases and statements on Costa Rica, Peru, Bolivia, Norway, and Canada. He undertook a country mission to Argentina from 27 November-7 December 2011 in which he urged Argentina to give high priority to indigenous issues.

In addition, the Office also supported co-operation and interaction between the three UN mandates devoted to indigenous peoples through a coordination meeting around the margins of the Expert Mechanism session. Apart from supporting the indigenous mandates, OHCHR continues to advocate for and advance the rights of indigenous peoples through its thematic work, and provision of information on indigenous peoples' issues to UN treaty bodies and other UN Special Procedures mandates.

Capacity-building with indigenous peoples – fellowships and funds

In order for the UN Declaration to yield concrete results, there is a need to build capacity and expertise at the national level. OHCHR's indigenous fellowship programme is one important tool to building such capacity within civil society. In addition to fellowship programmes in English, French, Spanish and Russian, OHCHR has introduced the position of a Senior Indigenous Fellow as part of its efforts to restructure and improve the programme. The first Senior Fellow joined OHCHR in May 2011 and contributed actively to the work of the Indigenous Peoples and Minority Section for a period of three months.

III. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE UN PERMANENT FORUM ON INDIGENOUS ISSUES

An operational guide for national human rights institutions

Further to the Permanent Forum's recommendation 11 of the Tenth Session that OHCHR and UNDP continue their work in support of national human rights institutions and indigenous peoples, OHCHR has markedly stepped up its engagement with national institutions on indigenous issues, since they play an instrumental role in advancing the implementation of the UN Declaration at the country level.

OHCHR started with a global consultation meeting in Bangkok in 2009, followed by a sub-regional meeting last year in New Zealand/Aotearoa, co-organized with the New Zealand Human Rights Commission. Another consultation was held in Geneva on 11 July 2011 titled "Toward an Operational Guide for National Human Rights Institutions: Possible good practices in addressing the rights of Indigenous Peoples". At the meeting, representatives of NHRIs from Namibia, South Africa, Kenya, Canada, New Zealand, Australia, Philippines, Malaysia, the Russian Federation, Peru, El Salvador and Panama shared examples of advancing the rights of indigenous peoples and discussed the possible content of the operational guide, as well as ways to move the process forward.

OHCHR further partnered with the ILO, UNDP, UNICEF and WHO to explore how NHRIs were advancing the rights of indigenous peoples in Latin America. It

organised a meeting which brought together representatives of the *Defensorias del Pueblo* from Guatemala, Honduras, Nicaragua, Panama, Costa Rica, El Salvador, Mexico, Argentina, Chile, Paraguay, Bolivia, Colombia, Ecuador, Peru and Venezuela. The meeting took place in Santa Cruz de la Sierra in Bolivia from 24 to 28 October 2011 and discussed a range of issues, including health, conflict prevention, indigenous children, and the rights of indigenous peoples under the ILO Convention on Indigenous and Tribal Peoples No. 169 and the UN Declaration. In addition, participants shared real life experiences of the rights contained in ILO 169 and the UN Declaration, as well as practical examples of work that their institutions have undertaken to promote education and awareness raising; complaints handling; mediation and conflict resolution; public inquiries on specific rights; legislative inquiries and law reforms; engagement with international or regional mechanisms; and work in partnerships with indigenous peoples.

OHCHR also shared an advance draft of the Guide currently developed in cooperation with the Asia Pacific Forum of National Human Rights Institutions and the Australian Human Rights Commission. Many useful inputs and comments were received during the meeting and will be reflected in the final version of the Guide.

Land rights

Further to the Permanent Forum's recommendation 20 from its Tenth Session, the Indigenous Peoples and Minorities Section of OHCHR has prepared a compilation of international standards on land and indigenous peoples. This compilation is annexed to the current report with a view to increasing the understanding of various stakeholders on lands, territories and resources. The Office has continued to advocate for the land rights of indigenous peoples across various fora. The issue of consultation and free, prior and informed consent with regards to extractive industries and development projects was specifically addressed in the High Commissioner's 9 August 2011 media statement on the Day of the World's Indigenous People.

Training for UN Country Teams

Further to the Permanent Forum's recommendation 25 from its 10th Session, a representative from the Indigenous Peoples and Minorities Section participated as a

resource person along with ILO and the Secretariat of the Permanent Forum in a training for the UN Country Team in the Republic of Congo on indigenous peoples' issues. The training was organized by UNCT Office – UNICEF and the Secretariat of the UN Permanent Forum on Indigenous Issues in November 2011. This was part of the roll-out of the UNDG Guidelines on indigenous peoples and in response to recommendations made by the UN Special Rapporteur on the rights of indigenous peoples. It focused on recommendations from the international mechanisms, and on a National Action Plan on the Improvement of the Quality of Life of Indigenous Peoples (2009-2013), as well as the recently promulgated Law No.5-2011 to promote and protect the rights of indigenous peoples. The training brought together colleagues from UNICEF, UNDP, UNFPA, OHCHR, UNESCO, FAO, WHO, IOM, UNHCR, UNAIDS, WFP and 16 governmental representatives and parliamentarians and indigenous peoples. Mr. Simon M'Viboudoulou also participated as a member of the Permanent Forum.

Free, prior and informed consent

With regards to recommendation 37 of the UN Permanent Forum, OHCHR provided support to the Expert Mechanism as it continues to build upon its 2011 study on indigenous peoples and the right to participate in decision making in 2012, with a focus on extractive industries. The Expert Mechanism discussed its work in this area during the January 2012 coordination meeting between the three indigenous mandates of the UN and will address the issue further at its 2012 session

United Nations-Indigenous Peoples Partnership (UNIPP)

In line with recommendation 39 of the UN Permanent Forum's Ninth session urging OHCHR, ILO and UNDP to "strengthen their collaborative framework and partnership for the promotion and implementation of indigenous peoples' rights through joint country programs...", OHCHR entered into a Memorandum of Understanding with ILO and UNDP to set the UN-Indigenous Peoples Partnership initiative. In 2011 UNICEF and UNFPA joined the initiative, which was formally launched on 20 May 2011 with support from the United Nations Secretary General and the Deputy Secretary General. The key aim of this initiative is to facilitate the implementation of international

standards on indigenous peoples, in particular the UN Declaration and ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).

Since the launch, the UN partner organisations constituted a Policy Board comprised of indigenous experts, and UN representatives at the Director level. Nominations for indigenous experts were received from the Special Rapporteur on the rights of indigenous peoples, the UN Permanent Forum on Indigenous Issues, and the Expert Mechanism on the Rights of Indigenous Peoples. OHCHR was elected as the Chair on behalf of participating UN organisations and Raja Devasish Roy was elected as co-Chair by the indigenous experts. Other indigenous expert members of the Board who participated in the first and second meetings included Adelfo Regino Montes (Secretary of Indigenous Affairs, Government of Oaxaca, Mexico), and Angela Riley (Director of American Indian Studies Center and Professor of Law at the University of California Los Angeles, and Chief of the Supreme Court of the Citizen Potawatomi Nation, USA).

A number of key decisions were made at the Policy Board meetings. These included: 1) the finalization of the Policy Board Terms of Reference; 2) Strategic Framework covering 2011-2015; 3) resource mobilization strategy; 4) a limited call for proposals; and 5) review and approval of six UN country programs and one regional program for Southeast Asia. During the second Board meeting, a fourth indigenous expert was also selected to represent Africa and youth based on nominations from the UN Permanent Forum and the Expert Mechanism. Ms. Hindou Oumarou Ibrahim from Chad (Coordinator of l'Association des Femmes peuples Autochtones du Tchad (AFPAT) has accepted the invitation as the fourth indigenous expert member.

The following proposals were considered and approved by the Policy Board for a total amount of USD 1.32 million with some recommended revisions:

1. **Bolivia** (Resident Coordinator – Lead partner, OHCHR, UNDP, UNFPA, UNICEF, ILO) to support legislative development and implementation of the ‘right to consultation’ and participation of indigenous peoples with an emphasis on highly vulnerable indigenous peoples.
2. **Nicaragua** (Resident Coordinator’s Officer and UN Indigenous Consultative Mechanism) to support the strengthening of knowledge and consultative

- mechanisms for indigenous peoples in order to facilitate implementation of the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 on Indigenous Peoples.
3. **Cameroon** (OHCHR – Lead partner, ILO) to support legal and institutional reforms in Cameroon with a view to enhancing free, prior and informed consent of indigenous peoples.
 4. **Central African Republic** (ILO – Lead partner and UNFPA) to support Government’s review of laws, policies, and services to implement ILO Convention 169 on Indigenous Peoples and provisions of the UN Declaration on the rights of indigenous peoples.
 5. **Republic of Congo** (UNICEF – Lead partner, ILO, UNDP, UNFPA, OHCHR) to support implementation of the national law on indigenous peoples along with advocacy for ratification of ILO Convention No. 169.
 6. **Nepal** (ILO – Lead partner and OHCHR, with Ministry of Local Development, Nepal Federation of Indigenous Nationalities, Nepal Foundation of Indigenous Nationalities, and LAHURNIP) to support the implementation of ILO Convention 169 and the UN Declaration through local monitoring, planning and budgeting committees.
 7. **South East Asia** (UNDP Asia Pacific Regional Centre – Lead partner and OHCHR Regional Office for South East Asia) to support a continuation of the Regional Indigenous Peoples’ Program with a focus on review of laws, and national/regional dialogues on land rights and natural resources related to indigenous peoples.

Further to the Permanent Forum’s recommendation 59 from its Tenth session, UNIPP will continue to support the consultative committee established in Nicaragua by the UN Resident Coordinator. UNIPP will also support consultation processes and mechanisms through currently approved, and future proposals. The UNIPP Policy Board and Secretariat are actively working on resource mobilisation. Any future call for proposals will be dependent on the funds mobilised.

Questionnaire on the implementation of the UN Declaration

OHCHR also responded to a questionnaire prepared by the secretariat of the Permanent Forum to compile good practices which could further the implementation of the UN Declaration. This is in furtherance to the Permanent Forum's recommendation 49 from its Tenth Session calling upon member states and UN agencies to respond to the annual questionnaire from the secretariat of the Permanent Forum.

Furthermore, pursuant to Human Rights Council resolution 18/8 (2011), the Expert Mechanism is undertaking a survey of UN member states and their strategies to implement the UN Declaration on the Rights of Indigenous Peoples. The results of the survey will be presented in draft at the 5th session of the Expert Mechanism and in their final form to the Human Rights Council in September 2012.

Treaties, agreements and other constructive arrangements

Further to recommendation 94, a side event on "Advancing Dialogue on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples within the UN system" was organized in the margins of the 4th session of EMRIP by the International Indian Treaty Council (IITC) in cooperation with OHCHR. The event discussed the relevance of treaties, agreements and constructive arrangements. It drew on the outcome of the two seminars organized by OHCHR in 2003 and 2006 as well as on the importance of recognizing and ensuring implementation of treaties and agreements in light of the relevant provisions of the UN Declaration. Possible next steps were also discussed. A third seminar on the topic is planned for the second half of 2012.

Truth and Reconciliation Processes

OHCHR and a member of the Expert Mechanism, both participated and contributed to an expert conference titled "Strengthening Indigenous Rights through Truth Commissions" organized by the International Centre on Transitional Justice in New York from 19-21 July 2011. The conference themes included: 1) identification of lessons learned; 2) key concerns in truth seeking in indigenous peoples' rights; and 3) looked at setting new standards for Truth Commissions supporting indigenous peoples' rights.

2014 World Conference on Indigenous Peoples

In response to the Permanent Forum's recommendation 126 from the Tenth Session, OHCHR would like to draw attention to the role assigned by the UN Human Rights Council in its Resolution 18/8 to the Expert Mechanism which requests the Expert Mechanism to discuss the World Conference and its related modalities with relevant mechanisms on indigenous issues. The Expert Mechanism is currently engaged in the preparatory processes associated with the 2014 World Conference on Indigenous Peoples.

IV. CONCLUSION

The Office of the High Commissioner continues to work closely with the UN Permanent Forum and its secretariat to advocate for and advance the rights of indigenous peoples. Indigenous issues are a key priority of the High Commissioner and an integral part of the work of the Office.

Annex I

LAND RIGHTS AND INDIGENOUS PEOPLES: A COMPILATION

The following compilation has been prepared by the Indigenous Peoples and Minorities Section of OHCHR in response to recommendation 20 of the Permanent Forum's Tenth session. While the compilation makes reference to some jurisprudence from regional human rights bodies, the focus is largely on UN sources. Kindly note that this compilation is intended to be an illustrative guide to facilitate the understanding of those interested in indigenous peoples rights to lands, territories and resources. It is neither a comprehensive analysis of international law nor an exhaustive collection of sources on land rights.

I. Sources and general content of international law on indigenous peoples' rights to their lands, territories and resources

The rights of indigenous peoples' to lands, territories and resources are sourced in a wide range of international, regional and domestic instruments, decisions and policies. These include the UN Declaration on the Rights of Indigenous Peoples (UN Declaration); international human rights treaties; ILO Convention Concerning Indigenous and Tribal Peoples (Convention No. 169); regional human rights treaties, such as the Inter-American Convention on Human Rights and the African Convention on Human and People's Rights; and interpretations of international law by authoritative bodies such UN human rights treaty bodies, courts, and commissions.

The United Nations Charter states that the principle of equal rights and self-determination is one of the foundational purposes of the UN.¹ Since its foundation, the United Nations has elaborated numerous international human rights treaties and instruments to further expand on this principle. Common Article 1 of the International Covenant on Civil and Political Rights; and International Covenant on Economic, Social and Cultural Rights elaborates on the right to self-determination with equality and non-discrimination as underlying principles running through the text of the Covenants. The United Nations Declaration on the Rights of Indigenous Peoples, adopted through a General Assembly resolution in 2007, also elaborates further on equality and the right of indigenous peoples to self-determination as the most comprehensive instrument which encapsulates the rights of indigenous peoples.² It builds on existing rights enshrined in international human rights treaties and is a central part of one of the United Nations pillars - human rights.

¹ Article 1(2)

² Articles 2, 3, 4, and 46

The UN Declaration is endorsed by member states and many indigenous peoples' organisations and representatives around the world. It has been cited positively by numerous human rights monitoring bodies including UN and regional human rights treaty bodies, courts and commissions in their interpretation of binding human rights obligations. The Special Rapporteur on the rights of indigenous peoples has stated, "some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law",³ which is also a view shared by the International Law Association's Committee on the Rights of Indigenous People.⁴

Contemporary international law on indigenous peoples' rights to their lands, territories and resources is increasingly recognising that indigenous peoples have the right to their traditional lands held under their own indigenous laws and customs. Important and relevant case law includes the Inter-American Court of Human Rights decision in the *Awás Tingni v Nicaragua*, as well as jurisprudence of UN human rights treaty bodies,⁵ the Inter-American Commission and the African Commission on Human and People's Rights.⁶ The UN Declaration requires states to give legal recognition and protection to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Such recognition under Article 26(3) of the UN Declaration "shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".

UN human rights treaty bodies have stressed that recognition of indigenous peoples' rights to their traditional lands, territories and resources is required by an interpretation of the fundamental principle of non-discrimination and also the right to property, especially when both are read together.⁷ Non-discrimination is an overarching principle in international human rights law and an immediate and cross-cutting obligation of states. Thus the broader framework of non-discrimination, beyond explicit reference to land, may be relevant when addressing land issues from a human rights perspective.

Indigenous peoples' rights to traditional lands, territories and resources beyond their control, often due to the jurisdiction of conflicting laws within a state (e.g. land acquisition, mining, or other.), are in many cases difficult to address given competing claims to those lands, territories and resources, and some ambiguity in the normative framework provisions. The UN Declaration, under article 27, requires that states recognise and establish processes to adjudicate the rights of indigenous peoples' to lands, territories and resources, including those traditionally owned, or otherwise occupied and used. Moreover, the right to redress in article 28 of the UN Declaration covers lands,

³ Human Rights Council "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people" UN Doc A/HRC/9/9 (2008).

⁴ International Law Association, *The Rights of Indigenous Peoples* (The Hague Conference, 2010).

⁵ Committee on the Elimination of Racial Discrimination General Comment 23, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984 of 26 March 1990, Report of the Human Rights Committee, vol. II (1990) UN Doc A/45/40; see also, e.g., Human Rights Committee "Concluding Observations on the United States of America", UN Doc. CCPR/C/USA/CO/3 of 15 September 2006

⁶; African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2010).

⁷ *Awás Tingni* and Committee on the Elimination of Racial Discrimination UN Doc. CERD/C/NIC/CO/14 of 19 June 2008.

territories and resources “which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”

II. International human rights law and standards on indigenous peoples’ rights to lands, territories and resources

While there is no accepted definition of indigenous peoples’ lands, territories and resources under international law in general, the International Law Association’s Committee on the Rights of Indigenous Peoples states that indigenous peoples’ lands, territories and resources must be interpreted broadly and consistently with their own understanding rooted in indigenous culture, and their corresponding world view.⁸

The UN Declaration specifically lays out a broad and comprehensive set of international human rights standards which elaborate on existing rights enshrined in international human rights treaties. Articles 25, 26, 27, 28, 29, 30, and 32 of the UN Declaration are central in specifying indigenous peoples’ relationship with and rights to their lands, territories and natural resources.

UN Human Rights Treaty body jurisprudence

Various UN human rights treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child (CRC) have addressed land issues in their General Comments/General Recommendations, and in their review of State Party reports.

In its General Recommendation No. 23 on the Rights of Indigenous Peoples, CERD calls upon state parties to “recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and where they have been deprived of “[such] traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return [them]”.⁹

The CESCR discusses the issue of forced evictions in connection with land rights, development and infrastructure projects, and with land acquisition measures.¹⁰ Furthermore General Comment No. 12 of the Committee discusses the prevention of discrimination in access to food or resources of food, including right to inheritance and ownership of land...including natural resources.¹¹ The Committee’s General Comment No. 14 on the right to the highest attainable standard of health, notes the collective dimension of the health of indigenous peoples and considers that “development-related activities that lead to the displacement of indigenous peoples against their will from their

⁸ International Law Association, *The Rights of Indigenous Peoples* (The Hague Conference, 2010), page 20.

⁹ CERD General Recommendation No. XXIII, Paragraph 5

¹⁰ CESCR General Comment No. 7, Paragraph 7

¹¹ CESCR General Comment No. 12, Paragraph 26

traditional territories and environment, denying them sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health..”¹²

The CESCR has also elaborated in its General Comment No. 15 on the right to water that, in the context of guaranteeing the enjoyment of the right without discrimination, States should take steps to ensure that “[i]ndigenous peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution”.¹³

General Comment No. 20 on article 2(2) of ICESCR refers to property status – a land ownership or tenure, or lack of it – as one of the prohibited grounds of discrimination.

In its General Comment No. 21, the CESCR notes that “the strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to lands, territories and resources which they have traditionally owned, occupied, or otherwise acquired. Indigenous peoples’ cultural values and rights associated with their ancestral land and their relationship with nature should be regarded with respect and protected in order to prevent degradation...loss of their natural resources...and ultimately cultural identity.”

In its General Comment No. 11 on Indigenous Children, the Committee on the Rights of the Child notes that under Article 6 of the Convention “[i]n the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant important to their development and enjoyment of culture”.¹⁴

In addition to general recommendations and comments, which define land in relationship to culture, food security and right to water, treaty bodies have also considered country reports on the situation of indigenous peoples. For example, in its concluding observation after considering the country report of Sri Lanka, CERD noted with concern the situation of the country’s indigenous people, the *Veddas*, and the creation of a national park on their ancestral forest land. It drew the attention of the state party to its General Recommendation XXIII, in which it calls upon states parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.¹⁵

In some cases treaty bodies have considered individual complaints under the optional protocol. For example, the Human Rights Committee has considered individual complaints under the ICCPR on whether the logging of forests violates the individual’s right to enjoy one’s culture under article 27 of the Covenant.¹⁶ The Committee’s broad position on Article 27 of ICCPR is that it has to be placed within a situational context, and the prolonged impact of an economic activity has to be assessed before determining a denial of the right to culture of a minority.

¹² CESCR General Comment No. 14, paragraph 27

¹³ CESCR General Comment No. 15, paragraph 16 (d)

¹⁴ CRC General Comment No. 11, paragraph 35

¹⁵ Sri Lanka. A/56/18, paragraphs 321-342.

¹⁶ Communication No. 197/1985, 167/1984, 511/1992, as well as cases where it did not deem the state party to be in violation of Article 27 such as *O.Sara et al. v. Finland* 1994, *Aarela and Nakkaalajarvi v. Finland* 2001 among others.

In the case of the Lubicon Lake Band, a complaint was submitted to the Human Rights Committee for an alleged violation of the “right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence”. The claim further stated that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada was accused of violating the Band's right to determine freely their political status and to pursue the right to dispose of their wealth and natural resources. After due consideration of various state party submissions and the claim, the Human Rights Committee considered the claim admissible under various provisions of the Protocol and Covenant. It concluded that “Historical inequities, to which the State party refers, and more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue”.¹⁷

In 2006, the Committee expressed concern that “land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse...The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardises the rights recognised under the Covenant.”¹⁸ During his visit to the Lubicon Lake Nation in 2007, the Special Rapporteur on adequate housing also noted the destructive impact of oil extraction activities which continued to lead to the loss of lands and the asphyxiation of livelihoods and traditional practices.¹⁹

With the opening of Optional Protocol to the Covenant on Economic, Social and Cultural Rights for signature and after it enters into force, individuals or groups claiming to be victims of a violation of the Covenant by states party to the Protocol may submit communications. This will provide another mechanism for consideration of violations of economic, social and cultural rights, including those related to lands, territories and natural resources as they fall within the purview of the Covenant.

Special Procedures of the United Nations Human Rights Council

The following thematic Special Procedures mandate holders have generally considered and highlighted land related questions in their reports: Special Rapporteur on adequate housing; Special Rapporteur on the right to food; Special Rapporteur on the rights of

¹⁷ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* Communication no. 167/1984, Decisions of the Human Rights committee, CCPR/C/38/D/167/1984 (26 March 1990).

¹⁸ Concluding Observations of the Human Rights Committee : Canada, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006)

¹⁹ A/HRC/10/7/Add.3

indigenous peoples; Special Rapporteur (formerly Representative of the Secretary General) on the human rights of internally displaced persons; Special Rapporteur on violence against women, its causes and consequences; Independent Expert on minority issues; Special Rapporteur on adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights. Similarly, the issue of land has been noted in the reports of numerous country Special Rapporteurs. The following is an illustrative listing of reports and cases where the UN Special Rapporteurs have looked specifically into the issue of indigenous peoples' rights to lands, territories and natural resources.

In 2002 the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples noted that land is more than a productive resource, since it encompasses a number of concepts such as homeland, culture, religion, spiritual sites, ancestors, and natural resources like water, forests and belowground minerals.²⁰ Various reports of the Special Rapporteur on indigenous peoples have noted the highly discriminatory impact of extraction of natural resources from the subsoil and the impact of large scale development projects.²¹ The Special Rapporteur has also noted the gap between legislation and everyday reality within the context of many countries. In some cases there is a lack of consistency between indigenous specific legislation and various sectoral laws on mining, water, fishing and forests, which may have adverse implications.²²

In his report to the Fourth session of the Human Rights Council, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples discussed the issue of forest peoples. He specifically mentioned that eviction of indigenous peoples from their traditional forests is one of the causes of their impoverishment, including examples from the Congo basin, Rwanda, and Cameroon. The Special Rapporteur further analysed a number of forest laws, many of which do not adequately protect the security and rights of indigenous communities. He referenced the passing of the 2006 Scheduled Tribes and Other Traditional Forest Dwellers Act in India.²³ Although it recognises the right to own and occupy forest land for the collection and production of subsistence foods, it excludes hunting of wild animals. While claims to land ownership can be brought to the attention of the communal assembly at the village level, which initiates the process of determining forest rights, the final decision for recognition and land titling rests at the district level. The implementation of the 2006 Forest Dwellers Act remains a challenge in a number of cases.

On the issue of forest peoples, the Special Rapporteur recommended that States and multilateral agencies should respect the traditional rights of the forest peoples and include the indigenous peoples affected in all forest-resource management projects, ensuring that such projects have their full consent and that they share in any profits deriving from them.²⁴

²⁰ E/CN.4/2002/97, paragraphs 39 and 49

²¹ A/HRC/4/32, paragraph 52 and E/CN.4/2003/90

²² E/CN.4/2006/78, paragraph 14-20

²³ A/HRC/4/32, paragraphs 25-36

²⁴ A/HRC/4/32, paragraph 37

More recently, the Special Rapporteur on the rights of indigenous peoples has offered his assistance to Suriname to develop measures needed to secure indigenous and tribal peoples' land and related rights. This also followed CERD's recommendation of full compliance by Suriname with the orders of the Inter-American Court of Human Rights in the *Saramaka People* case.²⁵ In particular the Special Rapporteur offers observations and recommendations on the process of developing a legislation which encompasses land rights, and also makes recommendations on some possible contents of such legislation.²⁶ In addition to consideration of various country situations, the Special Rapporteur has also written on the duty to consult indigenous peoples on lands, territories and resources, as well as private company responsibility.²⁷

Furthermore, the Special Rapporteur on the right to food has developed a core set of principles with respect to land acquisition and leases. In particular, he discusses the right to self-determination with respect to the rights of indigenous peoples and specific forms of protection required for their right to land.²⁸ Additionally, he recommends that any shifts in land use should only take place with the free, prior and informed consent of local communities, in particular indigenous peoples.²⁹

Indigenous peoples' rights in relation to natural resources

In article 32(2) the Declaration states that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

In *Saramaka* the Inter-American Court of Human Rights held that the *Saramaka* people have the right to resources used by them and on which they rely on for their physical and cultural survival. This approach is similar to that adopted by the African Commission on Human and People's Rights in relation to Endorois rights.³⁰

Also in *Saramaka*, the Inter-American Court set out permissible state limitations on the Saramakas' right to their natural resources, such as proportionality between the objective of the limitation and the limitation itself. It also added supplementary criteria, applicable in cases involving Indigenous peoples' resources, including: ensuring Indigenous

²⁵ A/HRC/18/35/Add.7 and CERD/C/SUR/CO/12, paragraph 13

²⁶ A/HRC/18/35/Add.7 paragraphs 19-40

²⁷ A/HRC/12/34 and A/HRC/15/37

²⁸ Olivier De Schutter. Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge.

²⁹ Ibid

³⁰ See *Case of the Saramaka People v. Suriname* and African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

peoples' participation in decision-making about their resources; provision for Indigenous peoples' benefit sharing; and prior environmental and social impact assessments.

Free, prior and informed consent in relation to indigenous peoples' rights to their lands, territories and resources

Numerous international bodies have been engaged in elaborating the meaning of free, prior and informed consent, and especially the circumstances in which consent is necessary. In particular, the Committee on Economic, Social and Cultural Rights,³¹ the Inter-American Court of Human Rights,³² the African Commission on Human and People's Rights,³³ the Expert Mechanism on the Rights of Indigenous Peoples,³⁴ the UN Human Rights Council,³⁵ the Special Rapporteur on the rights of indigenous peoples and the UN Permanent Forum on Indigenous Issues³⁶ have all elaborated on this in detail.

The duty of states to obtain, or in some cases seek to obtain, indigenous peoples' free, prior and informed consent is clearly expressed in the UN Declaration, especially in relation to indigenous peoples' interests in lands, territories and resources (e.g. articles 10, 19 and 32(2)).

The UN Declaration provides a mandatory requirement to obtain indigenous peoples' consent in Articles 10 (on relocation and prohibition of forced removal) and 29 (on storage or disposal of hazardous materials on indigenous lands and territories). Beyond these requirements, the Declaration also contextualises consent, i.e. in the case of approval of any project affecting lands or territories and other resources, especially in connection with mineral, water and other resources. Article 6 of ILO Convention 169 also reflects the principle of free, prior and informed consent.

In its Advice No. 2 to the United Nations Human Rights Council, the Expert Mechanism on the Rights of Indigenous Peoples discusses the duty of states to consult with indigenous peoples and obtain their consent in detail. According to the Expert Mechanism this is expressed in the jurisprudence of a variety of international and regional human rights bodies.³⁷ The Expert Mechanism's final report on its study on indigenous peoples and the right to participate in decision making discusses free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance to their rights, survival, dignity and well-being. The potential impact of

³¹ General Comment 21, paragraph 37

³² See *Case of the Saramaka People v. Suriname*.

³³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*.

³⁴ Expert Mechanism on the Rights of Indigenous Peoples, Final report on the study on indigenous peoples and the right to participate in decision making (May 2011) UN Doc A/HRC/EMRIP/2011/2.

³⁵ See, for example, UN Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review: New Zealand, UN Doc A/HRC/WG.6/5/L.7 of 11 May 2009.

³⁶ See, e.g., Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/HRC/12/34 of 15 July 2009; UN Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc. E/C.19/2005/3 of 19 January 2005.

³⁷ Expert Mechanism Advice No.2 (2011): Indigenous Peoples and the right to participate in decision-making

proposed activities must be assessed contextually in deciding whether consent is necessary. The Special Rapporteur on the rights of indigenous peoples has stressed that “a significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent”.³⁸

Regional mechanisms such as the Inter-American Court on Human Rights have also laid out the importance of assessing when the consent of indigenous peoples is necessary. The Court has stated that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior and informed consent, according to their customs and traditions.”³⁹

In many instances, the UN Committee on the Elimination of Racial Discrimination has also noted state obligation to ensure adequate consultation and to obtain free, prior and informed consent, particularly in relation to development activities and especially resource extraction.⁴⁰

In her 9 August 2011 media statement, the United Nations High Commissioner for Human Rights referenced free, prior and informed consent from the UN Declaration and stated that “proper consultations must be conducted with indigenous peoples at all stages of the development and natural resource extraction cycle. They are entitled to full disclosure of environmental, social and human right impact assessments in a language of their choice. States should also provide financial and technical support to enable indigenous peoples to consult with corporations. When indigenous peoples consent to such projects, they should have a right to a fair share of benefits from activities on their lands. And where projects proceed without consent, mechanisms for redress are required. International and national institutions financing such projects must ensure their operational policies and guidelines are consistent with international human rights standards and principles”.⁴¹

Conclusion

³⁸ A/HRC/12/34, Paragraph 47

³⁹ *Saramaka People vs. Suriname*, paragraph 134

⁴⁰ Concluding Observations in relation to: India (2007) UN Doc CERD/C/IND/CO/19, para 19; Guyana (24 August 2008) Follow-Up to Concluding Observations; Argentina (2010) UN Doc CERD/C/ARG/CO/19-20; Philippines (2009) UN Doc CERD/C/PHL/CO/20; Chile (2009) UN Doc CERD/C/CHL/CO/15-18; Peru (2009) UN Doc CERD/C/PER/CO/14-17; Cameroon (2010) UN Doc CERD/C/CMR/CO/15-18; Indonesia (28 September 2009); Guatemala (2006) UN Doc CERD/C/GTM/CO/11; Ecuador (2003) UN Doc CERD/C/62/CO/2. Committee on the Elimination of Racial Discrimination, Urgent Action related activity in relation to: India (15 August 2008); Peru (letter from Committee, 3 September 2007 and 3 March 2008); Canada (13 March 2009); India (13 March 2010); Suriname, (Decision 1(69), CERD/C/DEC/SUR/3, 18 August 2006). See, also, the jurisprudence from other UN human rights treaty bodies, including: Economic, Social and Cultural Rights Committee Concluding Observations in relation to: Nicaragua (2008) E/C.12/NIC/CO/4, para 11; Colombia (2010) UN Doc E/C.12/COL/CO/5; Colombia (2001) UN Doc E/C.12/1/Add.74; Human Rights Committee Concluding Observations in relation to: Panama (2008) UN Doc CCPR/C/PAN/CO/3

⁴¹ Statement by the United Nations High Commissioner for Human Rights Navi Pillay for 9 August, the International Day of the World’s Indigenous People

This compilation attempts to guide the reader to various sources of international law and human rights standards, which may further the understanding of indigenous peoples' rights to lands and territories. These rights to land, territories and natural resources are intricately tied in with the culture of indigenous peoples and must be understood within this context. The various sources cited in this compilation draw the inextricable link between indigenous peoples' right to land, territories and resources and their identity and culture.