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Item 5 (b) of the provisional agenda

### **STANDARD-SETTING**

#### **LEGAL COMMENTARY ON THE CONCEPT OF FREE, PRIOR AND INFORMED CONSENT**

Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the  
Tebtebba Foundation offering guidelines to govern the practice of  
Implementation of the principle of free, prior and informed  
consent of indigenous peoples in relation to development  
affecting their lands and natural resources.\*

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\* In view of its late submission and length which exceeds the established page limits, the document is issued as received in the language of submission only.

## **Summary**

At its twenty-first session, the Working Group decided to consider possible new studies and standard-setting activities that might be undertaken by its members. In its resolution 2003/29, the Sub-Commission asked Ms. Antoanella-Iulia Motoc to prepare a preliminary working paper that would serve as a framework for the drafting of a legal commentary on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources (E/CN.4/Sub.2/AC.4/2004/4). The Working Group has also taken the initiative to build research partnerships with indigenous organizations for the preparation of the working papers on standard-setting. This working paper was a collaborative effort between Mrs. Motoc and the Tebtebba Foundation, an organization of indigenous peoples from the Philippines. At its twenty-second session, the Working Group invited Ms. Antoanella-Iulia Motoc, in cooperation with the Tebtebba Foundation, to prepare an expanded working paper offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent.

## I. INTRODUCTION

1. The Working Group on Indigenous Populations at its 21<sup>st</sup> Session decided to continue its standard-setting activities at its next session by elaborating a legal commentary on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources. In its resolution 2003/29, the Sub-Commission asked Mrs. Antoanella-Iulia Motoc to prepare a preliminary working paper that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. The Working Group also took the initiative to build research partnerships with indigenous organizations for the preparation of the working papers on standard-setting. This paper is a collaborative effort between Mrs. Motoc and the Tebtebba Foundation, an indigenous non-governmental organization with special consultative status with the ECOSOC based in the Philippines.

2. At its 22<sup>nd</sup> session, a preliminary working document E/CN.4/Sub.2/AC.4/2003/4 was presented for discussion to the Working Group on Indigenous Populations. The present paper is submitted in accordance with Sub-Commission decision 2004/15 which invited Ms. Antoanella-Iulia Motoc in cooperation with the Tebtebba Foundation and other indigenous sources prepared to make a contribution to its analysis to prepare a paper offering guidelines to govern the practice of implementation of the principles of free, prior and informed consent for consideration by the Working Group at its 23<sup>rd</sup> session.

3. The principle of Free, Prior and Informed Consent (FPIC) of indigenous peoples to policies, programmes, projects and procedures affecting their rights and welfare is being discussed in a growing number of international, regional and national processes. These processes cover a wide range of bodies and sectors ranging from the safeguard policies of the multilateral development banks and international financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit-sharing arrangements; scientific and medical research; and indigenous cultural heritage.

4. The Permanent Forum on Indigenous Issues at its first, second and third sessions, identified as a major methodological challenge the application of the principle of free, prior and informed consent concerning indigenous peoples. At its third session, the body recommended the holding of a technical three-day workshop on free, prior and informed consent which was authorized by the Economic and Social Council, in decision 2004/287. The workshop with the participation of representatives of the United Nations system and other interested intergovernmental organizations, experts from indigenous organizations, interested States and three members of the Permanent Forum on Indigenous Issues was organized by the Secretariat of the Permanent Forum on Indigenous Issues and was held on January 17-19 2005 at the UN Headquarters in New York. The purpose of the workshop was not a standard setting exercise but to develop realistic and concise methodologies on how the principle for free, prior and informed consent (FPIC) should be respected in activities relating to indigenous peoples. The aim of the workshop was to identify challenges in the application of FPIC, to draw lessons and to outline the elements of a common inter-agency approach. The report of this workshop ( E/C.19/2005/3) identified elements of a common understanding of free, prior and informed consent of indigenous peoples towards promoting better methodologies for its application.<sup>1</sup>

5. Today indigenous peoples in many parts of the world are in the process of trying to renegotiate their relations with States and with new private sector operators seeking access to the resources on their lands. They are asserting their right to free, prior and informed consent as expressed through their own representative institutions in dealing with the many external interests. They are seeking support from international human rights bodies to find new ways of being recognized by international and national laws and systems of decision-making without losing their autonomy and their own values.<sup>2</sup>

6. This standard-setting work of the UN Working Group on free, prior and informed consent is intended to harmonize with efforts by other United Nations mechanisms on indigenous peoples such as the Permanent Forum and the Special Rapporteur. It is supportive of and complementary to the growing number of bodies and processes elaborating on this principle. The reality that FPIC is being discussed and elaborated at numerous international and national political arenas in recent years underscores the evolution and crystallization of this right as a norm and a standard to be applied in relation to indigenous peoples in pursuit of social and environmental justice, and human rights for all.

7. In the elaboration of guidelines to govern the implementation of the principle of free, prior and informed consent with regards Indigenous Peoples, this paper undertakes:

- To provide an overview of the recognition of this principle in international and human rights law, jurisprudence and national legislation and practice, so as to serve as a useful reference on the theme.
- To elaborate on the meaning and application of the principle of free, prior and informed consent with reference to recent relevant decision-making by international and regional bodies human rights bodies and national governments. These decisions elaborate further on the duties and obligations of States towards indigenous peoples in keeping with international human rights instruments, including the Draft United Nations declaration on the rights of indigenous peoples, which provides a comprehensive set of indigenous peoples' rights.
- To draw lessons about the substantive and procedural elements underlying the exercise of free, prior and informed consent from existing PIC regimes in other areas of international law, contract law, and national experiences about how the principle should be respected in practice.

8. This legal commentary and guideline on FPIC goes beyond a legalistic rendering of existing jurisprudence and legislation by reflecting on international law as an ongoing system of decision-making addressing contemporary global concerns and values<sup>3</sup> to reach a just and lasting relationship with indigenous peoples founded on respect for diversity, equality and non-discrimination, self-determination, and fundamental freedoms and human rights.

9. Information relevant to the preparation of this paper was drawn from a growing number of international meetings, reports and publications, expert papers, case studies and focused research on this theme. The issues covered are closely related to the Final Reports prepared by the Special Rapporteur Erica-Irene Daes on Land and Permanent Sovereignty over Natural Resources.

## II. FREE, PRIOR AND INFORMED CONSENT IN INTERNATIONAL AND DOMESTIC LEGAL INSTRUMENTS

10. That consent is the basis for relations between states and indigenous peoples was observed as early as 1975 by the International Court of Justice in its advisory opinion in the *Western Sahara* case. In that case, the Court stated that entry into the territory of an indigenous people required the freely informed consent of that people as evidenced by an agreement.<sup>4</sup>

11. The principle of free, prior informed consent is acknowledged in several international human rights law instruments. The International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) refers to the principle of free and informed consent in the context of relocation of indigenous peoples from their land in its article 16. Article 7 recognize indigenous peoples' "right to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development." In articles 2, 6 and 15, the Convention requires that States fully consult with indigenous peoples and ensure their informed participation in the context of development, national institutions and programmes, and lands and resources. As a general principle, article 6 requires that consultation must be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.

12. The draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex) is an important emerging instrument that explicitly recognizes the principle of free, prior and informed consent in its articles 10, 12, 20, 27 and 30.<sup>5</sup>

13. At present, the proposed American declaration on the rights of indigenous people of the Organization of American States (OAS) recognizes the right to consent in relation to relocation, recognition of indigenous institutions and traditional practices with the organizational systems of states, modification of indigenous peoples' title to lands and resources, development activities and with regard to resource extraction on certain categories of indigenous peoples' lands.

14. Several United Nations committees have made reference to the principle of free, prior and informed consent in their jurisprudence. In its general recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination calls upon States to "ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent" (para. 4 (d)). The Committee makes repeated reference to the right to consent and general recommendation XXIII in its concluding observations.

15. On a number of occasions the Committee on Economic, Social and Cultural Rights has highlighted the need to obtain indigenous peoples' consent in relation to resource exploitation. In 2004, for instance, the Committee stated that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities" (E/C.12/1/Add.100, para. 12). A few years earlier it observed "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem" (E/C.12/1/Add.74, para. 12). It subsequently recommended that the State party ensure the participation of indigenous peoples in decisions affecting their lives and particularly urged it "to consult and seek the consent of the indigenous

peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169” (ibid., para. 33).

16. The Inter-American human rights system has also dealt with the issue of consultation and consent in its jurisprudence. “As early as 1984, for instance, the Inter-American Commission on Human Rights stated that the ‘preponderant doctrine’ holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.”<sup>6</sup> In three recent cases, all involving indigenous rights over land and resources, the Inter-American bodies have articulated a requirement for states to obtain the prior consent of indigenous peoples when contemplating actions affecting indigenous property rights, finding that such property rights to arise from and are grounded in indigenous peoples’ customary laws and traditional land tenure systems.<sup>7</sup>

17. The Inter-American Commission on Human Rights frames inter-American human rights law to include the taking of “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation”.<sup>8</sup> The Commission has also held that inter-American human rights law “specially oblige[s] a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. ... [This is] equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”<sup>9</sup> Thus the Inter-American Commission has articulated a link between consultation resulting in full and informed consent, and protection of indigenous peoples’ property rights.<sup>10</sup> The Inter-American Court of Human Rights similarly held in the landmark *Mayagna Sumo Awas Tingni Community Case* in 2001.<sup>11</sup>

18. A similar conclusion was reached by the African Commission on Human and Peoples’ Rights in the 2002 *Ogoni case*. The Commission noted that “in all their dealing with the Oil Consortiums, the Government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland” and held that Nigeria had violated the right of the Ogoni people to freely dispose of its natural wealth and resources by issuing oil concessions on Ogoni lands.<sup>12</sup>

19. The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights also recognizes the principle of free, prior and informed consent in the context of indigenous peoples by stating: “Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects” (E/CN.4/Sub.2/2003/38/Rev.2, para. 10 (c)). This is consistent with the views of the former UN Centre for Transnational Corporations expressed in a series of reports that examine the investments and activities of multinational corporations in indigenous

territories.<sup>13</sup> The fourth and final report concluded that multinational companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision making" and "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development..." (E/CN.4/Sub.2/1994/40, para. 20).

20. Similar statements on FPIC have been made by UN Special Rapporteurs on indigenous land rights (E/CN.4/Sub.2/2001/21), treaties concluded between states and indigenous peoples (E/CN.4/Sub.2/AC.4/1998/CRP.1), and indigenous peoples' intellectual and cultural heritage (E/CN.4/Sub.2/1993/28), as well as by the Commission on Human Rights' Special Rapporteur on situation of the human rights and fundamental freedoms of indigenous people (E/CN.4/2002/97).

21. Important measures have been taken by United Nations specialized agencies in terms of the operationalization of the human rights of indigenous peoples in the general framework of international law. The Conference of the Parties to the Convention on Biological Diversity has established a working group specifically to address the implementation and related provisions of the Convention. This working group is open to all Parties, and indigenous and local community representatives play a full and active role in its work. Traditional knowledge is considered a "cross-cutting" issue that affects many aspects of biological diversity, so it will continue to be addressed by the Conference of the Parties and by other working groups as well. FPIC has also been recognized in ongoing CBD work on Access and Benefit Sharing,<sup>14</sup> CBD guidelines on environmental and social impact assessment of activities affecting indigenous peoples' territories and sacred sites<sup>15</sup> as well as regional standards on access and benefit sharing adopted by the African Union<sup>16</sup> and the Andean Community.<sup>17</sup> Similar language is also found in the Convention to Combat Desertification.<sup>18</sup>

22. In preparation for its 3<sup>rd</sup> session, the UN PFII distributed a questionnaire to all UN system 'Indigenous Peoples Focal Points' in order to gather information about "how the principle of FPIC is understood and applied by United Nations programmes, funds, agencies" (E/C.19/2004/11, para. 3). The UNDP, UNFPA, FAO, ILO, UNITAR, IFAD, OHCHR, WHO responded that, while they do not have an official, working definition of FPIC, they recognized it as being embedded in the human rights framework and maintained, while not without challenges, that they "to a large extent implemented [FPIC] on an ad-hoc basis in line with the general guidelines, legal instruments and principles through which they work" (ibid, para 7).

23. The Inter-American Developmental Bank Strategies and Procedures on Socio-Cultural Development provides that IDB will not support projects affecting tribal lands and territories "unless the tribal society is in agreement." The United Nations Development Programme also states that it promotes and supports the rights of indigenous people to free, prior and informed consent in its policies.<sup>19</sup> The European Union Council of Ministers' 1998 Resolution entitled, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* provides that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas."<sup>20</sup> The EU interprets this language to be the equivalent of FPIC.<sup>21</sup> The International Finance Corporation's Micro-Finance Exclusion List states that IFC funds may not be used to finance "Production or activities that impinge on the lands owned, or claimed under adjudication, by indigenous peoples, without full documented consent of such peoples."<sup>22</sup>

24. While the World Bank does not require FPIC, its new policy on indigenous peoples, OP 4.10 of 10 May 2005, requires obtaining indigenous peoples' broad community support through culturally appropriate and collective decision-making processes subsequent to meaningful and good faith consultation and informed participation at each stage and throughout the life of the project. For projects and without such support the Bank will not proceed with project processing.<sup>23</sup>

25. Representatives of non-governmental organizations and industry have also contributed to the discussion on free consent. Participants in the United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5 to 7 December 2001, discussed the principle of free, prior and informed consent, recognizing the need to have a universally agreed upon definition of the principle. The participants reached a basic common understanding of the meaning of the principle, as the right of indigenous peoples, as land and resource owners, to say "no" to proposed development projects at any point during negotiations with Governments and/or extractive industries (see E/CN.4/Sub.2/AC.4/2002/3, para. 52).

26. The World Commission on Dams commissioned a thematic review of dams, indigenous peoples and ethnic minorities which examines the experience of indigenous peoples and ethnic minorities within the context of large-scale dam constructions. Upon documenting the negative impact of large dam projects on indigenous and minority communities, the thematic report identifies a set of principles to guide future energy and water resource development projects with a view to minimizing conflict and protecting the rights of indigenous peoples and ethnic minorities. Among the guiding principles that the thematic report elaborates are that indigenous peoples and ethnic minorities should be involved from the beginning in planning and decision-making processes and that the principle of free, prior and informed consent should guide the building of dams that may affect indigenous peoples and ethnic minorities.<sup>24</sup>

27. The Final Report of the World Bank's Extractive Industries Review concluded that "indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation."<sup>25</sup> It recommended that the World Bank Group "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."<sup>26</sup>

28. Several domestic legal instruments underline the importance of free, prior and informed consent. For example, in five states of Australia, consent must be obtained in connection with mining through statutory indigenous-controlled Land Councils for more than 30 years.<sup>27</sup>

29. The Philippine Indigenous Peoples Rights Act recognizes the right of free, prior and informed consent of indigenous peoples for all activities affecting their lands and territories including: exploration, development and use of natural resources; research and bio-prospecting; displacement and relocation; archaeological explorations; policies affecting indigenous peoples such as Executive Order 263 (Community-based Forest Management); and the entry of military.

30. Aotearoa-New Zealand's, Crown Minerals Act 1991, provides special protection for Maori land, as defined by the *Te Ture Whenua Maori Act 1993*: if the Maori land is regarded as



*waahi tapu* (sacred areas), access even for minimum impact activities can only be obtained if the Maori landowners give their consent (sec. 51) and; for activities other than minimum impact activities, the owners of Maori land also have a right to consent (secs. 53-4) even where there may be public interest grounds that would require arbitration in the case of non-Maori land owners. Guyana's policy and practice on mining also requires that consent be obtained prior to authorization of mining on indigenous lands, as do Peruvian laws pertaining to protected areas.<sup>28</sup>

31. The right to give or withhold free, prior and informed consent has also been recognized in domestic jurisprudence. The Colombian Constitutional Court, for instance, held that "... the information or notification that is given to the indigenous community in connection with a project of exploration or exploitation of natural resources does not have the same value as consultation. It is necessary ... that formulas for concerted action or agreement with the community are put forward, and, finally, that the community declares, through their authorized representatives, either their consent or their dissatisfaction in relation with the project, and the way in which their ethnic, cultural, social, and economic identity is affected."<sup>29</sup> The Canadian Supreme Court has also held on a number of occasions that the duty of the State to consult with indigenous peoples is proportionate to the expected impacts on traditional lands and resources. In the case of minor impacts, a duty to discuss important decisions pertains while full consent pertains for serious issues and impacts.<sup>30</sup>

32. Courts have also recognized and confirmed indigenous peoples' ownership of subsoil and other resources thereby obviating any right of the state to issue concessions on indigenous lands and the need for FPIC in relation thereto. The South African Constitutional Court reached this conclusion in 2003, holding that under indigenous law and by virtue of traditional occupation and use ownership of subsoil minerals may also vest collectively in indigenous peoples.<sup>31</sup>

### **III. FREE, PRIOR AND INFORMED CONSENT – SUBSTANTIVE AND METHODOLOGICAL ISSUES**

#### **The right of all peoples to self-determination**

33. Given the widespread recognition of the principle, what are the substantive and procedural rights of indigenous peoples underlying of free, prior, informed consent? The universal and continuing applicability of the fundamental right of peoples to self-determination is the general principle underlying free, prior and informed consent. Common article 1 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights spells out the rights of all peoples to self-determination, to freely pursue their economic, social and cultural development, to freely dispose of their natural wealth and resources and to be secure in their means of subsistence:

*"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."*

34. Self-determination has not been tied only to independence, but the right of peoples to freely choose their political and economic future and the right continues beyond the moment of decolonization, and allows choices as to political and economic systems within the existing boundaries of the state. The core of a people's right to self-determination in international law is the right to freely determine the nature and extent, (if any,) of their relationship with the state and other peoples, as well as to maintain its culture and social structures, to determine its development in accordance with its own preferences, values and aspirations, and to freely dispose of its natural wealth and resources. Scholars and courts have tried to show that self-determination can be exercised in many ways, including through open and pluralistic processes compatible with the protection of territorial integrity.<sup>32</sup>

35. That the right applies to peoples within existing states has been confirmed by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination,<sup>33</sup> and the African Commission on Human and Peoples' Rights,<sup>34</sup> as well as by leading scholars. James Crawford, for instance, states that

“Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1 does not say that some peoples have the right to self-determination. Nor can the term ‘peoples’ be limited to colonial peoples. Article [1, paragraph] 3 deals expressly, and non-exclusively, with colonial territories. When a text says that ‘all peoples’ have a right – the term ‘peoples’ having a general connotation – and then in another paragraph of the same article, it says that the term ‘peoples’ includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense”.<sup>35</sup>

36. The right has also been applied to indigenous peoples by both the Human Rights Committee<sup>36</sup> and the Committee on Economic, Social and Cultural rights in their capacity as oversight mechanisms for the International Covenants, particularly in relation to article 1(2).<sup>37</sup> In 2003, for example, the Committee on Economic, Social and Cultural Rights expressed its concern about “the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant; and, “recalling the right to self-determination enshrined in article 1 of the Covenant, urges the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence (E/C.12/1/Add.94, paras. 11, 39).

### **The Right to Lands and Permanent Sovereignty over Natural Resources**

37. Separate studies on indigenous peoples' permanent sovereignty over their natural resources, as well as indigenous peoples and their relationship to lands have already been carried out as contained in documents E/CN.4/Sub.2/2004/30 and E/CN.4/Sub.2/2001/21. In these studies, Special Rapporteur Erica-Irene Daes states that in order to be meaningful, the modern concept of self-determination must logically and legally carry with it the essential right of permanent sovereignty over natural resources.<sup>38</sup>

38. The U.N. Human Rights Committee has clearly applied to Indigenous peoples the natural resource provision in Article 1, para. 2 of the International Covenant on Civil and Political Rights. In its 1999 concluding observations on Canada (CCPR/C/79/Add.105) it stated that it:

*“... emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of*

*their own means of subsistence (art. 1, para. 2). ... The Committee ... recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.”*

39. Moreover, the U.N. Committee on the Elimination of Racial Discrimination has emphasized that Indigenous peoples have the “right to own, develop, control and use their communal lands, territories and resources”<sup>39</sup>.

40. The Inter-American Court on Human Rights in several landmark cases affecting indigenous peoples, articulated linkages between protection of indigenous peoples' property rights and consultation resulting in full and informed consent.<sup>40</sup> In the *Awas Tingni* case, the Inter-American Court recognized indigenous peoples' collective rights to land and resources on the basis of article 21 of the American Convention on Human Rights, which reads: “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”

41. The Commission had maintained that, given the gradual emergence of an international consensus on the rights of indigenous peoples to their traditional lands, such rights are now a matter of customary international law. The international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.” Among the remedies ordered was that Nicaragua delimit, demarcate and title the community's lands, “with full participation by the community and taking into account its customary law, values, customs and mores.” Further, it ordered that “until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members for the Mayagna (Sumo) *Awas Tingni* Community live and carry out their activities.” This principle was reaffirmed by the Court in June 2005 in *Stefano Ajintoena et al v. Suriname (Case of Moiwana Village)*. Thus the court has affirmed not only a right against state interference with indigenous peoples' rights in lands and resources without their consent, but also an affirmative right to state protection from such interference by private parties.

42. The Inter-American Commission on Human Rights followed this finding, in its reports on the *Mary and Carrie Dann* and *Maya Indigenous Communities* cases. In these cases, the Commission found violations of the international human rights to due process and property. With respect to the nature of indigenous interests in lands, the Commission described as general international legal principles:

- The right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- The recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent

between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

43. The Commission further stated that international law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent.”

44. Most recently, in the *Maya Indigenous Communities* case, dealing with Maya land rights in their traditional territories in the south of Belize, within which the government had granted oil exploration and logging concession, the Commission found that granting such concessions “without effective consultations with and the informed consent of the Maya people” constituted a violation of human rights guarantees. The Commission reaffirmed that international law upholds indigenous peoples' land and resource rights, independent of domestic law, and held that one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities ... [these rights] specially oblige a member state to ensure ... a process of fully informed consent on the part of the indigenous community as a whole.

#### **The State's duty to consult and the right to participate**

45. Self-determination of peoples and the corollary right of free, prior informed consent, is integral to indigenous peoples' control over their lands and territories, to the enjoyment and practice of their cultures, and to make choices over their own economic, cultural and social development. This right, in order to be meaningful, must include the right to withhold consent to certain development projects or proposals. These rights, while fully consistent with norms of democratic consultation, are not equivalent to and should not be reduced to individual participation rights. Self-determination and FPIC, as collective rights, fundamentally entail the exercise of choices by peoples, as rights-bearers and legal persons about their economic, social and cultural development. These cannot be weakened to consultation of individual constituents about their wishes, but rather must enable and guarantee the collective decision-making of the concerned indigenous peoples and their communities through legitimate customary and agreed processes, and through their own institutions.

46. Self-determination is the fundamental right enjoyed and exercised by a people as a whole. Understanding and recognizing indigenous peoples' collective rights is critical to implementing free, prior and informed consent. As stated by legal scholar Siegfried Weissner, “*While individual rights are ascribed to an individual human being as such, who can invoke them in her own name, collective rights are ascribed to groups of people and can only be claimed by the collective entity and its authorized agents.*” *The relevant group rights of indigenous peoples also protect culture, internal decision-making, and the control and use of land. Understanding this application of group rights is indispensable in order to effectuate a workable system of protection of indigenous peoples, their cultures and ways of life. To “individualize” these rights would frustrate the purpose they are supposed to achieve.*”<sup>41</sup>

47. The formulation of FPIC as not constituting an individual “veto” right confuses collective rights and individual rights, as well as the rights of peoples and the corresponding duties of States. Peoples may not be deprived of their natural resources, nor denied their choices about

their economic, political and social development, in the exercise of their rights to self-determination.

### **Treaty Rights and Free, Prior, Informed Consent**

48. The right to free, prior and informed consent is also a fundamental, underlying principle that is inherent to the relationships established by treaties between indigenous peoples and states and their predecessors. It is a general principle of law and a basic tenet of international treaty law that contractual arrangements such as treaties are founded on the consent of parties and that future acts that fall within the scope of the treaty's terms must also be consistent with this consent-based relationship.<sup>42</sup> The consent of the parties is thus an ongoing and integral element of treaty relations between indigenous peoples and states and is central to the performance of treaty obligations and treaty interpretation.<sup>43</sup>

49. The Special Rapporteur on treaties, agreements and other constructive arrangements between states and indigenous peoples analyzed the nature of these treaties and concluded that "those instruments indeed maintain their original [international] status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith" (E/CN.4/Sub.2/1999/20, para. 271). He also highlighted the importance of reciprocity and mutuality in treaty relations and observed that the unilateral termination of a treaty, or non-fulfilment of the obligations contained therein, "has been and continues to be unacceptable behaviour according to both the Law of Nations and more modern international law" (ibid, para. 279), this principle is codified in the Vienna Convention on the Law of Treaties, which, in the absence of a material breach permitting termination or suspension of a treaty (art. 60), provides that termination of or withdrawal from a treaty may only take place by the consent of all the parties (art. 54).

50. The UN treaty bodies overseeing compliance with human rights instruments have addressed treaty rights on a number of occasions. In 1998, the Committee on the Economic, Social and Cultural Rights cautioned that "policies which violate Aboriginal treaty obligations should on no account be pursued by the State Party (E/C.12/1/Add.31, para. 18). In 2001, the Committee on the Elimination of Racial Discrimination expressed its concern that treaties "can be abrogated unilaterally," and recommended that the State ensure indigenous peoples effective participation in decision-making and secure their informed consent (A/56/18, para. 400). Finally, the Human Rights Committee has recommended that domestic mechanisms concerning treaties with indigenous peoples fully account for the substantive rights guaranteed by those treaties itself (A/50/40, para. 188).

51. Good faith adherence to treaty obligations and the consent-based relationship that underpins performance of those obligations must transcend formalistic and legalistic views of relations between the parties and be seen as an essential element of conflict avoidance. As observed by the Expert Seminar on treaties, agreements and other constructive arrangements between States and indigenous peoples, the full observance of such treaties constitute "a means of promoting harmonious, just and more positive relations between States and indigenous peoples because of their consensual basis and because they provide benefits to both indigenous and non-indigenous peoples" (E/CN.4/2004/111, para. 3).

### **Free, prior and informed consent and State Sovereignty**

52. These rights are compatible with the principle of state sovereignty. In the contemporary world, no State enjoys unfettered sovereignty, being limited in their sovereignty by treaties and general international law, including norms of customary international law. It is common practice for States to enter into international agreements or multilateral treaties whereby parties agree to certain obligations and limitations on State conduct in pursuit of universal values, common objectives in exchange for the benefits to be derived from international co-operation. Through such treaties States consent to the observance of international standards and certain limits to their sovereignty associated with international oversight and compliance mechanisms. The duties and obligations of States defined in international human rights law clearly condition and constrain state sovereignty, and include the obligation to respect, protect, promote and fulfil the right of all peoples to self-determination. As stated by Judge Weeramantry of the International Court of Justice, “there is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty.”<sup>44</sup> It is also sometimes argued that FPIC conflicts with States’ powers of eminent domain and is therefore subordinate to eminent domain. However, “eminent domain is subject to human rights law in the same way as any other prerogative of state and, therefore, should not be granted any special status or exemption, in this case, to justify denial of the right of FPIC.”<sup>45</sup>

53. State sovereignty does not exclude the recognition of other associated sovereignties within the political boundaries of independent states. Professor Erica-Irene Daes in her final report on indigenous peoples’ permanent sovereignty over natural resources states that “in legal principle, there is no objection to using the word sovereignty in reference to indigenous peoples acting in their governmental capacity, although that governmental capacity may be limited in various ways. In fact, indigenous peoples have long been recognized as being sovereign by many countries in many parts of the world.” She cites the examples of the laws of United States of America which recognizes attributes of sovereignty on the part of Indian and Alaskan native governments, including immunity from suit.<sup>46</sup>

54. Other States acknowledge their pluricultural and multinational character, legally recognizing indigenous peoples, including their rights to ancestral territories, autonomy and self-government which are reflected in the corresponding structures of government which are made up of central government units, local government units, and tribal governments and/or autonomous authorities of indigenous peoples. Articles 246, 287 and 330 of the Colombian Constitution, for example, provide that indigenous territories (Indigenous Territorial Entities), are self-governing, autonomous entities, authorised to devise, implement and administer internal social, economic and political policies, which exercise jurisdiction in accordance with indigenous (customary) law and are considered to be of equal legal status to districts and departments within the overall political framework of the Colombian State.

55. In a number of federal states, there are clearly spheres of territorial authority and division of powers, with governmental authority over natural resources located at the level of State or other governmental entities, Canada and Australia for example, rather than central government. Once and if States and indigenous peoples agree to recognize each other’s existence and rights, the need remains for mutually agreed processes of interaction. A key principle that has emerged over a very long history is free, prior and informed consent.<sup>47</sup>

## CONCLUSIONS

56. Substantively, the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources - a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.

57. In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:

- Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- Their consent is sought and freely given prior to the authorization and start of development activities;
- indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- Their choice to give or withhold consent over developments affecting them is respected and upheld.

58. Human rights, coupled with best practices in human development, provide a comprehensive framework for participatory development approaches which empower the poorest and most marginalized sections of society to have a meaningful voice in development. Indeed, this is integral to a human rights-based understanding of poverty alleviation as evidenced by the definition of poverty adopted by the Committee on Economic, Social and Cultural rights: "in light of the International Bill of Rights, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights (E/C.12/2001/10, para. 8). Moreover, the realization of human rights requires recognition of conflicts between competing rights and the designing of mechanisms for negotiation and conflict resolution. More specifically, human rights principles require the development of norms and decision-making processes that:

- Are democratic and accountable and enjoy public confidence;
- Are predicated on the willingness of interested parties to negotiate in good faith, and in an open and transparent manner;
- Are committed to addressing imbalances in the political process in order to safeguard the rights and entitlements of vulnerable groups;
- Promote women's participation and gender equity;
- Are guided by the prior, informed consent of those whose rights are affected by the implementation of specific projects;
- Result in negotiated agreements among the interested parties;

- **Have clear, implementable institutional arrangements for monitoring compliance and redress of grievances.**

#### **BEST PRACTICES OF PRIOR AND INFORMED CONSENT**

##### *Medical Research*

59. In the medical research field, ethical review boards are established to monitor content and procedures for prior and informed consent (PIC) in proposed research projects. These boards are independent, objective, and knowledgeable in deciding the scientific merits and ethical considerations of projects. They make determinations about the adequacy of PIC procedures in research proposals, e.g., that the expected benefit of the research justifies the cost to individuals, that certain communities will not bear a disproportionate burden in the project, and that the researchers will work in a manner that respects the cultural traditions of subject communities. The authority of these boards to designate projects as “unethical” can have secondary professional and financial consequences, but such a determination carries with it no direct legal penalty.

##### *Access and Benefit Sharing of Biological Resources*

60. The access and benefit-sharing regime for biological resources provides examples of proposed national practices that safeguard PIC. In order to access biological resources under an Australian draft law, an applicant must obtain PIC from the landowner where the biological resources are located. If the landowner is an indigenous group, this group must have given its “informed consent,” which should include the views of the relevant indigenous representative body, based on independent legal advice and adequate time and information to consider the access proposal. A government ministry then reviews the PIC before granting approval for access. The same ministry provides model contracts to facilitate negotiation and understanding of the access issues.

61. In Costa Rica, if the owner of the resources differs from the land owner, the applicant should obtain separate PIC from each. In Mexico, if the original use of resources changes, new PICs must be obtained from the resource provider and the government. In each of these three countries, PIC between providers and applicants takes the form of written private contracts with mutually agreed terms, while government PIC is granted in the form of a permit or license. Each country faces the challenge of ineffective monitoring and enforcement.

62. As stated by the Special Rapporteur on human rights and human genome, Iulia Motoc: “In August of 2001, Brazil adopted a provisional measure (Measure) to restrict access to genetic material within its territory. The Measure requires national government authorization for “access to components of the genetic heritage” of any nonhuman organism within Brazil. Such authorization, however, may be granted only with the prior consent of the indigenous community involved, where access occurs on indigenous territory. Where access occurs on private land, authorization requires the private landowner's prior consent. In addition, the consent of the owners of the tangible property involved, such as the plant containing the sought genetic resources, must be secured. Where there is a prospect of commercial use, access to the components of the genetic heritage requires a benefit-sharing contract. The national government may, but need not,



**be a party to the contract. However, all contracts must be submitted to the national government for registration and approval.”**

*Basel Convention (Transport and Disposal of Hazardous Waste)*

**63. The Basel Convention has a non-negotiable consent requirement that serves to reinforce an importing state’s self-determination or sovereignty. The Convention does not provide for ongoing consent, thereby placing a premium upon exporter responsibility: any nonconforming shipment is subject to re-importation to the country of origin. Information to be provided in solicitation of consent must answer predetermined questions, so that the process is highly standardized. However, the price of information standardization may be a loss of sensitivity to different cultural understandings. The lesson that can be drawn is the need for mandatory information requirements in relation to PIC.**

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<sup>1</sup> Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3 para 12.

<sup>2</sup> Marcus Colchester and Fergus Mackay, “In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent”. Forest Peoples Programme, 2004.

<sup>3</sup> Rosalyn Higgins, *Problems and Process, International Law and How to Use it*, Clarendon Press, Oxford, 1994. This choice to view international law as process is posed by Professor Rosalyn Higgins in the following manner: “There is an essential and unavoidable choice to be made between the perception of international law as a system of neutral rules and international law as a system of decision-making directed towards the attainment of certain declared values”...instead of recounting the well-agreed principles of international law, ... I have tried to show how the acceptance of international law as a process leads to certain preferred solutions so far as these great and unresolved problems are concerned.”

<sup>4</sup> International Court of Justice, Western Sahara: Advisory Opinion of 16 October 1975, *ICJ Reports* 1975. See, also, M. Janis, The International Court of Justice: Advisory Opinion on the Western Sahara, 17 *Harv. Int’l L.J.* 609, 61 (1976).

<sup>5</sup> “The UN Draft Declaration identifies and includes provisions addressing many further crucial issues in such relationships, but does not connect these expressly to self-determination in the way advocated here. The dynamic of the UN process has been rather the opposite, treating self-determination as an end-state issue and separating the debate on self-determination from the structuring of relationships. The Draft Declaration provides much of the material from which the concept of self-determination may be reconstructed in relational terms, but does not always develop the relational aspects sufficiently ... Indigenous institutions and juridical practices may be maintained and promoted, subject to internationally recognized human rights standards, but the relation of these institutions and practices to state institutions, particularly the judicial system, is not addressed explicitly. The Draft would require states to include the rights recognized in the Declaration in national legislation ‘in such a manner that indigenous peoples can avail themselves of such rights in practice’, but the role of state institutions, especially courts and administrative agencies, is not addressed systematically. The Draft alludes to the capacities and powers of states throughout. States are required, for instance, to ‘take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples’, a formulation that deliberately did not provide for indigenous consent to receipt of such materials.” B. Kingsbury, “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law, *New York University Journal of International Law and Policies*, vol. 34 (2001), 22. 225-226.

<sup>6</sup> *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.26. (1984), 120.

<sup>7</sup> James Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources”, paper presented at American Association of Law Schools Conference, January 2005

<sup>8</sup> *Mary and Carrie Dann v. United States*, case 11.140, Report No. 75/02, Inter-Am. C.H.R., 2002, para. 131.

<sup>9</sup> *Maya Indigenous Communities and their Members (Case 12.053 (Belize))*, Report No. 40/04, Inter-Am. C.H.R., 12 October 2004, at para. 142 (footnotes omitted).

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<sup>10</sup> James Anaya, *ibid.*

<sup>11</sup> *Case of the Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Inter-Am. Court H.R., Judgment of 31 August 2001, para. 153.

<sup>12</sup> *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, para. 58.

<sup>13</sup> The CTC reported to the Working Group on Indigenous Populations four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples ( UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54) and; a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations "to mitigate the adverse impacts of TNCs on indigenous peoples' lands, and increase indigenous peoples' participation in relevant government and TNC decision-making." (UN Doc. E/CN.4/Sub.2/1994/40)

<sup>14</sup> See CBD Conference of Parties Decision V/26A, para. 11

<sup>15</sup> Seventh Conference of Parties to the Convention on Biological Diversity, *Decision VII/16F, Annex: The Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.*

<sup>16</sup> Organization of African Unity / Scientific, Technical and Research Commission, *Declaration and Draft Legislation on Community Rights and Access to Biological Resources* (Addis Ababa, Ethiopia, 1998).

<sup>17</sup> Andean Community, *Decision 391, Common Regime of Access to Genetic Resources, of the Commission of the Cartagena Agreement*, July 1996.

<sup>18</sup> *Convention to Combat Desertification, particularly in Africa* 1994, Article 16(g).

<sup>19</sup> *UNDP and Indigenous Peoples: A Policy of Engagement*, paras. 26-30 (2001).

<sup>20</sup> European Union, Council of Ministers Resolution, *Indigenous Peoples within the framework of the development cooperation of the Community and Member States* (1998).

<sup>21</sup> T. Griffiths, *A Failure of Accountability. Indigenous peoples, human rights and development agency standards: A reference tool and comparative review.* Forest Peoples Programme, Moreton-in-Marsh 2003, 28, 29, 46, 62. Available at: [www.forestpeoples.org/](http://www.forestpeoples.org/)

<sup>22</sup> *Procedure for Environmental and Social Review of Projects.* International Finance Corporation, December 1998, at p. 36.

<sup>23</sup> IBRD/IDA, Operational Policy 4.10 on Indigenous Peoples, 10 May 2004, para. 1, 6(c) and 11.

<sup>24</sup> Marcus Colchester, Forest Peoples Programme, *Dams, Indigenous Peoples and Ethnic Minorities*, (Cape Town, South Africa: Secretariat of the World Commission on Dams), November 2002. The World Commission on Dams subsequently commissioned the Institute of Development Studies at the University of Sussex to undertake a study that would elaborate a framework by which indigenous peoples are ensured equal status with other members of the community in the planning, negotiations and decision-making leading to the implementation of water and energy projects. The study entitled *Consent and participation in planning and decision-making processes in water and energy* outlines, inter alia, how public acceptability and the free, prior and informed consent of indigenous peoples can be ensured throughout all phases of project planning. The study notes that the necessity of obtaining free, prior and informed consent from communities affected by development projects is based on the norms of human rights law which guarantee all peoples the right to continuing participation and consent in the decision-making processes as well as the right to freely determine their own development. The principle of free prior and informed consent should not be considered as a concession by Governments that grants special treatment to vulnerable communities; rather, it applies to all cases in which outsiders propose specific development projects that impact indigenous communities.

<sup>25</sup> *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review*, Vol. I, December 2003, at 21.

<sup>26</sup> *Id.* at 50.

<sup>27</sup> Aboriginal Lands Rights (Northern Territory) Act 1976, Pt. IV; Aboriginal Lands Rights Act 1983 (NSW), sec. 45(5); Aboriginal Land Act 1991 (Qld), sec. 42; and Torres Strait Islander Land Act 1991 (Qld), sec. 80; Mineral Resources Act 1989 (Qld), sec. 54; Mineral Resources Development Act 1995 (Tas), Pt. 7, and; Aboriginal Land (Jervis Bay Territory) Act 1986 (Cth), sec. 43, 52A(1), (2)

<sup>28</sup> *Government's Policy for Exploration and Development of Minerals and Petroleum of Guyana.* Georgetown: Government of Guyana, 12 (1997); "Supreme Decree 038-2001-AG (2001 amendment to 1997 Law No. 26834: "Law of Natural Protected Areas"

<sup>29</sup> *Constitutional Court, Ruling SU-039/97*, Proponent Magistrate, Antonio Barrera Carbonel. Translated in: R. Roldán, *Indigenous Peoples of Colombia and the Law. A Critical Approach to the Study of Past and Present Situations.* Gaia Foundation/COAMA/ILO: Colombia, 2000, at 104.

<sup>30</sup> Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010; Taku River Tlingit First Nation v. British Columbia, [2004] SCC 74; Haida Nation v. British Columbia (Minister of Forests) [2004] SCC 73.

<sup>31</sup> *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others* CCT 19/03, para. 64 (2003). See, also, *United States v. Shoshone Tribe of Indians* 304 US 111 (1938) and *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 1086 (recognizing indigenous ownership of the subsoil).

<sup>32</sup> Rosalyn Higgins, *Problems and Process, International Law and How to Use it*, Clarendon Press, Oxford, 1994

<sup>33</sup> Human Rights Committee, General comment 12, *The right to self-determination of peoples (Art. 1): 13/04/84* (1984), at para. 6 - Article 1(3) “imposes specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination” (emphasis added) – and, Committee on the Elimination of Racial Discrimination, *General Recommendation XXI on the right to self-determination* (1996), at para. 5 – “... the rights of all peoples within a State.”

<sup>34</sup> *Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, para. 58.

<sup>35</sup> J. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*. In, P. Alston (ed.), *Peoples' Rights*. Oxford: OUP (2001), pps. 7-68, at 27.

<sup>36</sup> *Concluding observations of the Human Rights Committee: Canada. 07/04/99*, at para. 8. UN Doc. CCPR/C/79/Add.105. (Concluding Observations/Comments) (1999). *In accord*, see, also, *Concluding observations of the Human Rights Committee: Mexico*. UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Norway*. UN Doc. CCPR/C/79/Add.112 (1999), paras. 10 and 17; and *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Concluding Observations/Comments)*, para. 8.

<sup>37</sup> Among others, see, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11, 26 November 2002, at para. 7.

<sup>38</sup> Erica-Irene Daes, E/CN.4/Sub.2/2004/30 and E/CN.4/Sub.2/2001/21

<sup>39</sup> Among others, *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4

<sup>40</sup> James Anaya, *ibid*

<sup>41</sup> Siegfried Weissner, “Rights and Status of Indigenous Peoples” *Harvard Human Rights Journal*, Vol. 12 Spring 1999, ISSN 1057-5057 pp. 120-121,

<sup>42</sup> Vienna Convention on the Law of Treaties 1969, arts. 10-15. See, also, P.K. Menon, *The Law of Treaties between States and International Organizations* (1992), 33.

<sup>43</sup> *Ibid.*, article 31(3)(a), which provides that when interpreting a treaty reference may also be made to “any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation.”

<sup>44</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Separate Opinion of Judge Weeramantry, § 2 (1996) at <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>. The Committee on the Elimination of Racial Discrimination, recently concluded that “development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population....” *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname*. CERD/C/64/CO/9/Rev.2, para. 15 (2004). The Committee also stated that “While noting the principle set forth in article 41 of the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples.” *Id.* at para. 11.

<sup>45</sup> Fergus MacKay, “Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review”. IV(2) *Sustainable Dev. Law & Policy* 43-66, at 53 (2004).

<sup>46</sup> Professor Erica-Irene Daes, *Final Report Indigenous Peoples’ Permanent Sovereignty over Natural Resources* (E/CN.4/Sub.2/2004/30) and *Indigenous Peoples and Their Relationship to Land* (E/CN.4/Sub.2/2001/21) , *Indigenous Peoples’ Permanent Sovereignty over Natural Resources* (E/CN.4/Sub.2/2004/30)

<sup>47</sup> Marcus Colchester and Fergus Mackay, “In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent”. *Ibid.*