



Rights & Democracy

International Centre for Human Rights
and Democratic Development

Seminar Right to Self-Determination of Indigenous Peoples

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PREFACE

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Preface

Jean-Louis Roy, President, Rights & Democracy

For five years, Rights & Democracy, through its Rights of Indigenous Peoples Programme, has been closely monitoring the efforts of the open-ended working group of the Commission on Human Rights. This group is responsible for preparing the Draft Declaration on the Rights of Indigenous Peoples ¹ before the end of the International Decade of the World's Indigenous Peoples ² in 2004. ³

Although the discussions were initiated in 1995, only two of the 45 articles of the Draft Declaration have been approved by the member States of the working group. ⁴ There is still no consensus among the member States on Article 3 of the Draft Declaration, which explicitly recognizes the right to self-determination. This is a key article, because it is designed to confirm the international community's recognition that indigenous populations are indeed "Peoples," an obvious fact that has been denied by numerous States in recent centuries. This status is the very basis of the indigenous right to self-determination.

Furthermore, Luis Enrique Chavez, Chairperson of the Draft Declaration working group, concluded in 1999 that the governments and the indigenous peoples agreed that the right to self-determination is the cornerstone of the Declaration. And although the various indigenous peoples of the world face different challenges, they all agree that their future depends on the recognition of their right to self-determination. This is their principal aspiration, the tool that they regard as indispensable to their collective survival.

Yet Article 3 has become the stumbling block of the Draft Declaration. That's why we are actively seeking ways to help depolarize the debate and to identify avenues that will lead to solutions. To this end, on May 18, 2002, during the first session of the Permanent Forum on Indigenous Issues in New York, Rights & Democracy organized a parallel expert seminar on the right of indigenous peoples to self-determination.

About forty participants – including experts and representatives of governments, indigenous peoples and non-governmental organizations – accepted our invitation to debate their interpretations of Article 3 and the issues raised by the recognition of the right to self-determination.

We hope that holding this seminar outside the formal framework of the deliberations of the working group of the Commission on Human Rights will have, at the very least, fostered constructive dialogue on the issue of self-determination between State representatives and those of indigenous peoples.

We have chosen to publish the presentations of the experts who took part in the seminar because we are convinced that these texts can also promote dialogue among those directly involved in the deliberations, decisions and activities associated with the adoption of the Draft Declaration.

This dialogue is essential. It must be conducted with mutual respect and with a view to resolving the problems facing indigenous peoples with regard to human rights, development, the environment, education, health, etc.

It would be tragic, with respect to both history and the future, if the International Decade of the World's Indigenous Peoples were to end without a favourable response to their principal aspiration. The adoption of the present version of Article 3 by the working group has thus become a priority; it would help break the current deadlock and facilitate the adoption of the Declaration by 2004.

Rights & Democracy thus joins indigenous peoples' organizations in encouraging governments to recognize the right of indigenous peoples to self-determination. This right does not represent a threat to peace. It is a condition for peace. It amounts to a *sine qua non* of justice for indigenous peoples and of the recognition of their rights.

RECOGNITION OF THE RIGHT TO SELF-DETERMINATION FOR INDIGENOUS PEOPLES: ASSET OR THREAT?

Marie Léger, Coordinator, Rights of Indigenous Peoples Programme, Rights & Democracy

Since the creation of the League of Nations, indigenous peoples have been actively striving for recognition of their status as peoples. (1) The League of Nations was replaced by the United Nations, but the consistently expressed aspirations of indigenous peoples have not changed.

One of the chief expressions of recognition of full status as a people is the right to self-determination. This right is clearly stated in Article 1 that is common to both the *International Covenant on Civil and Political Rights* (2) and the *International Covenant on Economic, Social and Cultural Rights* (3): "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Furthermore, this Article was used as a model for Article 3 of the Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the Sub-Commission on the Promotion and Protection of Human Rights: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

BACKGROUND: SELF-DETERMINATION IS THE CORNERSTONE OF THE DECLARATION

In 1999, Luis Enrique Chávez, Chairperson of the working group created by the UN Commission on Human Rights for the purpose of drafting a declaration on the rights of indigenous peoples, stated that there was agreement in the group that the concept of self-determination was the cornerstone of the Declaration. Recognition of this right is a fundamental condition for indigenous representatives and a major stumbling block for some representatives of governments.

WHY IS SELF-DETERMINATION ESSENTIAL FOR INDIGENOUS PEOPLES? (4)

Self-determination is the primary collective right that makes it possible to exercise all other rights. International instruments have recognized it as an essential characteristic of all peoples, and it is seen as being essential to the survival and integrity of their societies and cultures.

The recognition that indigenous peoples are entitled to this right "as peoples" is important because it establishes the fact that they can freely determine their political status and provide for their economic, social, and cultural development by virtue of their status as peoples, not by virtue of powers delegated by the States in which they live. This is an important nuance because it implies the obligation for States to negotiate with a collective entity that holds rights predating the creation of said States and unrelated to their goodwill. It may also include resorting to outside help when agreement is not possible.

For indigenous peoples, recognition of self-determination is an acknowledgement of their status as peoples with exactly the same rights as other peoples of the world. It is also the acknowledgement of their dignity as peoples. This is referred to in Article 1.2 of the UN Charter: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

The right to self-determination for indigenous peoples may exist in different forms and be expressed by various arrangements in accordance with the diverse conditions of indigenous peoples.

Above all, self-determination provides a people with the possibility to choose the most favourable political framework for economic, social, and cultural development. This vision of self-determination is very close to the wording of Article 1 in both

covenants mentioned above. It is also firmly linked to a people's right to enjoy the advantages of its natural resources and therefore to a people's relationship with the land.

REACTIONS BY STATES: THEIR MAJOR ISSUES (5)

Beyond a consensus on the importance of matters related to the status as peoples under international law and the right to self-determination, what stands out is the diversity of positions stated by governmental representatives. A small number of States endorse indigenous positions, but the others usually raise one or more of the following questions or objections:

1. How does the implementation of self-determination affect the territorial integrity of States?
2. How can self-determination be exercised within the framework of existing States?
3. How can a State respect the right to self-determination when its territory is occupied by many indigenous peoples that may wish to exercise their right to self-determination in different ways?
4. Is the exercise of the right to self-determination subject to certain international standards such as the *Universal Declaration of Human Rights*?

The right to self-determination is often a cause for concern over possible threats to the territorial integrity of States. The recent history of decolonization, leading to the creation of many new States, suggests the relevancy of such a concern, although some experts question this kind of reasoning. Some jurists consider that the right to self-determination cannot be limited simply to secession. The formation of a new State is only one of several possibilities with regard to political status. According to the *Declaration on Friendly Relations* (6), "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people." Incidentally, some observers have stated that neither the right to secession nor its prohibition exists in international law.

Many do believe, however, that the right to self-determination is one of the fundamental tenets of international law. They claim that it cannot be defined by one of the possible results of its implementation but, instead, should be defined by its essence, the right to choose. Practices regulating secession or threats to territorial integrity cannot be confused with those regulating the right to self-determination.

Respect for the constitutional framework of the State is also a concern. Some States would like to see the recognized rights of the indigenous, including that of self-determination, subject to the existing constitutional framework of each State. This postulate contradicts the aspirations of indigenous peoples, who precisely want recognition of rights that cannot be defined or limited by the States in which they live. The difference between these two positions lies basically in the status of the parties (the State and indigenous peoples) and not in the inclusion of the results from eventual agreements between these parties in laws or constitutions.

The issue of who is entitled to the right to self-determination is a problem for States believing that not all indigenous peoples are actually peoples in terms of international law. Some are of the belief that peoples and States are one single entity with regard to international law, and this vision therefore excludes peoples living within sovereign States. Such States consider that a way to resolve this matter would be to include in the declaration on the rights of indigenous peoples a safeguard similar to the one contained in Article 1.3 of ILO Convention 169, later reworded in the Durban Declaration: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." (7) This statement is unacceptable to indigenous peoples because it specifically contradicts their objective of obtaining recognition of their status as peoples under international law.

Going beyond the legal issue, some States fear the divisions that might result from the recognition of the right to self-determination of indigenous peoples and the ensuing threat to national unity. Some States have a large number of different peoples living within their territories—over 200 in Brazil, for example—and many indigenous peoples live on land that overlaps current State borders. Finding tangible ways to provide for the coexistence within one State of differences including systems of justice and political institutions, for instance, remains a challenge requiring political creativity. Several examples are available to those who would like to think about possible solutions: the creation of Nunavut, Denmark's arrangement with Greenland, Panama's *comarcas*, and the recognition of the Navajo territory, which spans three states in the U.S. In addition, arrangements concerning non-indigenous entities such as the Jersey Islands and the Isle of Man as well as certain kinds of federalism and other possibilities can also be sources of inspiration.

CHARACTERIZING THE RIGHT TO SELF-DETERMINATION FOR INDIGENOUS PEOPLES

The aspirations of some and the fears of others have been clearly expressed in the debate on the relevance of describing the right to self-determination in the text of the declaration on the rights of indigenous peoples, particularly in Article 3. For all the reasons mentioned above, several States would like to see some limitations included in the declaration: internal self-determination, governmental autonomy, respect for territorial integrity and/or the sovereignty of democratic States.

For the reasons expressed earlier, the representatives of indigenous peoples have rejected all attempts to characterize, limit, or even define the right to self-determination. It may seem difficult to understand why they refuse such attempts, given that most or all indigenous demands can be fulfilled without the creation of new sovereign States. One of the reasons, however, is that they will not accept the imposition of conditions different from those to which other peoples are subject because the goal associated with having their right to self-determination recognized is to establish their equality with other peoples.

The questions that arise are the following: (a) Considering that Article 3 is part of a larger declaration and should be interpreted in relation with the other articles contained in it (particularly Articles 31, 32, 35, and 45), is limitation truly necessary?; (b) Are the requirements of international law enough to alleviate the fears of States regarding their territorial integrity and possible plans for secession (in particular, the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*)? If not, why should limitation be included in a declaration designed specifically for indigenous peoples rather than clarifications which could be added to the corpus of instruments that make up international law? Indeed, most major threats of secession do not originate from the demands of indigenous peoples.

What Obligations Stem from the Recognition of the Right of Indigenous Peoples to Self-Determination?

Answers to this question might focus the discussion on the steps needed to reach an agreement between indigenous peoples and States. To resolve these issues, it is necessary to know whether Article 3, as it now stands, adds obligations for those States that have ratified the two covenants. Furthermore are those obligations respected to the extent that the committees responsible for implementation of the covenants (8) already consider Article 1 on self-determination to be applicable to indigenous peoples. (9) It is also necessary to know if the implementation of such new obligations might be conducted by different means.

A NEW RELATIONSHIP AND POSSIBLE SOLUTIONS

Explicit recognition of the right of indigenous peoples to self-determination means, above all, acknowledging the fact that indigenous peoples have the right to be active stakeholders in decisions affecting them and that, as collective entities, they have the right to choose and negotiate arrangements that will ensure their continuity as peoples. Recognition also means a political commitment to respect this fact and to work toward its gradual implementation. The results of their choices and negotiations will probably be as diverse as the situations and needs of indigenous peoples throughout the world.

To a certain extent, the Draft Declaration, with its 45 articles, is an enumeration of the different components of self-determination. It describes the minimum standards for the survival of indigenous societies and the fields in which action is needed to ensure their economic, social, and cultural development.

Any agreement in the declaration on the terms of recognition of the right to self-determination will have to provide indigenous peoples with the assurance that they are not being subjected to discrimination in relation with other peoples. Any such agreement will also have to provide States with the assurance that they will not be jeopardizing their own stability or the interests of the other peoples living on their territories.

If these two conditions are met, it will be possible to build a new relationship between States and indigenous peoples on the basis of negotiations and mutual respect. As Erica Daes said in her statement to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, "... international security can only be assured in a world that respects the freedom and dignity of all peoples."

INTRODUCTION : ARTICLE 3 OF THE DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: OBSTACLES AND CONSENSUS

Erica Irene A. Daes, Chairperson-Rapporteur of the UN Working Group on Indigenous Populations

At its inception, the UN Charter clearly did not include any general right to self determination. The principle of equal rights and self determination of peoples, with all its ambiguity, is referred to only twice in the UN Charter. The development of

friendly relations among nations, based on respect for the principle of equal rights and self determination of peoples, is listed as one of the purposes of the UN. The principle of self determination in contrast to the principle of sovereignty, and all that flows from it, was not originally perceived as an operative principle of the Charter. Accordingly the principle of self determination was one of the desiderata of the Charter rather than a legal right that could be involved as such.



Erica-Irene Daes and Nina Pacari, recently named Minister of Foreign Affairs of Ecuador.

The proclamation by the UN General Assembly of the historic Declaration of the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV) of December 14, 1960) was clearly the beginning of a revolutionary process within the UN and represented an attempt to supplement the relevant provisions of the Charter. The Declaration on Colonial Independence expressly provides that "(all) peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." This declaration is essentially a political document with questionable legal authority, but it has formed the cornerstone of what may be called the new UN law of self determination.

Nowadays, it is almost impossible to deny that the right to self-determination has attained true legal status consistent with a realistic interpretation of the practice of the political organs of the UN.

Further, although the Declaration on Colonial Independence provides that integration and free association are ways for peoples' right to self determination to be exercised, a great number of States fearing secession do not accept that indigenous peoples are qualified for decolonization. Indigenous peoples are systematically opposing the assumption that they are not entitled to the same rights as other "peoples". According to them this is a racist policy and practice. The right to self determination was further limited by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter (1970), which provides that States enjoying full sovereignty and independence and possessed of a government effectively representing the whole of their population shall be considered as conducting themselves in conformity with the principle of equal rights and self determination of peoples, as regards that population. It also notes that nothing in the relevant paragraphs of the aforesaid Declaration shall be construed as authorizing any action which would impair, totally or in part, the territorial integrity, or political unity of such States. The above mentioned Declaration on Friendly Relations provides further, that only when all peaceful means of achieving self determination have failed should other measures be adopted. The basic objective of the Declaration was to discourage secession.

Furthermore, the right to self determination was reaffirmed by the Helsinki Final Act of the Conference on Security and Cooperation in Europe (1975), which under the heading of "Equal Rights and Self Determination of Peoples" provides:

The participating States will respect the equal rights of peoples and their right to self determination, acting at all times in conformity with the purposes and principles of the UN Charter and with the relevant norms of international law, including those relating to territorial integrity of States.

Here again the question arises : Upon whom is the right to self determination conferred? The answer given in identical terms in all the above mentioned international instruments is as simple in formulation as it is chimerical in fact. All these instruments stipulate: "all peoples have the right to self determination". However, the context in which the universal goal is declared demonstrates an intention to confine the right to self determination to the peoples who are still "dependent" and those subjected to "alien subjugation, domination and exploitation." No specific reference has been made to indigenous peoples.

In addition to the aforesaid international instruments, paragraph 2 of the Vienna Declaration of the World Conference on Human Rights (June 1993) expressis verbis provides that "All peoples have the right to self determination. By virtue of that

right they freely determine their political status and freely pursue their economic, social and cultural development." This basic provision of the aforesaid declaration has been considered that they are applicable only to peoples under colonial or other forms of alien domination foreign occupation, but not to the world's indigenous peoples.

The inalienable right to self determination is provided for by both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in their common Article 1: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

At the eleventh session of the Working Group on Indigenous Populations (1993), I presented a revised text of the Draft UN Declaration on the Rights of Indigenous Peoples to be used for the second reading and for its final consideration by the members of the Working Group and all the other participants including in particular the indigenous peoples. After long debate, the Working Group acceded to the requests mainly of the indigenous representatives and adopted unanimously as Article 3 of the Draft UN Declaration the following text that quotes the above mentioned Article 1 of the two international covenants on human rights, without any qualification except for changing the opening word "All" to "indigenous". Thus, Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples reads:

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

This decision of the aforesaid Working Group, was greeted with a standing ovation from indigenous participants and a conciliatory response from many of the governments.

It should be once more underlined that, in my opinion, no other UN human rights instrument was prepared with so much direct involvement and active and constructive participation of its intended beneficiaries. On this basis the final version of the Draft UN Declaration on the Rights of Indigenous Peoples was prepared and after its approval by all concerned and the express consent mainly by the representatives of the world's indigenous peoples, was duly submitted to the Sub Commission on the Prevention of Discrimination and the Protection of Minorities (its new title is: SubCommission on the Promotion and Protection of Human Rights).

The Sub Commission, after an attentive consideration of the revised Draft Declaration, during which no amendments or further revision were proposed, submitted it to the Commission on Human Rights for further action. The Commission established an open ended inter session working group with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to Resolution 1994/45 of 26 August 1994 of the Sub Commission entitled: "Draft United Nations Declaration on the Rights of Indigenous Peoples", for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People.

Unfortunately, the Draft Declaration is still pending before the aforesaid ad hoc Working Group of the Commission for the sole purpose to consider further, even to redraft it and to submit it to the General Assembly for adoption and proclamation within the International Decade of the World's Indigenous People. (G.A. Res. 49/214 of 23 December 1994).

Nineteen years have already elapsed, since I began the elaboration of the Draft Declaration and nine years have passed since the drafting was completed at the level of the Working Group on Indigenous Populations. Indeed, it has been more than 26 years since attention was initially drawn to the demands of indigenous peoples for recognition of their right to self determination, at an international non governmental conference in Geneva on the indigenous peoples of the Americas.

Throughout these years, governments have remained sceptical on the right to self determination of indigenous peoples. There have been some exceptions, but a majority of governments has continued to express fear and uncertainty about self determination and in particular about Article 3 of the Draft Declaration. This fear and uncertainty by the governments on this important and multifarious point has been the main factor delaying the completion of the elaboration of the Draft Declaration as a whole at the level of the ad hoc Working Group of the Commission, which, as you might know, is the political body of the UN dealing with human rights.

The unjustified fears of a number of governments have prevented the UN system from devoting serious attention to studying the practical application of the right to self determination, for example, through national, regional and international workshops, or through field missions to countries, which are important steps to empower indigenous peoples. Without further work of technical nature at the national, regional and international levels, we cannot develop an understanding of the concrete implications of the right to self determination. Moreover, without a better understanding of the meaning of the concept of self determination in actual practice, we, in turn, cannot alleviate the fears of governments. Also the governments do not have fear only for separatism but for the exploitation of their lands, territories and resources. It is a vicious circle,

pervaded by fear and ignorance. It is high time governments accept that neither the intent nor legal effect of Article 3 of the Draft Declaration is to promote separatism.

It should be underlined that the spirit of the right to self-determination of the Draft Declaration and the fundamental condition for realizing this right in practice is trust between peoples. Trust is impossible without cooperation, dialogue, and respect. Governments have nothing to fear from indigenous peoples they can learn to respect and trust.

In my view it is very important to think of self determination as a process. The process of achieving self determination is endless. This is true of all peoples—not only indigenous peoples. Social and economic conditions are ever changing in our complex world, as are the cultures and aspirations of all peoples. For different peoples to be able to live together peacefully, without exploitation or domination—whether it is within the same State or in two neighbouring states—they must continually renegotiate the terms of their relationships. There are far too many tragic examples, for instance in Europe, where a failure to attain self determination as part of a living, growing relationship between peoples has resulted in oppression and violence. Relevant lessons can be learned from certain situations in the Balkans.

It is useful to make an attempt to examine how the concept of self determination has been explained in many different indigenous languages. Thus, the words most frequently used to translate self-determination have the meaning of freedom, integrity and respect. In other words, self determination means the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non indigenous neighbours.

The Mohawk legal scholar Patricia Monture has written extensively about the ideas of law and justice in culture. She has translated the Mohawk words for law and justice as "living together nicely". The freedom of people to "live together nicely", as they understand this to be, is what could be also conceived as the true spirit of indigenous peoples self determination within the framework of the Draft UN Declaration.

The protection of this freedom unquestionably involves some kind of collective political identity for indigenous nations and peoples; that is, it requires official recognition of their representatives and institutions. However, the underlying goal of self determination, for most indigenous peoples, has not been the acquisition of institutional power, but rather achieving the freedom to live well and humanly, and to determine what it means to live humanly. In my view, no government has grounds for fearing that.

Indeed, it is entirely possible for a State to recognize indigenous peoples' right to self government, and to delegate various administrative tasks and responsibilities to indigenous communities—including perhaps even some limited authority to legislate upon purely local or internal matters—and yet, despite all of this, the spirit of the right to self-determination has not been fulfilled. The true test of self-determination is not whether indigenous peoples have their own institutions, legislative authorities, laws, police or judges. The true test of self-determination is whether indigenous peoples themselves actually feel that they have choices about their way of life.

The existence of a genuine right to self determination cannot be only determined from the outward form of indigenous peoples' self governing or administrative institutions. The true test is a more subjective one, which must be addressed by indigenous peoples themselves. In other words, the amount of power transferred to indigenous institutions is not a measure of self determination. Indigenous peoples must feel secure in their right to make choices for themselves, to live well and humanly in their own ways.

In this respect, it is precisely because indigenous peoples do not seek, and will not be able to acquire, a great deal of physical and economic power, that new forms of international cooperation are needed to guarantee the security and rights of indigenous peoples. If we are genuinely committed to conserving the world's cultural diversity, then we must accept responsibility for establishing an international regime in which small nations and peaceable peoples can survive. A world system dominated by power and wealth is incompatible with cultural diversity. Peoples who must fight continually for their subsistence and existence are never truly free to develop their distinctive cultures.

We live in a world of economic globalization in which the power of transnational corporations often dwarfs the power of States. Many governments are overwhelmed by market forces. Acting alone, they can be ineffective at regulating corporate ventures, and in protecting indigenous peoples from destructive approaches. There is an urgent need to develop new international legal machinery to extend the power of States in order to defend their citizens and their environment against irresponsible trans boundary corporate activities, including in particular corporate activities that disrupt, displace and destroy indigenous peoples.

These are some of my views concerning the main obstacles which are preventing the acceleration of the work for the adoption of the aforesaid Declaration. Also, the above mentioned comments are based specifically on the spirit of the concept

of self determination in terms of achieving the real goals of indigenous peoples themselves, rather than creating the appearance of indigenous self government or local administration.

Now, I should like to make a brief reference to two other important elements of the true interpretation of the concept of self-determination: land and mutual respect.

In my opinion, a fundamental aspect of the true meaning of self determination is the respect for the land, without which, indigenous peoples cannot fully enjoy their cultural freedom or cultural integrity. As I have repeatedly explained in my capacity as Special Rapporteur on the Protection of the Heritage of Indigenous Peoples:

Land is not only an economic resource for indigenous peoples. It is also the peoples' library, laboratory and university; land is the repository of all history and scientific knowledge. All that indigenous peoples have been, and all that they know about living well and humanly, is embedded in their land and in the stories associated with every feature of the landscape.

Naturally, indigenous peoples need land to subsist and meet their physical needs. But their cultural integrity and cultural development also depend fundamentally on their continuing right to determine their relationship with everything in their territories including landforms, water, animals and plants. Indigenous peoples could become wealthy from government support payments, or from the development or sale of forests and minerals, and still lack genuine self determination if the land and natural resources are no longer under their meaningful control.

The alienation of indigenous peoples from their land can never be adequately compensated. For this reason, issues relating to land cannot properly be separated from political discussions of autonomy or self government. This has, of course, been a matter of some sensitivity mainly in the Nordic countries.

Indigenous peoples have argued persistently that relationships to land or territories are at the heart of their distinct cultures. It should be said that human ecology and geography are intrinsic components of indigenous peoples' conceptions of living well and living humanly. It is, therefore, inconceivable that an indigenous peoples could attain self determination if they are detached from their ancestral territory, or if they have no real choices in the disposition of their territory.

There is one more fundamental condition, at least in the long term, for achieving the spirit as well as the letter of self-determination. This condition is mutual respect. As North American Indians and Aboriginal Australians have experienced, in the wake of changes in the political philosophies of their national governments, self determination is never secure if it depends entirely on legislation and high level political decision making. Whatever may be given by one Prime Minister or political party can be taken away by the next. Even constitutions can be changed.

The only real security for self determination lies in improving social relationships between indigenous peoples and their non-indigenous neighbours. Change is at the grass roots, that is, in the ways indigenous peoples and their neighbours perceive each other and interact as individual human beings. This must take place before indigenous peoples can enjoy real freedom.

In this regard, reference can be made to the notion of a "culture of human rights" which has been promoted mainly by UNESCO, and by other human rights bodies of the UN system, for more than a decade. In my view, a culture of human rights begins with basic respect for the existence, and the identity, of our own neighbours—regardless of their ethnicity, nationality, religion, colour, or culture. This is the foundation upon which the complete range of human rights and fundamental freedoms can begin to be realized. This is not a reverence to fear of the law or the State, or the philosophical ideals of human rights, but of respect of the value and humanity of the person who lives in the next house, or a few miles down the road.

When indigenous peoples speak in their own languages about self determination in terms of respect, this is what they mean; Indigenous peoples are calling upon the leaders of governments to set an example, by treating the leaders and the elders of indigenous peoples with the full respect and dignity of fellow humans who can be trusted. This is so simply, but it has been very elusive.

How can the leaders (elders and Chiefs) of indigenous peoples and States build trust and respect? We must return to the concept of self determination as a process. As in the case of peace building and disarmament, there is a preliminary need for confidence building, through a gradual process of cooperation and collaboration. In other words, self determination can never be defined in the abstract. It can only arise out of a process of sincere engagement. A good faith process can eventually result in a practical arrangement, specific to the country and the people, while consultations or negotiations in bad faith will most certainly deepen the divisions between States and indigenous peoples, and diminish the possibilities of peaceful solutions.

The growth of the European Union has been a very gradual process of building trust, of accommodation and of compromise. Over time, sovereignty and historical differences have grown less problematic, and confidence in the possibility of living well together has developed. Our experiences in constructing a new European Union offer some insights for States that are uncertain or fearful of constructing new relationships with indigenous peoples. Defining the specific modalities for the exercise of self determination is far less important than beginning to talk and getting to know one another. Speaking with good hearts and with a willingness to earn trust is more important, in truth, than the letter of the law.

It is my sincere hope that this presentation and analysis of the concept of self determination, the identification of some of the basic obstacles, and certain key elements of the true meaning and scope of the Draft UN Declaration and in particular of its Article 3, will effectively contribute to the alleviation of the fears of governments, to the revocation of their reservations in connection with the inalienable right to self determination of indigenous peoples and to the development of a constructive dialogue based on good will, good faith, trust and understanding between indigenous peoples and governments.

THE RIGHT TO SELF-DETERMINATION: THE OBLIGATION OF STATES AND INDIGENOUS PEOPLES: OPENING ADDRESS

Warren Allmand, former President, Rights & Democracy

As many of you know, the open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples, at its meeting in February 2002 decided that at the December 2002 meeting it would focus on Article 3, the right to self-determination which is basic to all the other articles and which has been a stumbling block to progress on the entire Declaration. Article 3 reads “*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”, and it is similar to Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) which has been ratified by 148 States and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), ratified by 145 States.

Most States are agreed that progress must be made at the December 2002 meeting of the Working Group, if work on the Draft Declaration is to be completed during the International Decade of the World's Indigenous Peoples which ends in 2004. That was the time frame given to the Working Group to complete its work. So far, the record on approving articles in the Working Groups has not been good.

After seven years (1995-2002), the Working Group has approved of only two articles out of 45 in the Draft Declaration. This followed nine years (1985-1994) of work by experts under Erica Daes and the UNCHR sub-committee.

Indigenous peoples fully participated at both stages. Consequently, it appears that there is a serious problem of political will in moving this document forward in the present Working Group. As you know, there are international instruments and standards for women, children, refugees, migrant workers, labourers, minorities, prisoners of war, criminals and human rights defenders, but with the exception of ILO Convention 169, none thus far for indigenous peoples who historically are one of the most wronged and exploited groups in the world. Furthermore, we must recall that in this case we are talking about a declaration, not a treaty.

In the pre-conference reading document that we prepared for this seminar, we tried to set out in summary fashion some of the arguments put forward by indigenous peoples to support their right to self-determination and at the same time, some of the concerns put forward by States for hesitating to support this right.

The indigenous peoples in the Americas for example, point out that when the Europeans from England, France, Spain and Portugal (and others), first made contact with them in the 15th and 16th centuries, they were various nations with languages, cultures, religions, institutions, territory, laws and economies. These nations were recognized as such by the European powers – by the British in the Royal Proclamation of 1763 – and treaties were concluded between the European States and many of the American First Nations. The indigenous peoples of the Americas strongly affirm that they never gave up this status and these rights – and consequently they continue to exist – and that they are peoples with the right to self-determination.

States, on the other hand, are concerned about either their territorial integrity and/or how the right to self-determination can be accommodated within their various State structures and constitutions. What will self-determination look like in practical terms as it is played out in their respective countries?



Rodolfo Stavenhagen and Warren Allmand.

These are issues that we will discuss today. For example, have the obligations in Article 1 of the ICCPR really impeded any of the ratifying States? Are some States exaggerating the consequences of recognizing the right to self-determination for indigenous peoples? Is it not possible that the recognition of the right to self-determination for indigenous peoples will bring greater stability and peace for their States than non-recognition?

Finally, we should try to avoid the temptation to predict in advance every possible interpretation of recognizing the right to self-determination for indigenous peoples. If States had taken this same approach with the articles in the UN Charter and the *Universal Declaration on Human Rights*, these important instruments would never have been approved or accepted. The principles in both documents were considered right and just and States approved them accordingly. What is important is the soundness of the principles and the spirit of trust between the States and the indigenous peoples. This is how progress will be made.

THE SELF-DETERMINATION OF INDIGENOUS PEOPLES: PAST DEBT AND FUTURE PROMISE

Maivân Clech Lâm (1)

It is a special honour to participate in this very first session of the UN Permanent Forum on Indigenous Issues and work alongside its members, representatives of States and indigenous peoples, as well as fellow specialists, to find ways for unravelling the stand-off that has developed in the Working Group on the Draft Declaration (WGDD) of the Human Rights Commission over Article 3 of the 1994 Draft UN Declaration on the Rights of Indigenous Peoples. Article 3, as we know, States without any condition that indigenous peoples have the right to self-determination. As I understand it, our host, Rights & Democracy, has brought us together informally in this space today with the hope that we shall converse frankly, and without unwanted attribution, as we earnestly seek to arrive at a conceptualization of the legal, political, and institutional contours of the right to self-determination of indigenous peoples that could move the WGDD to see that the recognition of this right represents nothing more than the payment of a debt that the world has long owed indigenous peoples, and also nothing less than the promise of a richer, more just, and therefore also more harmonious future that the world owes itself.

Professor Erica-Irene A. Daes, who so wisely and courageously guided the Working Group on Indigenous Populations (WGIP) to insert the standard wording of the right to self-determination in Article 3 of the Draft Declaration in 1993, has just reviewed for us the history behind the right. I will now briefly, and as specifically as possible, discuss three other matters: 1. The maturation of the right to self-determination in international law; 2. The need for international institutions and processes to mediate, when needed or as requested, the exercise of the right to self-determination by any people, indigenous or otherwise; and 3. The consequences to indigenous peoples and States of the recognition of the right.

THE MATURATION OF THE CONCEPT OF SELF-DETERMINATION.

I choose to speak of the maturation, rather than evolution, of the concept of self-determination consciously, for two important reasons. First, maturation connotes growth, which I consider healthy, whereas evolution simply denotes change, whether progressive or regressive. Second, I wish to distance myself from the regressive position taken by some international lawyers, particularly in the U.S. who, since the creation of the WGIP in 1982, began to assert that self-determination in the contemporary world is a modified right that offers, especially in the case of indigenous peoples, only internal and not external self-determination. What these lawyers mean by internal self-determination is some form of autonomy, or limited self-government, within an existing State. They thereby reject the full meaning of the right to self-determination prevailing through the 20th century, during which the right played a pre-eminent role, legally and politically, in the liberation of peoples in the Third as well as Second Worlds from destinies they found oppressive.

The right was first enshrined, as Professor Daes has pointed out, in an international legal instrument in 1960 when the General Assembly adopted the UN Declaration on the Granting of Independence to Colonial Countries and Peoples, and elaborated in the companion General Assembly Resolution 1514. The right was then prominently confirmed six years later in the two international human rights covenants of 1966. Under the classic understanding of self-determination, a people that holds this right is entitled, among other things, to freely choose its political status -- whether in the form of incorporation with an existing State, free association with it, or separation from it.

Most Third World countries in the last century chose separation, which incidentally was denominated independence and not secession as they had never consented to union with metropolitan States in the first place. Their choice, however called, effected a separation of Third World peoples from colonial states that previously controlled them, and was considered a wholly legitimate and indeed expected expression of their right to self-determination. An interdiction of that particular choice today would therefore constitute a fundamental departure from, and drastic diminution of, the classic meaning of the right to self-determination which, it should be noted, is widely considered by international lawyers to have *jus cogens*, or non-derogable,

status in international law. **(2)** In contrast, the principle of the territorial integrity of States does not, indeed could not, enjoy this same status. The reason is simple: human can no more summon the power to freeze existing international boundaries than they can to interdict history itself.

Indigenous peoples, of course, have histories that distinguish them from dominant Third World peoples who went on to form independent postcolonial States in the 19th century in Latin America and in the 20th century in Asia, Africa, and Oceania. In acknowledgement of their unique experiences of subjugation, indigenous peoples are sometimes denominated the Fourth World. Generally speaking, Fourth World peoples have been far more overwhelmed and disrupted by the societies of settlers or otherwise alien subjugators that now permanently surround them than were Third World peoples under distant metropolitan rule. More disruption, caused by more intrusion, but also resulting in more inter-implication. Furthermore, indigenous peoples today are asserting their self-determination in a world that has itself become highly, perhaps overly, inter-implicated, or interdependent. Because of these circumstances, it stands to reason, as indigenous peoples have repeatedly emphasized in UN fora, that the overwhelming majority of them now seek, not independence, but a form of free association with enclosing States as mediated by international law and society.

Sadly, some States have chosen to exploit indigenous peoples' realistic desire and good faith willingness to negotiate a partnership with States to demand a formal downgrading of their right to self-determination. The US government, for example, which has long resisted the term "peoples" and "self-determination" in the Draft Declaration, now takes the position, first issued by the White House National Security Council in January 2001, that it is willing to accept the term "peoples" and "internal self-determination" in the Draft Declaration provided that the first is accompanied by the caveat attached to the term in ILO Convention 169, which states that the term carries no implication one way or the other regarding the right to self-determination; and that the second be worded to specify autonomy or self-government within the existing nation.

There are four distinct dangers to indigenous peoples in the U.S. position. First, no international legal instrument to date, to my knowledge, defines or even contains the terms "internal self-determination", "autonomy", or "self-government". That is, the terms have no meaning under international law, and are thus subject to the interpretation that particular States give them. Second, the interpretation that the U.S. Supreme Court gives the term "self-government" in the case of Native American nations is that its content is whatever the U.S. Congress, which the Court invests with plenary, and indeed unilateral, power over Indian nations, is pleased to say it is at any given time. Third, in the course of the U.S.' short history, its government has in fact whittled down the political status of Native American nations from that of full sovereigns with which it originally concluded treaties until 1868, to that of so-called self-governing entities that are permitted to do little more than define their members, regulate the latter's interactions, and prescribe tribal inheritance laws. Those familiar with European civil law will immediately recognize that this complex of powers constitutes nothing other than the humble domain of Personal Status law, which even the Ottoman Empire routinely devolved to its minorities. Fourth, I expect that the U.S. will continue to oppose the 1994 wording of Article 3 through the foreseeable future inasmuch as its behaviour here is consistent with its behaviour in other international law-drafting exercises that it judges inconvenient: whether on the law of the sea (UNCLOS), global warming (Kyoto Protocol), or the International Criminal Court (ICC). In each instance, the U.S. delays and delays the exercise with inordinate demands to safeguard its narrow short-term interests, only to refuse to sign at the end anyway (Kyoto Protocol), or compel re-drafting (UNCLOS), or even "unsign" (ICC).

The international community, in my view, should now simply move expeditiously forward to adopt the Draft Declaration and not allow any single State, however powerful, to force indigenous peoples to mortgage their future, which Article 3 protects, in order to uplift their present, which the rest of the Draft Declaration mandates. Let me explain this tension between the present and the future that the delay in adopting the Draft Declaration has imposed on indigenous peoples. While it is true that an indigenous people could, whether under the rubric of free association/autonomy or the alternative rubric of self-determination, in fact exercise the exact same degree of jurisdiction on the ground in its traditional territory, a world of difference actually separates the two theories under which it would do so. Where States have used the term in their domestic legislation, "autonomy" normally refers to a group's ability to regulate a specified set of affairs that the State usually oversees but that it permits the group to undertake in pursuit of its own welfare while remaining a constituent of that State. **(3)** It is a State's "extensive grant of liberty" or devotion of power, to a group that it encloses. **(4)** The liberty typically covers such activities as the running of the subgroup's own schools, the election of its own officers, and the identification of its own members. While the actual reach of that liberty may be identical to, or even vaster in scope than, the authority exercised by a holder of the right to self-determination that has agreed to curtail its power to associate with another, the two situations embody wholly different theories and potentials. The holder of the right to self-determination retains the inherent right to later enlarge its activities, within limits established by general international law or treaty obligations only, while the autonomous entity remains vulnerable to contractions of its authority that the enclosing State may unilaterally impose.

This unilateral power of States over indigenous peoples has proved devastating to them, as the UN report issued by José R. Martínez in 1986 recognized, (5) and as most agents of international civil society concerned with the subject now acknowledge. Indeed, the Cobo report specifically concluded that the widespread ethnocide, and sometimes genocide, of indigenous peoples in the modern period are directly linked to their lack of a recognized right to self-determination. They now need to acquire that right and, most importantly, the international legal personality that it confers, so that they may: 1. Negotiate with States on the basis of formal equality; 2. Readily appeal to the international community for protection from abuses of States when these occur; and 3. Participate as needed in international fora where, increasingly, decisions are made that radically affect their communities.

The goal that indigenous peoples entertain thus differs fundamentally from that of other peoples, in colonial territories or independent States, that asserted their right to self-determination in the last century. Typically, these sought and secured independent statehood first, and in consequence also gained international legal personality. The originality of the indigenous peoples' position rests in the arresting fact that, in the overwhelming number of cases, they seek international legal personality without at the same time pursuing independent statehood.

Indeed, apart from Article 3, the 45-article long Draft Declaration, which indigenous peoples spent long patient years in Geneva constructing alongside the WGIP, and now support in its entirety, sets out nothing other than a template for a minimally satisfactory State/indigenous peoples partnership. True partners however—whether in political, business, or personal relationships—must be free to enter, maintain, revise, or end their partnerships. Indigenous peoples seek nothing more, but also nothing less. It is therefore disingenuous for some States to hold the Draft Declaration hostage because a handful of indigenous peoples might choose to wholly separate from them. To analogize from personal relationships, in countries where the law recognizes divorce, marriages continue to exist, and even last and thrive where parties work to offer mutual benefit and receive mutual satisfaction. At the same time, few States grant divorces on mere demand, or whim. Likewise, a State cannot, and should not, be made or unmade in a day. In that regard, I strongly advocate leaving Article 3 intact, but possibly adding to it, or to Article 36 which deals with international settlement of disputes between States and indigenous peoples, or even in a companion protocol, the following paragraph:

The right to self-determination is available under international law to all peoples without discrimination. The exercise of the right, in an interdependent world where peace and justice must both be upheld, is subject to UN oversight and endorsement.

NEEDED INSTITUTIONS AND PROCESSES

The paragraph I have suggested brings up the matter of the institutions and processes that will need to be developed within the UN system—gradually, and inevitably through trial and error, beginning with the Permanent Forum—to assure that the right to self-determination of indigenous peoples translates into the survival and thriving of their communities as well as the preservation of States from avoidable dismemberment. This is what I meant when I spoke earlier of the maturation of the right to self-determination: we must not go backwards on the content of the right, but we can and must urge the UN to pro-actively channel the energy of self-determination to just goals via peaceful means, i.e., justice for indigenous peoples, and peace for both indigenous peoples and States. For this to happen, we all have to overcome certain obsessions that now dominate the culture of international law and international relations.

The first is our misguided and often dangerous conceit that we build for the ages: that the choice of a political status is forever, that territorial boundaries are eternal, that history, in other words, can be arrested. Instead, a particular manifestation of self-determination could be for increments of years, and be reviewable, as is the Federated States of Micronesia's (FSM's) Compact of Free Association with the U.S. The second is that a claim for self-determination is at bottom one for separation, which States call secession. Why not take indigenous peoples' assurances at face value? They are typically small populations that, notwithstanding a record of harsh suppression by States, have many reasons to retain the real or potential advantages of linkage to them and that furthermore know that, in the present global moment, statehood is not always as necessary, beneficial, or glamorous as it was thought to be in the last centuries. The third obsession comes from positivist lawyers intent on constructing regimes that prickle with definitions and rules. But the world of immense diversity and fast-paced change that we now inhabit needs fora and processes far more than it does rules that often arrive dead or at least obsolete on arrival. In this regard, too, the WGIP was extraordinarily prescient: it wisely resisted for almost two decades certain States' insistence that the term "indigenous peoples" be defined. Flexible guidance, not positivist straitjacketing, is what is now called for in a world grown too complex, uncertain, and fast-changing to be run by rote.

OBLIGATIONS FLOWING FROM INDIGENOUS SELF-DETERMINATION.

I shall only say a few words here, primarily to address the question that sometimes arises: what happens to the individual human rights of indigenous persons under a regime of self-determination for the indigenous collective? An irate answer might be that it would be hard to imagine a more power-less and rights-less situation for indigenous persons under a self-determination regime than currently obtains under the existing hegemonic State regime. My earnest answer however is this: entities invested with international legal personality must necessarily take on commensurate international obligations. This is the case with States, international organizations, and *sui generis* parties like the Vatican and the PLO, now become the Palestinian Authority. In the case of the indigenous collective these obligations might range from, for example, from respect for its members' human rights to observance of the international community's standards regarding emission of trans-territorial pollution. Once indigenous peoples are declared to hold the right to self-determination, the full extent of these obligations, as well as the means and methods for enforcing them, will have to be worked out in processes of mutual authorship and accommodation at the international level. There is no inherent reason, however, why the leadership of an indigenous people could not be held accountable, for example, to the Human Rights Committee for human rights violations that it commits.

States will also be answerable in new ways both to indigenous peoples they enclose and to the international community once indigenous peoples achieve self-determination. First and foremost, States must facilitate, and not frustrate, the right of access to international fora that comes with the international legal personality self-determination confers on indigenous peoples. Second, if a State enters into a relationship of negotiated free association with its indigenous peoples, it must honour the minimum standards for such a relationship set out in the 1994 Draft Declaration. The most crucial one of these, in my view, is that which requires that indigenous peoples give their free and informed consent to activities that affect their communities, territories, and resources.

Finally, as indicated in the paragraph I earlier propose be added to the 1994 Draft Declaration, the international community itself will have to assume an obligation to both indigenous peoples and States to assist them in their negotiations whenever either party requests it, or when potential for mischief surfaces. Fora and processes will need to be made available with the goal of channelling negotiations to just and peaceful outcomes. Last but not least, the UN must interdict, from the start, third party State interference in, or exploitation of, a bilateral State/indigenous dispute. Finally, it is important to remember that the proposed Declaration is only that: a set of inspirational norms which a group of experts nominated by States proposed, after seriously labouring over the issue for more than a decade, as a guiding document for changes we all agree are needed. We can always tinker with it later, when we shall have acquired the hindsight we will gain from trying to live under it.

CONCLUSION

In conclusion, we are presented today with a genuinely unique opportunity, in the form of the 1994 Draft Declaration, to lay down aspirational principles that will launch the process of making amends for the shameful harm that indigenous peoples have suffered for half a millennium now, and also to choose a path that offers all humanity the possibility of co-existing in peace and in enjoyment of the full richness and wisdom of our combined experiential patrimony. That is, we must choose between a violence and a homogenization that has demeaned and depleted our human and natural resources, and a peaceful mutual engagement for the purpose of preserving the human and natural riches that remain. In the slang of my adopted country, the U.S., the choice is a no-brainer!

SELF-DETERMINATION IN THE CONTEXT OF A PLURINATIONAL STATE: THE ECUADORIAN EXPERIENCE

Nina Pacari, member of the Republic of Ecuador's National Congress

Greetings to all of you, including government delegates, delegations of indigenous peoples, and to all sisters and brothers. Thank you for inviting me to be here. It is extremely important for us to be able to make a contribution regarding the recognition of self-determination on the basis of indigenous viewpoints and concepts.

I believe that one starting point for understanding recognition of the concept of self-determination is to see that self-determination is a political position. It is a position taken by peoples that have been excluded, a position with regard to a one-nation State that, on the basis of its single-ethnicity nature and formation, has never truly allowed indigenous peoples to be part of the decision-making process that determines their own fate. Throughout history these peoples have continued to exist. However, when national States were formed, their leaders ignored the existence of indigenous peoples and imposed institutional structures that do not respond to the extreme diversity of national realities. Because they were not included, the problem of exclusion was born. This problem must be rectified in a framework of recognition of pluriculturalism on the part of

society and the State, and recognition means more than simple declarations. In the case of Ecuador, guidelines for the exercise of self-determination on the part of indigenous peoples can be developed only through a plurinational State. It is therefore important to understand that there is no such thing as a first-class or second-class people. Nor are there any peoples in the world who will agree to their own disappearance. Although ILO *Convention 169* was an important step forward insofar as it recognized the nature of peoples, the stipulation that “the use of the term ‘peoples’ ... shall not be construed as having any implications as regards the rights which may attach to the term under international law,” which implies sovereignty, is discriminatory and places indigenous peoples in a second-class role. Furthermore, it could be understood that the white, crossbred (*mestizo*) peoples in Ecuador or Latin America — the ones who structured national States during the transformation of the colonies into republics — are the only ones who hold the privilege of exercising self-determination. To overcome this discrimination, self-determination requires no name but rather the political will to share decision-making.

A second starting point is to understand the need for new models for States. States can be inclusive. Although several States have now recognized their pluricultural nature, they have gone no further than mere declarations. Any materialization of their recognition has remained in an embryonic state. In many cases there is not even a will to acknowledge the principle of self-identification recognized by ILO *Convention 169*, which highlights the right of indigenous peoples to an autonomous identity. Moreover, there actually exists resistance to this recognition. In several of our countries we identify ourselves as the first nations. In Ecuador, we refer to ourselves as indigenous nationalities. States, however, find it difficult to fully recognize this collective self-identification, which could lead to the creation of plurinational States.

It is in this context that fears of secession arise. A State born of a one-nation, single-ethnicity political project will feel that its exercise of power has been decreased when the time comes for it to “share” decision-making. Such a State fears change because it can have far-reaching repercussions on its exercise of democracy and development. With this reality in mind, we could analyze the domestic territorial conditions in each of our countries and identify the different co-existing realities. This would become a basis for making the exercise of self-determination viable. There are several ways to implement the self-determination of indigenous peoples in a context of plurinational States. In Ecuador, we have proposed transition periods for the construction of a plurinational State, which means nothing more than a new, inclusive State. To achieve such a State we must carry out in-depth studies of our domestic territorial reality by means of a national geopolitical mapping process.

The territorial mapping conducted by indigenous peoples in 1998 made it possible to define the territorial locations of the 12 indigenous nationalities in Ecuador’s three regions: the Coast (*Costa*), the Uplands (*Sierra*), and Amazonia (*Oriente*). We found that separatism implied the theoretical creation of 12 States. This was not viable in practice because not all the territories were cohesive, nor were all the inhabitants of each territory indigenous. Furthermore, the Uplands have a completely pluricultural make-up. It was therefore clear to the indigenous movement that we cannot propose separatism or independence. Instead, it was apparent that self-determination could be exercised in the framework of a plurinational State in which indigenous peoples would have full powers to make decisions regarding the destinies of their peoples.

Plurinationalism would, of course, change the structures of the State by putting an end to the hegemonic make-up of its parliamentary, executive, and judicial structures. For example, there would be a plurinational parliament.

To reach our objective, we have created an initial constitutional foundation by including the collective rights of indigenous and Afro-Ecuadorian peoples. These specific rights do not diminish either the validity or the exercise of indigenous individual rights. For instance, an indigenous person has the same right to an education as other Ecuadorians. On the level of collective rights, that same individual has the right to receive an education in a way that is different and in accordance with cultural codes so as to strengthen his or her identity, thought structures, philosophy, and way of life as a member of a distinct indigenous people.

On the territorial level, as well, the principle of plurinationality implies reorganization. Some indigenous territories are clearly cohesive: this is the case of indigenous nationalities in Ecuador’s Amazonia and coastal regions. Other territories, such as some of those in the mountainous regions of Ecuador, can become more cohesive following reorganization, which would enable indigenous and black peoples to directly exercise local power. In most of the country’s mountainous regions, however, the pluricultural reality must be taken into account. In Ecuador we would therefore have three different territorial situations in which self-determination could be managed within a framework of a plurinational State.

The exercise of self-determination has repercussions that upset the hegemonic interests concentrated in small groups of economic power. One of those interests is oil. Self-determination would mean that indigenous peoples could be directly involved in decision-making related to oil resources for the purpose of protecting their collective interests.

We believe that there is an imperative need to move forward by reorganizing the use of land and territories because, when the current political and administrative divisions (townships and provinces) were drawn up, ethnic and cultural dimensions were

not considered. Some indigenous peoples or nationalities were broken up and placed in minority conditions within townships and provinces. The proposal for reorganization can become a reality only if there is strong political will and if the principle of cultural diversity and the exercise of indigenous rights are guaranteed.

Most of Ecuador is pluricultural territory. Indigenous peoples represent 50 or 60% of the population in townships such as Cotacachi and Otavalo, in the province of Imbabura. In the township of Guamote, in the centre of the country, 98% of the population is indigenous. Indigenous people have been elected as mayors of municipalities in those areas, and they have promoted pluricultural management, meaning that it is inclusive and participatory in these townships, where indigenous, Mestizo whites, and Afro-Ecuadorians live together. An exclusively “indigenous territory” would not be possible in such areas, given their pluricultural nature and their need for pluricultural governments. This reality dictates the need for decisions to be made via participation by the citizenry of the pluri-ethnic population of a specific township. Ongoing consultation, accountability, social control, and supervision by the citizenry can have a direct impact on the reorganization of public spending in accordance with priorities that benefit the entire local population. This kind of pluricultural participation on the part of citizens makes it possible to build citizenship, optimize human and economic resources, and eradicate the patronage and populism that have caused so much damage in our countries.

In summary, by building a new form of power at the level of local government we can begin to create a national framework for the construction of an inclusive, pluricultural, and plurinational State in which the exercise of self-determination for indigenous peoples can become a reality. Therefore, our proposal for a plurinational State must reach beyond the local level to the national scene so that indigenous and Afro-Ecuadorian nationalities can begin to make full use of self-determination.

Concepts such as sovereignty are being reconsidered on the international level, and the European Union is going even further with a single currency that is not just part of a monetaristic policy. We should therefore be able to make some headway on the concept of self-determination. We must not limit ourselves to old concepts, and we must not limit indigenous peoples concerning their exercise of self-determination. To do so would be to send the international community a signal that those who have identified themselves as modern or modernizers would actually like to maintain the current status of first-class and second-class peoples.

I have provided a brief outline on the situation of Ecuador's indigenous peoples with regard to self-determination, and it is similar to that of other countries in our region. There are nevertheless differences, such as those we saw with the indigenous peoples whom we visited in the U.S. They even have their own territorial spaces as well as a self-government law. At first, we were glad and full of admiration for their self-government, but when we began to share ideas with them, we realized that their self-government was very limited. Such limitations are not compatible with a country that takes pride in its democracy. The U.S. is a confederated State. Why, then, instead of recognizing only reservations, does it not recognize a confederation of indigenous States, in which the indigenous peoples could make decisions regarding their own destiny?

Indigenous peoples in different countries may have different proposals that fit their own reality, but, for the sake of democracy, there must be an opportunity to value and recognize the right to self-determination, as proposed by indigenous peoples.

In conclusion, I would like to insist on the historical responsibility incumbent on States to remove the shroud of contradiction that currently surrounds self-determination. The challenge is to face the reality that self-determination requires an inclusive State. The self-determination of indigenous peoples is an issue of democracy, and indigenous peoples have a right to self-determination.

We need to realize that we are living in times of transition in which we must achieve convergence and open-mindedness on the part of governments. This will enable them to overcome their fears, to discuss self-determination, and to understand that it is a basic condition for strengthening institutions and building pluri-ethnic democracies. We have seen enough fear-mongering over imaginary separatism. And if a specific reality so requires, and if the conditions are appropriate, why not agree to separation? Specific realities will determine how this issue is to evolve. I would however like to emphasize that a lack of political will should not be an excuse for ongoing support of the current model of exclusive States.

Undeniable realities will help us to do away with fears and to rid ourselves of all-embracing powers. We must speak out in favour of a real process of power sharing. That's what democracy means!

These are the experiences that I was asked to share with you. I hope that they will make it easier for you to understand our realities and proposals. My aspiration is that governments will overcome their fears regarding the exercise of self-determination and that they will move toward the establishment of inclusive States. I will end with a call for observance of

Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples, the result of several years of debate and efforts on the part of indigenous peoples.

SELF-DETERMINATION: AN AUSTRALIAN PERSPECTIVE

William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner

The Social Justice Commissioner is an independent, statutory officer with legislative responsibilities to monitor the compliance of Australian governments with human rights standards as they relate to indigenous peoples.

A major part of this role is that I am required to submit two reports to the federal Parliament each year. The first is on the exercise and enjoyment of human rights by indigenous peoples – the *Social Justice Report* – and the second specifically on issues of land title and human rights – the *Native Title Report* (1). I only arrived in New York last night as my latest reports were tabled in federal Parliament earlier this week.

I have been asked to provide an Australian perspective on the right of indigenous peoples to self-determination.

Historically in Australia government policy and other practice towards indigenous peoples has gone through the following stages - extinction; then when indigenous peoples had been brought to the brink of such extinction policy was aimed at 'soothing the dying pillow' through protection; followed by assimilation; followed in the early 1970s by self-determination. As Madam Daes noted this morning, governments change and so do their policies, and in 1996 Australia elected a conservative government who changed the basis of indigenous policy to self-management and now self-empowerment, whatever that means.

What I intend to do in the limited time available to me is to provide you with some Australian examples of the demands of indigenous peoples for self-determination. These examples illustrate the following key issues:

- First, that self-determination for Aboriginal and Torres Strait Islander peoples in Australia is about inclusive government and ensuring the effective participation of indigenous peoples in processes which define and control their lives;
- Second, and related to this, indigenous Australians do not entertain the notion that self-determination will lead to secession and the creation of separate States – and two examples that I intend to give you in the Torres Strait and Northern Territory are of particular interest in this regard;
- Third, that self-determination is seen by indigenous peoples in Australia as pivotal to the adequate protection and exercise of our cultures, and to the maintenance of cultural integrity; and
- Fourth, that despite these factors, and I believe consistent with them, indigenous peoples in Australia *do not* consider that their rights to self-determination should be confined to a notion of so-called internal self-determination.

As Ms. Pacari stated in her presentation this morning, self-determination is a political issue. I agree with this, and my starting point for any discussion on indigenous peoples and self-determination, however, has to be the unequivocal recognition of the political reality that indigenous peoples *do* have a right to self-determination. Practice of the UN human rights treaty committees over several years confirms this.

In July 2000, Australia appeared before the Human Rights Committee which had asked in its pre-sessional list of issues the following question:

What is the policy of Australia in relation to the applicability to the indigenous peoples in Australia of the right to self-determination of all peoples? (2)

In confirming the conclusions of the Committee on the Elimination of Racial Discrimination earlier that year that amendments to land title legislation in Australia discriminated against indigenous peoples (3), the Human Rights Committee stated in its concluding observations that:

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources (in accordance with Article 1, paragraph 2 of the Covenant).⁽⁴⁾

Other comments in recent years on the right of indigenous peoples to self-determination can be found in the pre-session lists of issues and concluding observations of the Human Rights and Economic, Social and Cultural Rights committees in relation to the periodic reports of Canada and Norway, as well as in several individual communications to the Human Rights Committee.⁽⁵⁾

So then, to the current situation in Australia. There are two brief examples that I wish to relay to you. The first is the debate over statehood in the Northern Territory of Australia.

Our constitutional system is a federation of states, with full plenary power, and territories with more limited powers. For less than 40 years the Northern Territory has existed as a territory, prior to which it was included within the State of South Australia. For much of this time, the NT has expressed the desire to attain full statehood – a matter which would require agreement from the Commonwealth to conduct a referendum in the Territory.

Such a statehood referendum took place in October 1998, following an extensive process whereby a committee of the NT parliament considered the various options for statehood and drafted a proposed constitution. This constitution included a number of critical features for indigenous peoples in the territory, including a bill of rights, mechanisms guaranteeing open government and providing for their full participation and recognition of their customary law and cultural practices.

However, the government of the day – a deeply conservative one, which has recently been tossed out of office after over 30 years in power- did not accept this constitution and replaced it with a proposal that did not provide such recognition to indigenous peoples. As a consequence, the indigenous peoples of the Northern Territory met at Kalkarinji in central Australia in August 1998 to determine a response to the statehood proposal.

The Kalkarinji statement of the Combined Aboriginal Nations of Central Australia that emerged, withheld consent for the establishment of a new State until such time as the government entered into good faith negotiations with the freely chosen representatives of the Aboriginal nations and led to a constitution based on equality, co-existence and mutual respect.

At the referendum that followed two months later, 52% of Territorians voted no to statehood and defeated the proposal. The Combined Aboriginal Nations then met again at Batchelor in December 1998 to develop standards for constitutional development. The outcomes of this meeting and the one at Kalkarinji are known as the indigenous Constitutional Strategy for the Northern Territory. ⁽⁶⁾

The indigenous peoples of the Territory state that this strategy constitutes ‘the indigenous blueprint for constitutional development in the NT (with) equal relevance for federal Constitutional development’ ⁽⁷⁾. It includes:

- The recognition of Aboriginal law through Aboriginal structures of law and governance;
- Protection of the inherent right of Aboriginal peoples to self-determination in the new Constitution;
- Continued recognition and protection of indigenous rights to land and resources;
- Processes to facilitate Aboriginal self-government, including direct funding arrangements with the federal government and the examination of options such as regional authorities, regional agreements and treaty arrangements;
- Negotiation on control and delivery of services relating to essential services and infrastructure, health, education, law and justice, to ensure that they are culturally appropriate; and
- Adequate protection of human rights.

This example provides an excellent illustration of the desires of indigenous peoples in Australia. It demonstrates a clear desire for dramatic change to existing relationships with indigenous peoples, yet importantly it does so within the context of the maintenance of the integrity of the territory's system of government and geography. It proposes what James Anaya has termed an 'indigenous layer of federation'.

The importance of this in the Australian context is that indigenous peoples in the NT constitute 28.5% of the total population. This compares with other states or territories where the largest proportion of indigenous peoples is 2.5%. The Northern Territory is also a territory with a twenty year land rights regime which has provided indigenous peoples with ownership of 80% of the coastline and over 50% of the territory; and a place where there has been a high level of retention, maintenance and practice of Aboriginal law, language and culture.

In short, it is one of the places in which desires for secession or a break from Australian systems of government would be most realistic on the basis of resource and land ownership and size of the population. And yet this is clearly not an aspiration that is expressed by the indigenous peoples of the territory.

The second example is another place where indigenous peoples have retained their traditional cultures and which geographically is regionally capable of an indigenous form of government – this is the Torres Strait. The Torres Strait islands are to the north of Queensland, bordering with Papua in the Timor Sea. They are the 'birthplace' if you will of native title in Australia – with Eddie Koiki Mabo's historic claim over Mer in the Torres Strait.

For over 20 years Torres Strait Islanders have been pushing for regional autonomy, through the establishment of a regional government that is inclusive of both indigenous and non-indigenous interests. This proposal is an expression of the will of the indigenous peoples of the Torres Strait to control service delivery processes and provide modes of government that maintain the cultural integrity of Torres Strait Islanders.

As the chairman of the Torres Strait Regional Authority, Mr Terry Waia has stated:

The vision which many Torres Strait Islanders have longed for has been for an autonomous Torres Strait Region One reason that we want to have greater autonomy is because we want to be empowered to look after our own affairs. A second reason is we know that the man on the ground is in the best position to know what is needed. In the past, and even at present, we have some decisions made in Canberra or Brisbane which overlook our local needs and culture. Good governance means decisions being made by the right people at the right level and in the right place at the right time. (8)

The federal government in Australia is largely supportive of this process, although the process continues to move slowly. As this process is negotiated with the Queensland state and Australian federal governments, the Torres Strait Regional Authority has also negotiated framework agreements for coordinated service delivery in health, education and other areas, as well as lodged a native title claim over the sea and waterways of the entire Torres Strait. These initiatives are in furtherance of this autonomy goal. The latter indicates the strong influence and centrality of cultural integrity to the process.

Again, the indigenous peoples of a well defined geographic area with strong indigenous cultures and systems are seeking to exercise their self-determination in ways that do not dismantle the Australian polity, but which ensure respect for culture and maximum and effective participation.

Overall, these and other examples highlight the deep dissatisfaction of indigenous peoples in Australia with current processes and the lack of participation and facilitation which they provide indigenous communities, against the backdrop of dramatically poor health, education, unemployment and crisis levels of crime and violence.

Mr Chair, these examples also highlight another key feature of self-determination – namely, that it is about establishing equitable relationships in society. As such, it is a process and not a single event. As Madame Daes has previously so eloquently said:

The right to self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of 'belated State-building', through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms. (9)

This should not be something to be feared by the rest of Australian society or the international community. It is not about the creation of separate rights. It is about inclusive government, in which indigenous peoples rightfully have a role in determining their priorities and destiny. As Madame Daes also states, the right to self-determination is the 'right to demand full democratic partnership' in society, and consequently:

this means that the existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible. (10)

It is for this reason that I find the automatic equation of self-determination with secession by some States as illogical. Self-determination requires States to enter into power sharing arrangements with indigenous peoples, rather than for all power to reside in one or other of these partners. It is difficult to see how a process conducted in good faith through genuine negotiation and with the purposes of cultural recognition and equality in mind can have such a prescribed outcome as secession.

At the same time, such processes of renegotiation are still substantial in the level of institutional reform that they require and it is my view that the concept of internal self-determination does not fully encapsulate this level of transformation. International processes have been integral to setting the benchmarks for States to meet in their treatment of indigenous peoples, and these benchmarks should not be set so low as within the context of current institutional arrangements and without recognition of the international legal personality of indigenous peoples. In my view, Article 3 of the Draft Declaration on the Rights of Indigenous Peoples – framed as it is in accordance with the provisions of the *International Bill of Human Rights*, constitutes the minimum acceptable expression of our right to self-determination.

AN ASIAN PERSPECTIVE

Victoria Tauli Corpuz, Executive Director of Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education)

I would like to present a brief overview of the situation of indigenous peoples in Asia, look at the reasons why self-determination is difficult to achieve in many situations in Asia, and propose some recommendations to further the achievement of this right.

Firstly, as many of you would know, the situation in Asia is varied. There are situations where indigenous peoples are not even recognized as such, where they do not even have citizenship rights. In Thailand for instance, our Hill Tribes brothers and sisters do not have citizenship rights. Thus, they cannot freely circulate in Thailand. It is the same for indigenous peoples in Burma. We have other situations where armed conflicts are raging in indigenous peoples communities. That is precisely because they have exhausted all peaceful means to resolve conflicts. As Erica Daes said earlier, nothing, no other choice, has been given these communities. In the Philippines, for example, when we were fighting against the construction of Chiku river dam, we explored all the peaceful means available to us. We had dialogue among ourselves and tried to establish dialogue with the government. We had petitions sent to President Marcos and numerous delegations visiting us, but nothing was done. The national authorities and the company still wanted to implement the dam. Thus, the only option left for many of our peoples was to take up arms to fight against this construction. It is only after peoples finally took arms that government realized they would have to talk to us and finally establish dialogue. The World Bank was forced to cancel the dam.

In the Philippines, the government passed in 1997, the *Indigenous Peoples Rights Act*, a clone of the Draft UN Declaration on the Rights of Indigenous Peoples, which reveals the links between the work we are doing at the local level and the lobbying we are doing at the UN. We are bringing back to the country the international work and using it as an instrument, a framework for a legislation that recognizes our rights.

Secondly, I would like to mention that as we all know there are lots of obstacles against the achievement of the right to self-determination. After the independence that many of our states won against the colonial rulers, the whole concept of one nation one State undermines all the diversities of peoples, which are in our own territories. This nationhood concept has really been one of the major issues that indigenous peoples have to deal with. In fact, even peoples who are not really part of the State have been colonized, East Timor or West Papua, to be included in the so called imaginary one nation. That is the reason why a lot of the dissent, the assertion of one's own identity has been suppressed violently.

The second obstacle is of course the discriminatory mind set of the dominant population and government agencies. I would like to pick up the point raised by Erica Daes saying that self-determination cannot be achieved by legislation only. This is one of the most important reasons that, in spite of the adoption of the *Indigenous Peoples Rights Act*, the establishment of the National Commission on Indigenous Peoples, the Philippines public servants or even the UN does not really understand, respect or accept what indigenous peoples are talking about. We had meetings with various government agencies to see how we could work together, in particular with regards to delineating ancestral lands and we had the opportunity to hear the most patronizing remarks you could ever imagine. It is very difficult to correct the culture, the mind set, the patronizing attitudes because these peoples still believe that we cannot do anything on our own. In fact, even in the UN system when we were

asserting that indigenous peoples should be part of the secretariat of the Permanent Forum, some UN people were asking Why? Can they do it? Is there anybody qualified among them? I mean that's the kind of comments that you hear and it really makes you angry. How can UN people who are supposed to implement this structure think and comment that way. Therefore, I think that it is really one of the greatest obstacles we have to deal with.

Thirdly, due to the phenomenon of globalization, many decisions are not even made by our own governments. Thus, even the right of States to self-determination is very much undermined. Decisions are being made by the World Trade Organization, the World Bank, the International Monetary Fund, etc. Even if these organizations claim that they will respect our rights, suddenly a law, an agreement comes out and we have to liberalize everything. In the Philippines for instance, it is true that we have the *Indigenous Peoples Rights Act* but we also have the *Mining Law*, which liberalizes the entry of all these foreign mining corporations. Moreover, the mining industry, the Mining Chamber of Commerce sued the Philippines government claiming that the *Indigenous Peoples Rights Act* was unconstitutional. Thankfully, we lobbied very hard and recently the Supreme Court came up with a decision. Now indigenous peoples are suing the government claiming that the Mining Act is unconstitutional, because our Constitution says only 40% of equity belong to foreign corporations and this mining law allows 100% ownership over equity on mining investments. To be fair to some governments, their hands are often tied because of the obligations they have, because they are heavily in debt. Thus, in many international events like for instance at the WTO we indigenous peoples find ourselves working closely with our government to assert our right to have a control over our own national territory and over our own national resources.

Therefore, what then are we supposed to do to strengthen the achievement of this right. First, I think we really need to look at and share all the experiences of self-determination from the local level up to the global level. I say local because in the Philippines for instance in spite of the *Mining Law*, several of the provinces, including my own village, have come up with a local or municipal ordinance saying that we ban the entry of mining corporations for 25 years. Moreover, we have a local government code which allows the local government to determine how the lands and resources should be used. We recently had a meeting and since five provinces in the Philippines already adopted that ban, it is now a provincial resolution, provincial ordinance. As the Philippines government does not know how to deal with these bans, the situation has led to the withdrawal of the biggest five mining corporations from these communities. These communities have simply refused to allow them to step into their territory. So I think this is an expression of self-determination. There is a lot of this happening all over the world and we need to look at these experiences. In addition, there is also a diversity of ways to implement self-determination. For instance, in the Philippines, we have such history but in West Papua, indigenous peoples decided that they would work with the Freeport Mining Corporation and get whatever they can get from them to strengthen their positions vis-à-vis the Indonesian government. In fact there is a wide range of experiences that we need to consider because that will really add up into the volume, richness and wealth of the experiences all over the world.

The active and sustained dialogue with the dominant population and continuous awareness raising education campaigns with people and government agencies is also another way of strengthening the implementation of our right to self determination. What else could be more peaceful than having a face to face meeting with the corporations, a face to face meeting with the government agencies, letting them see who we are, how we think. That is only then that mutual respect will come about. Many peace agreements have been negotiated between armed groups and government. Peace building processes have provided with this kind of face to face, personal dialogues, and I think that is the approach that has to be followed.

Finally, I think that international solidarity is really needed among indigenous peoples all over the world, we have demonstrated this need in the work that we are doing at the UN. Thankfully, there is such a thing as the UN which really brought us together to look at these experiences, to see what is common, and what we can do together. Definitely this solidarity has strengthened all our campaigns. I go back to this mining campaign, even if the mining company Rio Tinto comes to the Philippines and says that they have manifested a good behaviour, our brothers and sisters from Australia, from Latin America etc. will share their experience with this company with us. They would inform us of the behaviour this company showed with them. This kind of solidarity will really strengthen the knowledge we have of how these corporations or even governments have been behaving and of what we can do together to combat them more effectively.

We also need to consolidate our efforts to reshape the UN and strengthen the Permanent Forum. It is really is an institution that will help in reshaping the UN and have indigenous peoples be equal partners in bringing peace and justice in the world and in fact being the lead sector of peoples in bringing sustainable development in the world.

RECOGNITION OF THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES: THE FUTURE: OPENING ADDRESS

Rodolfo Stavenhagen, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples

The widespread current debate about the right to self-determination spills over into the discussion of the implications of this concept in relation to the rights of indigenous peoples.

I think we should remember that there are various levels of approach and analysis of the problem of the right to self-determination. It seems to me that the discussion over the last few years has been perhaps excessively legal and technical because what we are talking about goes beyond the technical and legal levels. We must be sure that the concepts we use have a firm foundation in sociological phenomena and philosophical concepts. I think one of the problems of this debate is that there have been two contradictory approaches to this issue of the right to self-determination: one might be termed the top-down approach and the other the bottom-up approach. The top-down approach of course is the one that has been traditionally adopted by States, as they are concerned with the valid application of the right to self-determination, as defined in the relevant national and international documents. Politically, the right to self-determination is used to further some very valid and legitimate national interests and national goals.

Yet the other, the bottom-up, approach is the one that, in my opinion, requires a lot more clarification. We might also consider it as the constructivist approach: the right to self-determination understood in fact as a right of peoples and not of States; as a right of collectivities organized in a certain way and here I think the term peoples must be used in its sociological and cultural meaning. Though it may be also a legal term, in the UN instruments there is hardly any reference to the term “peoples” as a legal concept. Moreover, in the political debates taking place in some countries we see controversial and polemical positions regarding the definition of “peoples”, so this is not an unproblematic term to use. But certainly when we attempt to build a new kind of international regime of the right of peoples to self-determination, we must start with the concept “peoples” itself. If this can be achieved, then it will be easier to accommodate the interests of States and the rights of peoples. In my opinion, these issues must be sorted out somehow in the current discussions on the right to self-determination both in the UN documents as well as in regional documents such as the Draft Declaration on the Rights of Indigenous Peoples in the American region.

I really expect these issues to be addressed in this afternoon’s discussion, helping us to think more clearly about the two approaches and values that we find underlying the legal and the technical use of the concept of self-determination as well as that of peoples. Hopefully our panellists and the discussants will help us address some of these issues.

INDIGENOUS PEOPLES AND THE RIGHT TO SELF-DETERMINATION: A GOVERNMENTAL PERSPECTIVE

Antonio Arenales Forno, Ambassador and Permanent Representative of Guatemala at the European Office of the United Nations

The right to self-determination is a collective human right recognized in covenants on civil and political rights as well as on economic, social, and cultural rights.

In accordance with these covenants, all peoples, without discrimination of any kind, including indigenous peoples, are entitled to the aforesaid collective human right; and by virtue of this right, all peoples may freely determine their political status and freely pursue their economic, social, and cultural development, disposing freely of their natural wealth and resources.

The association usually brought up between the right to self-determination and the birth of new States is what concerns governments when addressing the recognition or exercise of this right. The right to self-determination, however, may or may not give rise to the birth of new States, given that, by virtue of this right, States may also disappear as a result of integration processes, or different kinds of autonomy may be created within States. The declaration of principles concerning friendly relations and cooperation among States, which was passed in 1970 in UN General Assembly Resolution 2625, mentions these forms of exercising self-determination.

The fact that a large number of new States arose during the decolonization process and that it was almost exclusively with that context and result that the international community devoted its attention to studying the exercise of the aforesaid right is what prompts such an association between self-determination and independence, causing concern on the part of governments, especially those of States with several indigenous peoples living within their borders, and to a greater extent when some of those peoples constitute the majority of people living in certain parts of the country. The concerns become fears and resistance

when leaders or representatives of these peoples allow it to be seen in either clear or veiled terms that they have secessionist intentions when they cite said right.

It is enormously important for both States and indigenous peoples to begin to pay due attention to the right to self-determination outside the framework of colonial domination or foreign occupation. It has been outside this framework that the exercise of this right over the last quarter of a century has led to the most important and dramatic changes in the international community. Some examples, among many others, have been the birth or revival of some thirty States as a consequence of the disappearance of the Soviet Union, Czechoslovakia, and Yugoslavia; the strengthening of autonomies in Spain, the United Kingdom, and other States; the political integration underway in the European Union; and the decision made by Quebec to remain in Canada.

With respect to indigenous peoples, this issue has become the foremost obstacle preventing progress toward a declaration on their identity and rights, a goal that we have been discussing for ten years, despite its being only the first step toward the proper protection of indigenous identity and rights. A convention should arise following the declaration, as was the case for children and women, because only a legally binding instrument that recognizes indigenous rights as such, including their right to self-determination, can provide these peoples with an adequate guarantee concerning their identity and rights. However, it will only be possible to conclude work on the declaration and eventually reach a convention if we clearly define the meaning and scope of the exercise of the right to self-determination.

The collective human right to self-determination has existed and been exercised from time immemorial. It exists and is as much in force today as it was in 1945, when the UN Charter was signed, or in 1960, when Resolution 1514 on decolonization was adopted, or later, when the covenants were drafted. Peoples have exercised this right by changing the world's political structure without regard for the obstacles erected by certain States that cite international standards, use force, and now seek to question the entitlement of indigenous peoples to the right to self-determination by denying or qualifying the status as a people claimed by those who consider and identify themselves as such.

Regarding this last issue, which has occupied us for so long in our work on the declaration, it is unacceptable that a collective human right be made to depend on prior recognition by States of status as a people. Given that it is already impossible to achieve a single and universally accepted definition of the term *people*, which, even were it possible, would lead us to the equally impossible task of defining *nation*, it is absurd to make the exercise of a basic human right dependent on the will of States to confer a status for which there is no sure definition.

This lack of definitions, which has and will continue to occupy jurists, sociologists, and anthropologists, should not pose an obstacle to the recognition and exercise of the above-mentioned right. It has not been an obstacle for peoples submitted to colonial domination, nor has it been nor can it begin to be admitted as one for peoples not submitted to colonial domination.

What should concern and occupy the international community is ensuring that the exercise of the right to self-determination is attainable by peaceful means. For this purpose there could be an evaluation of the possibility of creating an international legal framework on the scope and conditions of the exercise of self-determination. Such a framework would have to be clearer and more precise in its terms and concepts than Resolution 1514 on decolonization and the declaration concerning friendly relations and cooperation among States, approved in 1970 by way of Resolution 2625.

On the State or national level, the State's political and legal system, including its system of government, must guarantee the human rights and basic freedoms of its citizens, including the collective human right to self-determination. This can only be possible if there are adequate levels of decentralization and autonomies, as well as the proper institutional mechanisms for ensuring citizen involvement in decision-making processes and citizen control over those in government. To achieve such levels and the proper institutional mechanisms, necessary consideration must be given to several factors, including the area and characteristics of the land as well as the number and make-up of its inhabitants. All this is nothing more than a democratic state of rule.

In all States — including those that are multinational, or composed of multiethnic nations, or however we may define the diversity of their citizenship — all peoples living together in each of these States will be able to exercise their right to self-determination within that State, provided that they have an effective democracy, meaning that, in accordance with the characteristics of each State, they are equipped with adequate levels of decentralization and autonomy and have the proper institutional mechanisms for ensuring citizen participation and control.

If the levels of decentralization or autonomy and the institutional mechanisms are not adequate, then the political and legal systems of States must be flexible enough to allow for adaptation or improvement. If a system is rigid and citizens do not have

the political and legal tools to promote change, or if a State resists the necessary changes, the exercise of the right to self-determination can legitimize movements of rebellion and/or secession as a last resort and an exceptional remedy.

Another formula that has been used in an attempt to limit the exercise of the right to self-determination is the separation of so-called internal, or domestic, and external, or international, issues. This right does not have one internal and another external aspect, as such. Instead, there is a need for internal conditions in States, allowing for the peaceful exercise of this right, with respect for the governing authority and the territorial integrity of the State. If such conditions do not exist or cannot be created, then the right to self-determination may eventually legitimize rebellion or secession, and this requires external or international responses, beginning with recognition.

In simpler terms, it could be said that, although independence and the birth of new States seem to be the normal way in which peoples submitted to occupation or colonial domination exercise self-determination, when peoples are not submitted to occupation or colonial domination, self-determination should be exercised within States, provided that the necessary political and legal conditions exist or can be created.

By the same token, the international community, which, on the basis of the right to self-determination, has supported and continues to support the independence of peoples submitted to colonial domination or foreign occupation, should defend the territorial integrity and the government of a State in which there exists a political and legal system that allows its people or peoples to exercise the right to self-determination. When this political and legal system does not exist in a State, or when it is faulty or insufficient, then the international community should, first of all, offer its cooperation and promote adaptation or improvement. Only in extreme cases could it endorse, encourage, or tolerate an anti-government rebellion or a secessionist movement intended to divide a State. This is the context in which an attempt could be made to create a legally binding framework whose basis would be the aforementioned declaration of principles.

Wars for the sake of national liberation, one of the last assumed justifications for the right to wage war in the world today, must be restricted to the context of the exercise of the right to self-determination. The right to wage a war for independence or national liberation is for peoples submitted to colonial domination or foreign occupation. For peoples not submitted to colonial domination or foreign occupation, this right could only be a last resort once all recourses to national and international bodies had been exhausted. This would be a right to rebel against undemocratic governments or a right to secede.

Many constitutions, such as that of my own country, recognize the right of rebellion. The international community, more, unfortunately, for political or economic interests than for those related to the defence of democracy, the right to self-determination, or to sovereignty and territorial integrity, recognizes or does not recognize governments and States.

Going back to the terms *people* and *nation*, without intending to define them, it is important to recall that Resolution 1514 refers to the fact that people have a right to their national territory. If we contrast this concept with what we find in constitutions such as Guatemala's, which use the term *nation* to refer to all nationals, in this case, the people of Guatemala, it would seem that the word *people* is used as a synonym of *nation* to designate all nationals, and this justifies the objection of those who deny that the indigenous have any status as a people.

However, the fact that the nationals of a State are identified as a people — and this is legally and factually the situation of the Guatemalan people — does not mean that, in a multinational State such as Guatemala, there are not persons who also identify themselves as part of the Maya people. The same situation exists, for example, with the Welsh, Flemish, Catalan, Québécois, and other peoples, and there is no reason why indigenous peoples cannot do the same.

The nature of the collective right to self-determination is such that, when exercised, it does not matter if a person is identified as belonging to both the people that includes all the nationals of the State and, at the same time, to another people made up of those persons who have a collective awareness of belonging and have developed bonds of a different kind, such as traditions, beliefs, and customs, which distinguish and identify them as a people.

A multinational State can survive if its political and legal system is adequate or capable of adjusting to the exercise of self-determination on the part of all the peoples that are part of it. Europe's recent history provides us with the example of Spain, whose political and legal system proved to be successful, and with that of Yugoslavia, where we witnessed a terrible failure.

In the case of Spain, whose political and legal system is recognized as adequate for the exercise of the right to self-determination, the international community defends its sovereignty and territorial integrity in the face of secessionist movements.

When we refer to a democratic system of government, to decentralization, autonomy, and institutional mechanisms for participation and control, we are not referring only to that part of the right to self-determination that concerns the free

determination of political status but also to the part about disposing freely of the natural wealth and resources so that peoples can pursue their economic, social, and cultural development. This is because, even in plural, multinational, or multiethnic States, proper levels of decentralization and autonomy will allow for adequate participation in and control over the State's management of natural wealth and resources.

It cannot be forgotten that the right of peoples to dispose freely of natural wealth and resources so as to pursue their development is granted by virtue of the exercise of self-determination on the part of both indigenous and national peoples. A violation of the right to self-determination would occur both if indigenous peoples were discriminated against or marginalized from the benefits of natural wealth and resources, especially when the latter are located in the territory where they live, and if, to the detriment of all other nationals, indigenous peoples were to dispose exclusively or preferentially of natural wealth or resources.

During the years of the Cold War, we witnessed the demise of fragile democracies in many developing countries that had become victims of the struggle to export or militarily prevent revolutions. Guatemala was no exception. Following the Cold War, most of these States began a process of democratization, but, in Guatemala and many other States, such transition is extremely difficult and complex. This is because they are not confronted with the reconstruction of a demolished political and legal system, given that, in most cases, these systems had not responded to the multiethnic, multicultural, or multilingual characteristics of the State. Instead, their challenge is to build a new political and legal order that, by responding to such characteristics, will allow for the exercise of the collective right to self-determination on the part of both the national people and indigenous peoples.

There is no such thing as a model of a political and legal system that could be valid for all States, particularly with the current broad diversity of States that can be called plural, multinational, or something similar. What certainly does meet universal acceptance, nevertheless, is the requirement that all political and legal systems must strive to guarantee and enforce human rights and basic freedoms, including the right to self-determination. This demands the involvement of citizens in decision-making processes and their control over those in government, to whom they delegate — but do not abdicate — sovereignty. In multinational States, such participation and control will only be possible by means of processes leading to decentralization and autonomies, the needs and levels of which will depend on the specific characteristics of each State.

INDIGENOUS PEOPLES AND THE RIGHT TO SELF-DETERMINATION: THE NEED FOR EQUALITY: AN INDIGENOUS PERSPECTIVE

Dalee Sambo Dorrough, Inuit Circumpolar Conference (ICC) Working Group on United Nations Issues.

In these brief remarks I would like to share some of the various conceptions of the right to self-determination that have been expressed by indigenous peoples and follow with the contrasting state positions, and conclude by offering my interpretation of the way in which the right to self-determination of indigenous peoples should be reflected in the Declaration.

INDIGENOUS CONCEPTIONS AND PERSPECTIVES ON EXERCISING THE RIGHT

There is a diversity of views amongst indigenous peoples, just as there is great diversity in the historical, cultural, social, political and economic characteristics of indigenous peoples. Throughout the course of this indigenous/State debate concerning self-determination, indigenous peoples have described their various conceptions of the right and how it operates within their communities and societies. Some of them have described regional autonomy arrangements such as Nunavut or the Greenland Home Rule, others have addressed tribal sovereignty within the U.S., like that of the Navajo Nation, others, like the Haudanasaune have described their perspective of the right for their peoples, and others still address it in terms of a broad spectrum of political possibilities. For example, the Aboriginal and Torres Strait Islander Commission stated:

ATSIC believes that unambiguous reference to self-determination is fundamental to the integrity of the Declaration. To remove this reference, would irreparably damage the Declaration's content, particularly the paragraphs in part VI relating to the relationship of indigenous peoples to their land. ATSIC agrees with the views of indigenous organizations represented at this forum and supports the position which will be conveyed to you by Australia's non government representatives. It would be inappropriate to limit the application of the concept so as not to infer that is poses any challenge to the nation State. Indeed ATSIC would view further qualifications to the references to self-determination as an unnecessary weakening of the text. To Australia's indigenous peoples self-determination is an aspirational concept – which embraces a widening spectrum of political possibilities, from self-management by

indigenous peoples of their own affairs to self-government by indigenous peoples of their own communities or lands. Self-determination is a ‘dynamic right’ under the umbrella of which Aboriginal and Torres Strait islander peoples will continue to seek increasing autonomy in decision making. The Declaration should state in simple unambiguous terms that all indigenous peoples have a right to self-determination. (1)

In 1997, again ATSIC and seven other Aboriginal organizations addressed the right to self-determination and stated that:

“international practice has increasingly shown that self-determination can be realized in many different forms. In the case of indigenous peoples, these forms will vary in accordance with particular customs, needs and aspirations. Central to the right to self-determination are notions of control and consent: control over decision-making processes affecting our affairs and consent to the terms of our relationships with States. Increasingly, these have been recognized as central to any catalogue of the rights of indigenous peoples and implicitly in the principle of racial non-discrimination as applied to indigenous peoples. (2)



Dalee Sambo Dorrough

While the reality of the exercise of the right to self-determination for indigenous peoples is quite clear: few, if any, seek full independence or full autonomy as nation-states, every indigenous person who has intervened at the UN has unequivocally stated that the right to self-determination must be recognized for indigenous peoples, as “peoples” without qualification, limitation or any other discriminatory double standard. The right to self-determination must be applied universally, to all peoples, including indigenous peoples.

In this regard, Article 1 of the Covenants already applies to indigenous peoples, as peoples. Article 1(1) of the international human rights covenants, provides that “all peoples have the right to self-determination.” It may be said that the context for the emergence of such language was solely for colonized peoples, specifically, those in non-self-governing and trust territories as referred to the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*. (3) Certainly, this era of decolonization gave rise and contributed to the understanding of the content of the right to self-determination for such peoples and the international community in general. However, by the time that the 1970 Declaration Concerning Friendly Relations, was adopted and made similar reference to the right to self-determination, it was construed as a right not necessarily confined to colonial conditions. (4)

In relation to indigenous peoples, it is important to note that self-determination, sovereignty and self-government are inherent in the legal status of indigenous peoples as peoples. The right is pre-existing and cannot be given or created by anyone or any government. It is expressed, exercised and manifested in different ways by different peoples. Therefore, it must be acknowledged that there are a wide range of approaches and interpretation for the exercise of the right to self-determination in regard to indigenous peoples – far too many to discuss in the present context.

Throughout 1997, CHR working group session, a troubling discussion was prompted by States concerning the notion of “internal” and “external” self-determination. This false dichotomy has been set up by States in order to confine indigenous peoples right to self-determination to one of domestic or State prescription. The right to self-determination cannot be separated; it is a whole right. Governments cannot affirm that indigenous peoples, like all peoples, have the right to self-determination and in the same breath state that indigenous peoples only have the right to internal autonomy or self-government consistent with State-prescribed methods for defining the content of the right. The expressions of indigenous peoples in this seminar, at the UN, the Arctic Council and other international fora are examples of the external exercise of the right to self-determination. We, ourselves, are expressing our worldviews and perspectives on the international plane, and making our voices heard outside of or external to our own communities. And, this is one aspect of the right to self-determination.

In summary, the position of indigenous peoples has been the need for explicit recognition of the right to self-determination, without qualification, limitation or any other discriminatory double standard attached to the right in the Declaration. Indigenous peoples have not expressed opposition to the principles of international law. Rather, they have recognized such principles and have asserted the fact that these principles must apply equally to indigenous peoples as they apply to all peoples.

STATE GOVERNMENT POSITIONS

This is where we begin to see the contrast between indigenous peoples and States. The most alarming position expressed to date is that of the Government of Canada. I suggest that the position of Canada may be even more troublesome than that of the U.S., as suggested by Professor Maivan Lam. I believe this for two reasons: 1) the Canadian government position expressed in the March 2002 OAS Working Group is their current formulation to dealing with the article on self-determination in both the OAS and the UN Declarations; and 2) they are at the center of the debate, facilitating the closed door meetings of governments and other inter-sessional consultations. The colonial attitudes of State governments persist though it is difficult to quickly identify such attitudes as they are often expressed with subtle nuance, and not the blunt statements or labeling that we have experienced in the past: “barbarians,” “savages,” “pagans” or “backward peoples.” The colonial attitudes surface in positions such as that of Canada. The most recent proposal made by Canada, at the OAS, but applicable to the UN as well reads:

The following is a Canadian attempt, for the purpose of both the UN and the OAS Working Groups, to outline how the right to self-determination could be implemented by indigenous collectivities living within States having a government representative of the whole people belonging to the territory without distinction as to race, creed or colour:

- This right to self-determination respects the political, constitutional, and territorial integrity of democratic states;
- Exercise of the right involves negotiations between States and the various indigenous peoples within those States on the means of pursuing the political, economic, social and cultural development of the indigenous peoples involved;
- These negotiations must reflect the jurisdictions and competence of existing governments and must take account of different needs, circumstances and aspirations of the indigenous peoples involved;
- This right to self-determination is intended to promote harmonious arrangements for indigenous self-government within sovereign and independent States; and;

Consistent with international law, the right shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States, conducting themselves in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representative of the whole people belonging to the territory, without distinction as to race, creed or colour.

There is no doubt that this position will be met with strong opposition from indigenous peoples. For example, in regard to territorial integrity, indigenous peoples have already advanced grounded, intellectually honest legal arguments in response to the “unfounded” fears of government to dismemberment. Some States have claimed that Article 3 of the Declaration must be altered in a manner that permanently entrenches the notion of territorial integrity of States. Indigenous peoples vehemently oppose such proposals since they are unnecessary, as well as having the potential of stifling the natural evolution of the right to self-determination under international law. Furthermore, the notion of territorial integrity is already incorporated as an integral part of international law. In particular, the 1970 Declaration Concerning Friendly Relations, as an interpretive document for the UN Charter, emphasizes this point. States are well aware that other existing principles and rules in international law will still be applied in any given circumstance, in determining the meaning and scope of the right of peoples to self-determination.

Like other aspects of self-determination, the principles of territorial integrity is also evolving; the principle of territorial integrity is no longer one that is tied solely to States. Rather the integrity of indigenous peoples’ territories and their other basic interests are intimately linked to this principle. In this regard, U. Umzurike emphasizes:

... the ultimate purpose of territorial integrity is to safeguard the interests of the peoples of a territory. The concept of territorial integrity is therefore meaningful so long as it continues to fulfill that purpose to all the sections of the people. (5)

It is also important to note that the right of peoples to self-determination is a relative right. Contrary to the implications by some States, self-determination is not an absolute right without limitations. It does not confer on any one people the right to deny other peoples the same right on an equal footing. It does not include any right to oppress other peoples. As Professor R. McCorquodale makes clear: “The right to self-determination is not ... an absolute right without any limitations.” (6)

It is almost laughable that certain States, such as the United States and Canada, suggest or imply that the explicit recognition of indigenous peoples’ right to self-determination is a threat to the territorial integrity of existing States. Current developments in Canada, for example, demonstrate the reverse. In fact, over the past two decades, the self-determination actions of indigenous peoples in Canada have effectively contributed to safeguarding the territorial integrity of Canada. For example, the democratic actions of James Bay Cree people have far exceeded what the government of Canada itself has done to secure its

borders as an existing State. (7) In fact, as will be discussed below, there are few indigenous peoples, nations or communities seeking to disrupt or dismember existing nation States. On the contrary, more and more indigenous peoples and nations are seeking to create relationships that allow for the natural tension of shared sovereignty and cross cultural regimes and arrangements to protect and promote their distinct interests.

As noted above, indigenous peoples do not have any difficulty with the principle of territorial integrity. The point indigenous peoples have been making in articulating their arguments is that of opposition to state attempts to alter international legal principles in the context of indigenous peoples and for self-serving reasons. Thereby creating a different standard for indigenous peoples.

It appears that State governments have become far too focused upon drafting of a text, which will ensure that an isolated, “worst-case scenario” will never be realized. They have conjured up “scenarios” where the right to self-determination is absolute and if upon, inclusion of the unqualified right of indigenous peoples to self-determination in the Draft Declaration, the sky will fall and the world as we know it will collapse into chaos and strife.

States have used such an approach, as well as other erroneous assumptions, to support their views. They are now trying to build consensus around language to protect themselves from their “scenarios” and to preserve the status quo – the status quo being a narrowly defined notion of self-determination as only a right of States and not peoples. Furthermore, State government representatives have failed to be intellectually honest about the dialogue and debate concerning the right to self-determination. To date, few States have even engaged in a substantive and intellectually honest discussion, at the international level, about this fundamental human right. States are making indigenous peoples out to be insurgents threatening their territorial integrity and this is clearly not the case.

Indigenous peoples have encouraged States to consider the content of the right, from a range of perspectives, including articulation of how the right operates in domestic contexts. Furthermore, the political, demographic, and economic realities don’t point to indigenous peoples as the major threat to State dismemberment, impairment or disruption. The matter of the right to self-determination of indigenous peoples will have to be addressed on a case by case basis and will require the full, direct and meaningful participation of the indigenous peoples concerned.

To compound the Canadian governments’ position on territorial integrity is their introduction of the concept of “constitutional integrity” and “political integrity.” What do these terms mean? In this regard, I recall the government statements that were raised when indigenous peoples cited the reality of cultural genocide and ethnocide during the February 2002 discussion of Article 7 of the Declaration. Government representatives stated that they “are not terms that are generally accepted in international law.” On this point, I must borrow the words of the Canadian government and state that “constitutional integrity” and “political integrity” are not terms that are generally accepted in international law, especially in the context of the exercise of the right to self-determination.

Furthermore, the Canadian government March 2002 statement on self-determination attempts to confine and limit the right to internal self-determination based on negotiation to further prescribe the right, in order to bring about “harmonious relations.” However, as has been stated by both Professor Daes, Maivan Lam and Bill Jonas, there is no security in legislation or high-level political institutions, which are highly volatile arenas and subject to frequent change. Finally, the 1970 Declaration Concerning Friendly Relations already provides for alternatives to independence, namely to negotiate other arrangements for the exercise of the right to self-determination of peoples within existing States.

CONCLUSION

In conclusion, consistent with the Purposes and Principles of the UN, as set out in Articles 1 and 2 of the UN Charter, it is not within the mandate or competence of the UN or its member States to engage in a process that would undermine the status of indigenous peoples as “peoples” or the indigenous right to self-determination. When these critical issues are discussed, the present positions of many States violate the principles of the UN in respect to democracy, equality and non-discrimination and other fundamental human rights. Therefore, these positions should not be entertained by the UN or its committees and working groups. The UN is not free to determine that indigenous peoples are not “peoples” with the right to self-determination, based on indigenous identity or origin or any other discriminatory grounds. With respect to indigenous peoples, the UN and member States must uphold well-established international norms and principles of equality, non-discrimination and the prohibition of racial discrimination. Moreover, the Working Group that is currently addressing the Draft Declaration relating to the rights of indigenous peoples should follow the practice of the human rights treaty bodies which have repeatedly recognized the concept of indigenous peoples as peoples with the right to self-determination.

If Article 3 of the Declaration were to be altered - even to include the same or similar notions as might currently exist under international law - it would invite interpretations to be applied to indigenous peoples' right to self-determination that are different from those of other peoples. It might also have the effect of wrongfully "freezing" the interpretation of this indigenous human right, in such a manner as to prevent or otherwise stifle its natural evolution under international law. The significance of such principles as self-determination and territorial integrity must be able to evolve under international law in the same manner for indigenous and non-indigenous peoples. This would be inconsistent with the prevailing view of the need for constant evolution and accommodation of different circumstances

I do not want to appear rigid about the position of indigenous peoples in this debate. We are willing to engage in a debate or negotiation to reconcile differences. However, we will only do so when States are prepared to be intellectually honest and engage in debate and negotiation in good faith, and more importantly when States are prepared to abide by the peremptory norms that they themselves have established in international law: equality, non-discrimination and the absolute prohibition against racial discrimination.

There is no doubt that the matter of the right to self-determination, in the context of the Draft Declaration, will continue to be a matter of debate. However, from an indigenous perspective, there is little to debate: we cannot accept any qualification, limitation or discriminatory double standard. In regard to the right to self-determination, indigenous peoples must have identical wording as in the human rights covenants. In this way, our multiple realities can be realized, and we can actually enjoy our fundamental human rights, and we are able to freely determine our political status and freely pursue our economic, social, cultural and spiritual development.

SUMMARY OF DISCUSSIONS

Marie Léger, Coordinator, Rights of Indigenous Peoples Programme, Rights & Democracy

PREFACE

On May 18, 2002, Rights & Democracy held an expert seminar on the right to self-determination of indigenous peoples in New York. The purpose of the seminar was to contribute to depolarizing the debates on Article 3 of the Draft UN Declaration on the Rights of Indigenous Peoples that will be central to discussions at the next session (in December 2002) of the working group set up by the Commission on Human Rights to elaborate the Declaration before the end of the UN Decade of the World's Indigenous Peoples in 2004. Since 1995, only two articles of the Draft Declaration have been adopted.

Some forty people—experts and representatives of governments, indigenous peoples and non-governmental organizations—gathered to discuss their understanding of the right to self-determination. This is a summary of their discussions.

INTRODUCTION

After 14 years of discussions in the working group of the Sub-Commission on the Promotion and Protection of Human Rights and seven years of debates in the working group of the Commission on Human Rights (in accordance with Resolution 1995/32), many governments are still sceptical about the applicability of the right to self-determination to indigenous peoples.

Following are a few of the key questions some governments are asking about the possible recognition of the right to self-determination:

- 1- How does the exercise of the right to self-determination affect the territorial integrity of States?
- 2- How can the right to self-determination be exercised within existing States?
- 3- How can States respect the right to self-determination when they have within their borders many indigenous peoples who may wish to exercise this right in different ways?
- 4- Is the exercise of the right to self-determination subject to international standards such as the *Universal Declaration of Human Rights*?

Indigenous peoples are unanimous about the need for unqualified recognition of their right to self-determination. They support the current wording of Article 3 of the Draft Declaration, which is based on the common Article 1 of the *International Covenant on Civil and Political Rights* ((1)) and the *International Covenant on Economic, Social and Cultural Rights* ((2)) and reads as follows: "1. All indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The expert presentations and discussions with the participants provided an opportunity to answer some of the governments' questions, to raise new questions and hopefully to move the debate forward.

UNDERSTANDING THE RIGHT TO SELF-DETERMINATION AND ITS ATTENDANT OBLIGATIONS

At the time when the UN was founded, the self-determination of peoples was conceived of as an aspiration, a *desideratum* of the international community. Only gradually, and particularly under the impetus of the wave of decolonization, did it acquire actual legal status.

The exercise of self-determination is a continuous process that enables peoples to negotiate the terms of their relations with their neighbours or with the State in which they live. Self-determination is not about the scope of the responsibilities a people assumes; rather it is about a people's power to decide what responsibilities it needs to be able to assume in order to ensure its development. Consequently, self-determination cannot be granted by governments or constitutions. Furthermore, governments come and go, and constitutions change. Self-determination proceeds from the very status of peoples. The exercise of the right to self-determination takes many different forms, reflecting the many different circumstances of different peoples; all, however, imply negotiation between equals with States, the possibility of appealing to the international community and the possibility of participating in international forums.

Political forms are evolving and have always evolved. They cannot be cast in stone once and for all. Furthermore, the question of the right to choose one's political status must now be placed in the context of an increasingly interdependent world in which the great trading blocks are redefining the scope and practice of the sovereignty of States. In this sense, self-determination is now more a question of process than of pre-established rules, and a question that must be approached in a spirit of trust among peoples.

The relationship between peoples and their land and resources is an essential component of the right to self-determination, recognized in the following terms in the second paragraph of Article 1 of the two Covenants: "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 co-operation, based upon the principle of mutual benefit, and international law. Under no circumstances may a people be deprived of its means of subsistence." For indigenous peoples, this is all the more important because their territories are their source of cultural identity, knowledge and spirituality and therefore intimately bound up with their very survival.

Because indigenous peoples are not, for the most part, seeking the creation of new States and have generally yielded little power in the concert of nations, it is up to the international community to find the means to enable them to survive and develop other than through the creation of independent States. One of the goals of indigenous peoples is to gain recognition for their international legal personality as peoples. They could likely obtain international legal personality without forming an independent state. There exist already examples of forms of non-State international legal personality (some international organizations, for example) that can inform the thinking of the international community in this respect.

OBLIGATIONS STEMMING FROM THE RECOGNITION OF THE RIGHT TO SELF-DETERMINATION

For indigenous peoples, recognition of their right to self-determination means for that they must abide by the standards and norms of human rights, negotiate in good faith and make use of all available peaceful avenues of negotiation in the exercise of their rights.

For States, recognition that indigenous peoples have the right to self-determination means that indigenous peoples must have access to international forums, negotiate as equals and, in the event of conflict, agree to turn to international mechanisms in search of solutions.

Recognizing the right of indigenous peoples to self-determination without qualification is a way to recognize that they are not "second-class peoples" and are equal in rights and in dignity.

Recognizing indigenous peoples' right to self-determination is also a way for the international community to pay its debt to indigenous peoples. The Mohawk term for law and justice "*live together nicely*" aptly expresses the spirit that must prevail with respect to the right to self-determination.

EXERCISING THE RIGHT TO SELF-DETERMINATION: POSSIBLE AVENUES

Indigenous peoples have been excluded from the State creation process, Ecuador being a case in point. For the indigenous peoples of Ecuador, exercising the right to self-determination means being included in the structures of the State, not seceding from them. Recognition of the pluricultural nature of the State is one way of including peoples that have been marginalized.

The recent recognition of the collective rights of Ecuador's indigenous peoples implies a reordering of the country's administration. There are three possibilities that can and must co-exist: in the regions of the Amazon and the Coast, self-government is a viable option because the boundaries of the territories of the indigenous peoples are clearly defined. In other parts of the country, the administrative boundaries could be redrawn to create zones with very large majorities which could have forms of local self-government (some Black communities in particular). Other zones where indigenous peoples make up between 60% and 90% of the population should become multicultural zones that create conditions conducive to the participation of all citizens. These changes are primarily about establishing a new ways of sharing of power and wealth in society. In this sense, self-determination and democracy are intimately interrelated.

Recognition of the right to self-determination also has a bearing on the prevention of conflicts. In many cases, in Asia and elsewhere, indigenous peoples have taken up arms because they have been unable to get the States in which they live to recognize their rights in any other way. In some cases, indigenous peoples are even denied citizenship. In Asia, there remain several obstacles to the recognition of indigenous rights. To begin with, the post-colonial "One State/One Nation" concept persists in a number of countries in the region. Then there are the discriminatory attitudes that continue to prevail toward indigenous peoples. Moreover, globalization is diminishing the real sovereignty of the world's nation-States; particularly when development projects and the control of natural resources are involved, international organizations such as the World Trade Organization, the World Bank and the International Monetary Fund, are major players. In such cases, indigenous peoples identify with the States in which they live, in an attempt to maintain some degree of decision-making power at the national level, and there are local experiences of self-determination that need to be made better known. Indigenous peoples want to rise to the challenge of changing the UN system so that they can play a role and contribute to world peace and sustainable development.

In Australia, indigenous peoples have been calling for an inclusive government that guarantees them participation and control over the decisions that affect them. In the past, the Australian government has experienced many shifts in its policy toward indigenous peoples, moving from extinction to assimilation, to recognition of the principle of self-determination, and more recently to self-management and "self-empowerment". The results of the current approach have been disappointing, given the costs incurred. The statistics confirm that Australia's indigenous peoples are marginalized. The only way to remedy this situation is to build a partnership in a spirit of mutual respect. Indigenous peoples' demands are in no way secessionist. Even in the Torres Strait Islands, where geographic separation could conceivably be invoked to support calls for a separate State, the demand is for regional autonomy, not secession. Australia has nothing to fear from recognizing the right to self-determination of its indigenous peoples, whose calls for inclusion and effective participation do not threaten the country's territorial integrity. However, Article 3 of the Draft Declaration is the minimum acceptable expression of the right to self-determination of Australia's aboriginal peoples.

In Panama, the constitution allows for initiatives to respond to the needs of the country's indigenous peoples and respect their own development. The right to self-determination is exercised *de facto* through the system of *Comarcas*, which enable indigenous peoples to have a special form of government and maintain their cultural practices within their territories. In all of the years since the first *Comarca* (kuna) appeared in the 1930's, there has never been a secessionist movement in Panama, despite the fact that the *Comarcas* constitute small states within the Panamanian State.

In Greenland, rather than fuelling conflict, the home rule policy has resulted in greater cooperation between the Inuit and the Danish. The autonomous government was originally dictated by Denmark, but Greenland has now taken the initiative in renewed discussions on the powers and jurisdictions Greenlanders see as necessary. Although Denmark has stated that it will respect the right of Greenlanders to self-determination even if it means an independent State, there is nothing to date that suggests that independence is the road most Greenlanders are inclined to take.

A GOVERNMENTAL PERSPECTIVE ON THE RIGHT TO SELF-DETERMINATION

Both Covenants state that all peoples, including indigenous peoples, have the right to self-determination. The exercise of this right may or may not give rise to the creation of new States. The UN has in recent years gained some 30 new members, and during that period new forms of shared sovereignty, such as the European Community, have emerged. Other States could at some point disappear by merging with other States.

The fact is, however, that the history of the last few decades has led the international community to focus on the issue of independence, and the potential for secessionist dynamics should not be underestimated. Nevertheless, the time has come to give the right to self-determination the attention it deserves outside of the decolonization process, independence being but one of the possible forms self-determination can take. As a collective human right of peoples, self-determination is exercised, not granted. It cannot be dependent on prior recognition by a State of the applicants' status as a people, a term for which there is no specific and universally-recognized definition.

The real responsibility of the international community is to ensure that the right to self-determination is exercised through peaceful means. To this end, consideration could be given to a more precise international legal framework than the current one, which is based mainly on the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res. 1514 (XV)) and on the Declaration Concerning Friendly Relations (UNGA Res. 2625 (XXV)).

States have the responsibility to make it possible for peoples to exercise their right to self-determination. It is up to the States to work out the political and legal arrangements whereby this right can be exercised (decentralization, autonomy, etc). Should States fail in this task, the international community would be justified in allowing new States to be created.

In other words, what is at issue is really the democratic challenge to States to allow their peoples to exercise their rights freely. While there is no "internal" or "external" aspect to the right to self-determination, there are internal conditions within States that make the peaceful exercise of the right to self-determination possible.

In some cases, the State is made up of several different peoples, but the majority of citizens identify themselves as being a single people (for example: the majority Spanish people and the Catalanian, Basque and other peoples). Peoples that coexist within a State are obligated to share their wealth. Indigenous peoples must take this fact into consideration.

Although there are no specific rules on how the right to self-determination is to be exercised, the Covenants do provide for mechanisms to ensure its application. This is also one of the functions of the UN Commission on Human Rights.

AN INDIGENOUS PERSPECTIVE ON THE RIGHT TO SELF-DETERMINATION

Virtually every indigenous person who has spoken at the UN has said that the right to self-determination of indigenous peoples must be recognized without reservation, limitation or discrimination. It is a universal right that cannot be divided up according to an internal/external dichotomy. At the same time, the forms of its exercise are many. Indigenous peoples want the exercise of the right to self-determination to be defined on a case-by-case basis with the full and direct participation of the peoples concerned.

There is no need to add clauses to the Declaration to preserve the territorial integrity of States, since international law is clear in this regard. Most legal experts agree that, unlike territorial integrity, the right to self-determination is a peremptory norm of international law. At the same time, the right to self-determination of a people is not absolute, and must be exercised with due consideration to the rights of other peoples.

States can neither base the wording of the articles of the Declaration on worst-case scenarios, nor act to maintain a status quo that amounts to giving precedence to the right of States over the right of peoples.

States should not seek to undermine the status of indigenous peoples as "peoples". Those which attempt to do so by proposing amendments to limit the scope of Article 3 are acting in violation of the UN's principles of respect for equality and non-discrimination.

The Covenants already apply to indigenous peoples, particularly the common Article 1, which stipulates that all peoples have the right to self-determination. Incorporating the wording of Article 1 of the Covenants into Article 3 of the Declaration on the Rights of Indigenous Peoples is a way of confirming that they have the same rights as other peoples and that their diverse realities can be taken into account.

The opposition of governments expresses persistent colonial attitudes, whereas non-discrimination and equality are peremptory norms of international law.

The moral imperative must have precedence over the legal imperative, not the other way around.

DEBATE ON CHANGES TO THE CURRENT WORDING OF ARTICLE 3

There was a debate on the relevance of adding a reference to Article 3 that might ease the concerns of some States with respect to their territorial integrity. It was suggested that a clause on possible international supervision in cases of conflict be added.

The opinions expressed were that such a reference is unnecessary and could even run counter to the primary purpose of Article 3, i.e. to confirm that indigenous peoples are peoples like other peoples.

Making changes to Article 3 is a perilous undertaking that could freeze the interpretation of the right to self-determination and prevent its natural evolution in international law. For example, the principles of self-determination and territorial integrity must be able to evolve for indigenous and non-indigenous peoples alike.

Article 3, and the Declaration as a whole, is framed by practices and norms in international law that appear to be adequate. While improvements would no doubt be possible, this is not a task that can be taken up as part of the process of drafting the Declaration. Furthermore, Article 3 must be read in relation to other articles of the Draft Declaration, including Article 31.

CONCLUSION

A number of speakers and experts expressed the hope that the seminar would convey a positive message, an appeal to trust and respect that would diminish the apprehensions of the States. Indigenous peoples are peaceful peoples, capable of taking charge of their present and future and contributing to peace and wisdom in the world. Indigenous peoples are not making secessionist demands; they are seeking first and foremost to be included in the international community and the States they live in, and to be able to develop themselves in accordance with their own values.

The experts and speakers also seemed to agree that because the right to self-determination is inherent in the status of peoples, it cannot be granted by States or subject to their laws or constitutions. They also suggested that there are no grounds for setting up a dichotomy between internal and external aspects of the right to self-determination. Concerns regarding territorial integrity and the sovereignty of States are already addressed in international law in terms that seemed adequate for most of the experts present.

According to one speaker, the denial of the right to self-determination is a greater source of conflict than its recognition.

No clear answers were given to some other questions: Does Article 3 create special rights for indigenous peoples? Why, if Article 1 of the two Covenants applies to indigenous peoples, does it have to be restated in Article 3 of the Declaration?

Finally, the issue of land and resources is clearly related to self-determination; hence the range of possible concerns for a number of States, and the need to study the matter in greater depth. Development and the shared control of resources need to be discussed.

BRIEF PRELIMINARY ASSESSMENT OF THE SEMINAR

The Seminar helped to clarify the scope and understanding of the right to self-determination and to outline the various forms it could take. The quality of the presentations was appreciated and several participants remarked that it would be very useful to have them published.

The Seminar did not directly contribute to depolarizing the debate, in the short term at least. There were few exchanges between the governmental representatives present and the panelists or indigenous representatives (getting government representatives to attend was difficult). In order to engage in an in-depth debate on the differences between positions, the governments that are insisting on the need to make major changes to Article 3, or that have serious reservations about recognizing the right to self-determination for indigenous peoples, will have to have a space to present their point of view. Perhaps the time has come for governments to take the initiative or create a space, in cooperation with NGOs and governments, to ensure that such a debate takes place.

ANNEX: DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous 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.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

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

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

NOTES

To go back to text, click on the corresponding note number.

Note numbering starts at **1** for each article containing notes.

Preface

- 1.--** Resolution of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/SUB.2/RES/1994/45, August 1994.
- 2.--** G.A. Resolution 48/163, December 1993.
- 3.--** G.A. Resolution 49/214, December 1994.
- 4.--** Articles 5 and 43. See E/CN.4/1998/106.

Recognition of the Right to Self-Determination of Indigenous Peoples: Asset or Threat?

- 1.--** Different works have been written about Deskaheh, an Iroquois leader who, in the 1920s, was actively engaged in obtaining the League of Nations' recognition of the Iroquois Confederacy.
- 2.--** A.G. res.2200A (XXI), 21 U.N. GAOR Supp. (no.16) at 52, U.N. Doc. A/6316 (1966)
- 3.--** A.G. res.2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc.A/6316 (1966)
- 4.--** See document by Sarah Pritchard: *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group*, June 2001, www.arena.org.nz/unindigp.htm. The author reviews and analyzes the arguments put forth over a six-year period by the representatives of the indigenous and of governments.
- 5.--** See articles by John Henriksen and Patrick Thornberry (in *Operationalizing the Right of Indigenous Peoples to Self-Determination*, directed by Pekka Aikio and Martin Scheinin, Turku/Åbo 2000) as well as the document by Sarah Pritchard (op.cit.).
- 6.--** A.G. Res 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
- 7.--** International Labour Organization Convention 169, Article 1.3.
- 8.--** The Human Rights Committee and the Committee on Economic, Social and Cultural Rights.
- 9.--** These two instruments have been ratified by 144 countries.

The Self-Determination of Indigenous Peoples: Past Debt and Future Promise

- 1.--** Visiting Associate Professor, Washington College of Law, American University (maivan71@hotmail.com). For a fuller discussion of the topic, see Maivân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, Ardsley, New York: Transnational Publishers, Inc. (2000).
- 2.--** See Antonio Cassese, *Self-Determination of Peoples*, Cambridge: Cambridge University Press (1995).
- 3.--** See Louis Sohn, "The Concept of Autonomy in International Law and the Practice of the United Nations," 15 *Israel Law Review* 2 (1980).

4.-- The Aaland Islands Question: Report of the Committee of Jurists", League of Nations Official Journal, Special Supplement No.3 (October 1920), p.6.

5.-- Cobo was in charge of the report but asked Augusto Willemsen Diaz, whom he acknowledged to be more expert on the subject, to write up. The report is nevertheless commonly known as the Cobo report. See U.N Doc. E/CN.4/Sub.2/1997/14.

Self-Determination: An Australian Perspective

1.-- For information on the Social Justice Commissioner, including the latest Social Justice and Native Title reports and other publications see: www.humanrights.gov.au/social_justice/index.html.

2.-- Human Rights Committee, List of issues: Australia, UN Doc: CCPR/C/69/L/AUS, 25/4/2000, Issue 4.

3.-- Committee on the Elimination of Racial Discrimination, Concluding observations – Australia, Un Doc CERD/C/304/Add.101; 19/4/2000, paras 8-10.

4.-- Human Rights Committee, Concluding observations on Australia, UN Doc: CCPR/CO/69/AUS, 28/7/2000, para 9.

5.-- CESCR, List of issues: Canada, UN Doc: E/C.12/Q/CAN/1, 10 June 1998, Issue 23; CESCR, Concluding observations: Canada, UN Doc: E/C.12/1/Add.31, 10/12/98; HRC, Concluding observations: Canada, UN Doc: CCPR/C/79?Add.105, 7/4/99, paras 7,8; HRC, Concluding Observations: Norway, UN Doc: CCPR/C/79/Add.112, 05/11/99, paras 10 and 17, which provides (at para 17) that 'the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that Article'. The HRC has also confirmed that indigenous peoples have a right to self-determination in the following individual communications: Lubicon Lake Band v Canada (1990) Un Doc: CCPR/C/38/D/167/1984; and Marshall (Mikmaq Tribal Society) (1991) UN Doc: CCPR/C/43/D/205/1986.

6.-- Indigenous Constitutional Convention Secretariat, Indigenous Constitutional Strategy Northern Territory, Northern Land Council and Central Land Council, Casuarina and Alice Springs, 1998.

7.-- Ibid, p5.

8.-- Waia, T, Greater Autonomy and Improved Governance in the Torres Strait Islands Region, Speech to Reconciliation Australia Conference on Indigenous Governance, 3 April 2002, www.reconciliationaustralia.org.

9.-- Daes, E., Discrimination against Indigenous People – Explanatory note concerning the Draft UN Declaration on the Rights of Indigenous Peoples, para 26.

10.-- ibid., para 25.

Indigenous Peoples and the Right to Self-Determination: The Need for Equality: An Indigenous Perspective

1.-- Statement by Chairperson of the Aboriginal and Torres Strait Islander Commission, WGIP Eleventh session, July, 1993.

2.-- Statement by ATSIC, Aboriginal and Torres Strait Islander Social Justice Commissioner, Foundation for Aboriginal and Islander Research Action, Indigenous Woman Aboriginal Corporation, National Aboriginal and Islander Legal Services Secretariat, New South Wales Aboriginal Land Council, Tasmanian Aboriginal Centre, CHR Working Group, Third Session, October 1997.

3.-- *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, UN Document A/4684, December 14, 1960.

4.-- H. Hannum, "Rethinking Self-Determination," 34 Virginia J. Int'l L. 1 (1993) at 40.

5.-- U. Umzurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972), at p. 234.

6.-- R. McCorquodale, "Human Rights and Self-Determination" in M. Sellers, ed., *The New World Order [:] Sovereignty, Human Rights, and the Self-Determination of Peoples*, (Oxford/Washington, D.C.: Berg, 1996) 9 at p. 16.

7.-- See generally: Grand Council of the Crees, *Sovereign Injustice [:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, Québec, 1995); Grand Council of the Crees (Eeyou Istchee), *Bill 99: A Sovereign Act of Dispossession, Dishonour and Disgrace*, Brief submitted to the National Assembly Committee on Institutions, February

2000; Grand Council of the Crees (Eeyou Istchee), *Canada's Clarity Bill and Aboriginal Peoples: A Strategy of Omission, Exclusion and Disempowerment*, Brief submitted to the House of Commons Legislative Committee on Bill C-20, February 2000.

Summary of Discussions

1.-- UNGA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) to 52, UN Doc. A/6316 (1966).

2.-- UNGA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) to 49, UN Doc. A/6316 (1966).

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Indigenous rights, indigenous wrongs: risks for the resource sectors

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1. Overview

The relationship between corporations and indigenous peoples is complex and often difficult. Companies and indigenous peoples look at the same landscape and see different things. A company will see the potential for harnessing resources to provide revenue and profits; indigenous peoples often see the land as integral to who

they are – incorporating their culture, spirituality, history, social organisation, family, food security, economy, and health.

For companies, managing this balance of interests can present a significant challenge. Over recent years oil and gas companies in particular have experienced the enduring damage to reputation that stems from conflict with indigenous peoples.

This briefing seeks to identify the risks and opportunities faced by companies with respect to managing indigenous rights issues and the ways in which these can materialise in the short to medium term for companies involved in resource sectors. The briefing also examines the policies and strategies relating to indigenous peoples adopted by seven companies operating in a range of sectors identified as high risk by EIRIS. Their management response is assessed against EIRIS indicators to determine the extent to which these risks are being mitigated. In relation to these seven companies EIRIS' **key findings** are as follows:

- While there is evidence of some companies addressing indigenous rights issues, none of the companies

researched are achieving a good assessment

- Most companies examined have a basic public commitment to indigenous rights (6 out of 7) and a commitment to meaningful consultation (6 out of 7)
- Of the high risk sectors analysed extractive industries such as oil and gas and mining are most likely to demonstrate a response; sectors such as forestry and agriculture lag behind in their response
- Few companies (3 out of 7) publicly commitment to the principles of free prior informed consent for all projects (as opposed to consultation) or are effectively managing the engagement and consent process
- The quality of reporting is generally poor, with most companies providing a response to any allegations of breaches of indigenous rights but few report voluntarily on areas of non-compliance

Given the level of NGO and media attention to the issue of indigenous peoples' rights and the introduction of laws and regulations in many countries, companies with strong commitments and effective engagement processes will undoubtedly benefit in an environment where access to land and resources is becoming increasingly difficult. Indigenous rights are a human rights issue that companies and their investors should address.

2. Background

2.1. Defining indigenous peoples

There is no universal or unambiguous definition of indigenous peoples.¹ There are a number of different terms used to describe indigenous peoples, including aboriginal, first nation, or land

connected. According to the UN there are 300 to 500 million indigenous peoples in more than 70 countries around the world, comprising over 5,000 languages and cultures.²

Most often cited are the Martínéz Cobo definition in the Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986), and the definition used in this paper, the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries, 1989, No 169 (ILO 169). Article 1 states that the convention applies to:

"(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

'Self identification' i.e. indigenous peoples defining or identifying themselves as indigenous, is a critical concept. Aboriginality refers to being first on the land but the definition need not be constrained by an exclusive reference to peoples of 'ancient times'. This connection to the land is related to cultural distinctiveness.

2.2. Indigenous rights

The concept of participation by local communities, including indigenous groups, in decisions that affect them, is a core tenet of a range of rights, including the right to self determination and the right to development.

The right to self determination does not give indigenous peoples a 'right of veto' over projects, but is really a right that affirms the fundamental importance of the right of self-determination of all peoples, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development.

For indigenous peoples, consent as a right has special importance because of their unique, or culturally distinctive, relationship with their traditional lands and territories. Gaining consent from indigenous peoples for relevant projects at all stages of the project lifecycle can therefore be viewed as an essential aspect of respecting the human rights of indigenous peoples.

There is no single definition of free prior informed consent, however it is understood as consent obtained free of manipulation or coercion. What will constitute 'informed' was further elaborated by UN Commission on Human Rights³. In order to be informed and properly equipped to give consent, affected communities must have access to information in an accessible form on the nature of the project. This includes information on the nature, duration, impact and personnel associated with the project.

Indigenous rights are specified in both ILO 169 and the UN Declaration on Rights of Indigenous Peoples which will be examined below in addition to other initiatives on indigenous rights.

2.3. International initiatives

2.3.1 ILO Convention 169

In 1989, the ILO adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169 (ILO 169). It is ratified by 19 countries (as at October 2007), 13 of which are in South America (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela). The other countries that have ratified the Convention to date are Nepal, Denmark, Fiji, Norway, the Netherlands, and Spain.⁴ These relatively low levels of ratification indicate the difficulties surrounding this issue.

Whilst the private sector does not hold any direct obligations under ILO 169, there are implications that may arise from national legislation implementing ILO 169. Where ILO 169 has been ratified directly into national law, it may be used by the Courts to define responsibilities, which the courts could theoretically decide to apply to non government players, such as corporations. Also there may be implications for companies where a vocal NGO perceives a company to be breaching the ILO 169 in a country which has ratified it.

Specific rights include:

- the right to own and control lands, territories, and resources (ILO 169, Art 13-19)
- the right to self determination (ILO 169, Art 7)
- the right to recognition and protection of social, cultural, religious and spiritual values and practices (ILO 169, Art 5)

2.3.2 UN Declaration on Rights of Indigenous Peoples

The adoption of the Declaration by the UN General Assembly in September 2007 has been the most authoritative indicator to date of the growing consensus on standards required by states as well as non-state actors such as corporations and investors⁵. In total, 143 countries have now adopted the Declaration, as members of the UN General Assembly, demonstrating the growing recognition of the need to establish human rights law on the issue of indigenous peoples' rights.

The Declaration includes the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources (Art 30). There were 11 abstentions and, notably, four countries with large indigenous populations that did not adopt the Declaration: Australia, Canada, New Zealand and the United States, which registered objections concerning the provisions on self-determination, land and resource rights.

2.3.3 Convention on Biological Diversity

The Convention, signed by 150 government leaders in 1992, focuses on the close and traditional dependence of many indigenous and local communities on biological resources. It contains a broad recognition of the contribution that traditional knowledge of indigenous peoples can make to both the conservation and the sustainable use of biological diversity.⁶

2.3.4 Permanent Forum on Indigenous Issues

Following a recommendation by the World Conference on Human Rights, the UN General Assembly proclaimed the International Decade of the World's Indigenous People (1995-2004).⁷

A key outcome of the Decade was the establishment in 2000 of the Permanent Forum on Indigenous Issues (UNPFII) by the UN Economic and Social Council to serve as an advisory body to the Council, advising on indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. The aim was to provide a formal setting in which indigenous peoples would be able to participate and communicate their views directly to governments and civil society.

2.3.5 Indigenous Statements

The first indigenous ambassador to make a statement to the international community was Cayuga Chief Deskaheh, as the representative of the Six Nations of the Iroquois, who travelled to Geneva in 1923, to initiate formal talks with League of Nations. In more recent times indigenous peoples have collaborated and made numerous declarations and statements directed at the international community to understand their concerns, including:

- International Cancun Declaration of Indigenous Peoples, 5th WTO Ministerial Conference - Mexico, September 2003⁸
- Motupore Declaration - July 2003⁹
- Charter of the Assembly of First Nations - Canada, April 2003¹⁰
- Indigenous Peoples' Plan of Implementation on Sustainable Development - South Africa, September 2002¹¹

- Declaration of Civil Society and Indigenous Participants of the Regional Workshop of the World Bank's Extractive Industries Review - Brazil, April 2002 ¹²

The central theme of these statements has been to call on governments and corporations to recognise indigenous peoples' rights. In one case the Indigenous Environment Network called for companies to 'ask for freely given, prior-to-project approvals from the state, and informed consent to all forms of mining' and 'pay reparations to affected communities and restitution for past damages'. Such statements have increased the pressure on governments and companies to take action.

2.3.6 World Bank and International Finance Corporation (IFC) Safeguards

In 2005 the World Bank approved a revised guidance document on Indigenous Peoples - Operational Policy/Bank Procedure 4.10 - setting out policies and procedures for corporations and governments. This includes requirements for screening for the presence of indigenous peoples, social assessment, consultation with affected communities, preparation of a plan or framework (Indigenous Peoples Plan or Indigenous Peoples Planning Framework), and disclosure relating to affected indigenous peoples on all Bank financed projects.¹³ Despite criticisms by some indigenous groups relating to the application of requirements for the screening for the presence of indigenous peoples and the Indigenous Peoples Plan, the World Bank policy and procedure, have further raised the profile of indigenous rights issues.¹⁴

IFC applies to all the projects it finances environmental and social standards to minimise their impact on the environment and on affected

communities. The IFC has recently strengthened these safeguard policies and performance standards. The 2006 IFC Performance Standard 7 specifically addresses the issue of indigenous peoples and includes requirements for the avoidance of adverse impacts, information disclosure, consultation and informed participation. Standard 8 also recognises a broader duty to protect and support places of cultural heritage.

2.4 Industry initiatives

There is growing international recognition of the role of companies in relation to human rights issues. This was evidenced by the UN appointment in July 2005, of Professor Ruggie as Special Representative of the UN Secretary-General on Business & Human Rights and the setting up of a Business & Human Rights Resource Centre to facilitate communication and sharing of materials. The Special Representative assists in defining the evolving obligations of companies in relation to human rights including indigenous peoples' rights. In addition, a number of sector initiatives have developed. Four examples are outlined below.

2.4.1 International Council on Mining & Metals

The International Council on Mining and Metals (ICMM) represents leading international mining and metals companies. ICMM members have adopted an operational Framework comprising three elements – a set of 10 Principles, public reporting and independent assurance. The ICMM is committed to the principles of sustainable development and has gone some way towards raising the profile of indigenous rights issues with companies in these sectors.

In March 2006 the ICMM developed a Draft Position Statement on Mining and Indigenous Peoples Issues¹⁵ which commits to meaningful participation and acknowledges that engagement practices "may include seeking consent for activities" and "negotiating agreements, such as for access and benefit sharing, participation, and land use". This policy has also sought to clarify the extent of indigenous peoples 'rights and interests' in relation to land.¹⁶

Underpinning the Framework is a commitment by ICMM members to public report on progress and to share good practice across the industry.

2.4.2 The Equator Principles

The Equator Principles provide a benchmark for the financial industry to manage social and environmental issues when providing project finance. Under the Principles of Social and Environmental Impact Assessment and Consultation and Disclosure the guidance includes consideration of indigenous peoples' rights and is backed up by reference to the IFC Safeguard performance standards.

The Equator Principles call on companies to "respect and preserve the culture, knowledge and practices of indigenous peoples" and also to "ensure the development process fosters full respect for the dignity, human rights, aspirations, cultures and natural resource-based livelihoods of indigenous peoples." See 'SEE risk briefing - Project finance: a sustainable future?' (EIRIS, 2006) for further details - click [here](#).

2.4.3 Forest Stewardship Council

FSC is a membership based organisation promoting the responsible stewardship of forests, and provides

certification for forestry companies that adhere to certain standards, policies and procedures. Principle 3 of "Principles and Criteria for Forest Stewardship" includes the recognition of and respect for legal and customary rights of indigenous peoples to own, use and manage their lands and territories, protection of cultural sites and compensation for use of indigenous knowledge.

2.4.4 Roundtable on Sustainable Palm Oil (RSPO)

RSPO includes NGOs, governments, banks, retailers and plantation owners. The Roundtable was initiated by an NGO as a result of concerns regarding the unsustainable production of palm oil and instances of the expansion of palm oil plantations giving rise to social conflicts between the local communities and plantation owners. The rights of indigenous peoples are considered under "Principles and Criteria for Sustainable Palm Oil Production", a guidance document for palm oil companies, but also generally relevant for companies involved in plantations. Principle 6.3 relates to the requirement for a 'documented system' to be in place for compensation for loss of land. Principle 7.5 states that no new plantations are to occur without free prior informed consent, using a 'documented system' that enables companies to take account of indigenous peoples' views. RSPO has a grievance mechanism which acts as a platform for the Roundtable to address complaints against RSPO Members.

2.5 NGO Initiatives

The Oxfam Australia Mining Ombudsman established in 2000 attempts to apply evolving international standards on indigenous rights and techniques of mediation between indigenous communities and companies, to address indigenous

rights abuses by mining companies in Australia. The Mining Ombudsman generally takes up a case at the request of a community organisation and checks all claims through site investigations. Any action taken by the Ombudsman is done in consultation with the community. A formal process is followed which aims to bring together the views of communities, companies and governments to establish a clear picture of the circumstances of and context for each case. The Ombudsman has played a useful role internationally in bringing large Australian companies to the negotiating table to listen to indigenous concerns. This was used successfully at Tintaya mine, Peru, between BHP Billiton and indigenous communities.

2.6 National laws and regulations

The extent to which the rights of indigenous peoples have been supported by laws and regulations varies greatly between countries as does their implementation. A number of national legislative frameworks are outlined below:

Australia, Northern Territory - legislation in the Northern Territory incorporates a right of veto for Land Councils. In the Aboriginal Land Rights (Northern Territory) Act 1976 consent is obtained through statutory indigenous-controlled Land Councils. A Land Council may not consent to a mining licence unless "they are satisfied that the traditional Aboriginal owners of the land in question understand the nature of the activity and any terms or conditions."¹⁷

Canada - impact and benefit agreements (IBAs) are signed between mining companies and First Nation communities in Canada in order to establish formal relationships between them, to reduce the predicted impact of a mine and secure economic benefit for

affected communities. IBAs are increasingly used by First Nations in Canada to influence decision making about resource exploitation on their lands.

Colombia – the 1991 Political Constitution establishes that: "The State recognises and protects the ethnic and cultural diversity of the Colombian Nation". It also recognises the indigenous territories. Since then, wide-ranging legislation has been promulgated but this has not, however, prevented the continuing loss of - and threats to – indigenous territories.

Papua New Guinea (PNG) - Papua New Guinea's Constitution has enshrined the principles of free prior informed consent by traditional owners. Currently, a number of forestry companies operating in the Western province of PNG accused of failing to adhere to these principles are involved in an ongoing court case regarding the customary rights of the Kiunga Aimabak people.

Philippines - the Indigenous Peoples Rights Act 1997 requires that free prior and informed consent of indigenous peoples is sought and obtained for any commercial activity undertaken on their ancestral lands and territories.¹⁸

3. Scope of EIRIS research

EIRIS' analysis in this report focuses on companies for whom the issue of indigenous rights to land and sea is a potential business risk. These companies are largely in the resource extraction and basic materials sectors; agriculture and farming, forestry, oil and gas production and mining.

The indigenous peoples' rights issues covered in this briefing include prior informed consent to projects, effective

participation in decisions affecting indigenous peoples and protection of indigenous expertise, traditional knowledge and culture.

It is generally recognised that indigenous rights covers a range of interrelated issues including health, representation in the media, access to basic services and equality in the administration of justice. However for the purposes of this briefing EIRIS has focused on companies involved in direct impact activities and excluded companies in other sectors such as Chemicals, Food Producers, Health Care Equipment & Services, Media, Pharmaceuticals & Biotechnology, Real Estate and Tobacco.

This briefing examines the policies and strategies adopted by seven companies operating in a range of countries and business activities to present an overview of the challenges companies face and the management responses they implement to address indigenous land rights issues.

The selected companies are Anglo-Eastern Plantations, Barrick Gold, BHP Billiton, Suncor Energy, Total, Weyerhaeuser, and Woodside Petroleum. All seven companies operate in countries with recognised indigenous peoples and engage in activities that have the potential to infringe on indigenous peoples land and/ or sea rights. These companies have been selected to provide a comparative analysis of management responses from different sectors.

A snapshot of EIRIS findings is presented in section 6.1.

4. Potential social, environmental & other ethical risks & opportunities

This briefing seeks to identify areas of potential risks and opportunities associated with operating in countries with indigenous peoples and engaging in business activities that may infringe indigenous land rights, and ways in which these may materialise in the short to medium term. The key risks identified are reputational risks, access to capital, damage to brand, licence to operate, and operational risks, in particular the threat of litigation and increased regulation. The main opportunities relate to using indigenous knowledge and expertise.

4.1 Reputational risks

4.1.1 NGO campaigns

Partnerships between NGOs and indigenous groups have provided worldwide visibility for indigenous peoples' concerns and have repercussions for companies who ignore the reputational risks that may arise when they come into conflict with indigenous peoples.

The Mining and Minerals Sustainable Development (MMSD) Project, initiated by the World Business Council for Sustainable Development (WBCSD) and supported by the Global Mining Initiative (GMI), recognised that campaigning by environmental and civil society groups has played an important role in catalysing major changes in the standards pursued by the minerals industry in the past, and that these groups would continue to be major drivers of change.¹⁹ Consequently some companies are facing increasing scrutiny by investors and the wider public on these issues.

NGO activities include:

- raising allegations that companies have not conformed with ILO 169²⁰
- engaging with senior management
- direct action such as blockades²¹
- strategic partnerships with private sector aimed at incremental change²²
- pressing for law reform and wider application of existing laws²³
- web and media campaigns²⁴
- lobbying shareholders to support indigenous peoples' rights at company AGMs and shareholder resolutions²⁵
- commissioning high profile reports²⁶

This increase in the sophistication and effectiveness of indigenous actions and the ways NGOs operate has transferred previously local issues covered in the local press to a global audience.

Reputational risk can harm brand value, employee morale, the ability to recruit and in some cases the ability to access markets and resources. In consumer facing companies, such as those in the oil and gas sector, poor performance with regard to indigenous peoples may result in a boycott.

4.2 Access to Capital

4.2.1. Access to investment capital

A company that can demonstrate transparent and responsible business practices may find it easier to secure access to capital from banks and shareholders. NGO campaigns have been influential in highlighting the funding provided by financial institutions for projects that have direct impact on indigenous peoples' land rights. An increased spot-light on project finance and increased awareness through initiatives such as the Equator Principles and the IFC Safeguard policies have resulted in greater scrutiny of financial institutions and subsequently affected resource

companies seeking finance from them. Companies with a poor track record on indigenous rights and other environmental and social areas risk limiting their access to financial backing.

4.3 License to operate

Poor performance on indigenous rights issues can lead to erosion of community and government confidence and consequent opposition to proposed operations. This may have a number of adverse consequences, including increased direct costs to operators through delays and increased operational costs. For example, the Grassy Narrows indigenous logging blockade against Weyerhaeuser is currently in its fifth year, the longest in Canadian history (2002-2007).

Building up expertise in engaging with indigenous peoples and previous good performance managing operational impacts on indigenous peoples can also assist when competing for local or national government licences or permission to access sites or exploit resources. Where there are several companies vying for a licence, governments may take previous track records into account.

The impacts of mismanagement can be considerable. Interruption to operations and attacks on or even kidnapping of employees can result where operations have been established without the consent or participation of local and indigenous communities. There can be additional security costs for companies operating in an environment where conflicts over rights to resources and land ownership are a real risk, for example in the Niger Delta.

4.4 Litigation

Lawsuits generate often adverse publicity impacting on a company's brand image and are a significant expense. They usually take many years to resolve and so continue to impact on brand and absorb large amounts of time and resources defending them in court. Irrespective of outcome, the cost of defending such actions is considerable and may not be fully recoverable even if the case is won. The risk that litigation poses is illustrated by Rio Tinto's resolution initially proposed at the 2006 AGM in Australia compelling class-action lawsuits against the company to be fought only in the state of Victoria. Whilst the company maintained this was a prudent way to protect the company and its investors, institutional shareholders failed to support the resolution, concerned that the motion would reduce accountability. Rio Tinto withdrew the resolution before the AGM.²⁷

Indigenous groups have used domestic and international conventions and laws to bring lawsuits at the national and regional level – for example in the US at the Organization of American States Human Rights Court at a regional level and at the international level, Convention 169 of the International Labour Organization.

Some current examples of litigation include legal action taken by traditional landowners in Australia concerned about the impact which a 5.5 km river diversion proposed by the company Xstrata may have on the environment²⁸ and a class action lawsuit on behalf of 13,000 Ningerum tribes people, to be heard in Papua New Guinea's National Court, alleging that BHP Billiton and other mine owners were "reckless and negligent" in dumping mine waste from

the OK Tedi mine into local river systems.²⁹

4.5 Increased regulation

The consequences of poor environmental management and inadequate consultation with indigenous peoples can lead to governments to impose restrictions or introduce regulation.

The legacy costs of a radioactive spill in 1979 in which 1100 tons of radioactive mill waste and 90 million gallons of contaminated liquid went into the Rio Puerco River prompted Navajo elders in the USA to declare their land would no longer be open for exploration or exploitation of uranium resources. This was passed into law as the Diné Resources Protection Act 2005, which imposes a moratorium on uranium mining for 25 years. More recently, in October 2007, the Wai Wai people, an indigenous group in Guyana, South America backed by government decree and a U.S.-based conservation organisation, banned miners and loggers from its section of the Amazon jungle and pledged to pursue an economic strategy based on ecotourism, research and traditional crafts.³⁰

4.6 Opportunities – indigenous knowledge and expertise

Indigenous peoples' knowledge of biodiversity, sacred sites, seasonal changes and ongoing environmental management can assist with pre-operational preparation, planning, the environmental impact assessment (EIA) process, day to day management of sites and remediation. Early ongoing engagement with indigenous peoples in relation to identifying sacred sites can avert future fines for destruction of these sites or lawsuits. Retaining this expertise through the employment of

indigenous peoples can make good business sense for a company while supporting the local community, building social capital and providing the company staff with a greater understanding of indigenous peoples.

5. Exposure factors

In identifying the companies most exposed to risks related to indigenous rights EIRIS has taken into account a) the nature of their business activities; b) the countries in which they operate; and c) previous allegations of indigenous land rights abuses.

5.1 Business activities

Direct impact activities undertaken by companies in the primary materials and resource extraction sectors represent the greatest risk. The nature of direct impact activities include:

- **Agriculture & farming** - including plantations
- **Forestry** – forestry and paper companies with forestry operations
- **Mining** – all types of mining
- **Oil and gas exploration and production** – on-shore or off-shore but only if associated with on-shore processing operations: for example, companies operating only in the North Sea or Gulf of Mexico are not included

5.2 Countries of concern

Key countries of concern for indigenous rights have been identified using a range of sources including the Indigenous World 2007, a project of the International Work Group for Indigenous Affairs (IWGIA) and a project mapping indigenous territories by the International Forum on Globalisation (IFG) working with partners including Amazon Watch, The European Centre for Ecological and Agricultural Tourism, Greenpeace-US,

Indigenous Environmental Network and Rainforest Action Network.

In most countries not all regions are inhabited by indigenous peoples, however companies are assumed to be exposed to these regions if present in a country unless the company has clearly indicated it is absent from these regions or this is evident from the description of their operations. A number of countries, most notably Japan, are not included in this list, although indigenous peoples live there, as the regions where they are present are unlikely to be in the regions where companies operate.

The countries of concern are:

- **Africa** - Algeria, Angola, Botswana, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of Congo (DRC), Ethiopia, Equatorial Guinea, Gabon, Ghana, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Niger, Nigeria, Republic of Congo (Congo Brazzaville), Rwanda, South Africa, Sudan, Tanzania, Uganda
- **Australia, New Zealand, and the Pacific** – Australia, New Zealand, Papua New Guinea
- **Asia** - Bangladesh, Burma, Cambodia, China (including Tibet), India, Indonesia (including West Papua), Laos, Malaysia, Nepal, Pakistan, Philippines, Thailand
- **Europe** - Denmark (Greenland only), Finland, Norway, Russia, Sweden
- **North America** – Canada, USA
- **Mexico, Central America and the Caribbean** – Belize, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, Trinidad & Tobago, Suriname
- **South America** - Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Venezuela
- **Middle East** – Iraq

5.3 Allegations of indigenous rights abuses

Companies with existing allegations for indigenous rights abuses are more greatly exposed to the risks outlined in section 4. Past allegations of indigenous rights abuses are monitored by EIRIS to identify companies that may previously have mismanaged indigenous rights issues. These companies are often under greater scrutiny from NGOs and the media and are considered to be exposed to a greater risk.

The following sources are used: main international and national press and key NGO websites. These include Business & Human Rights Resource Centre, Amnesty International, Human Rights Watch, Christian Aid and Survival International. Companies subject to an allegation of indigenous rights abuses levelled in one of the above sources within the last three years are classified as high risk exposure.

5.4 Exposure classification

EXPOSURE CATEGORY	CLASSIFICATION
High	Companies engaged in high risk business activities identified in countries of concern AND subject to allegations of indigenous rights abuses within the last three years
Medium	Companies engaged in high risk business activities identified in countries of concern

Companies involved in other business activities will be considered on a case by case basis where allegations of indigenous rights abuses linked to direct impact operations have been raised.

EIRIS has chosen the following selection of companies to analyse in this paper. The selection is a mixture of significant high and medium risk companies from a broad geographical range to offer an overview of approaches and steps taken in relation to indigenous rights. The companies selected all operate in high risk sectors.

Company	Business activity	Countries of concern	Allegations	Exposure
Anglo-Eastern Plantations	Plantations	Yes	No	Medium
Barrick Gold	Mining	Yes	Yes	High
BHP Billiton	Mining, metals & oil exploration	Yes	Yes	High
Suncor Energy	Oil & gas	Yes	No	Medium
Total	Oil & gas	Yes	No	Medium
Weyerhaeuser	Forestry	Yes	Yes	High
Woodside Petroleum	Oil & gas	Yes	Yes	High

All companies in the FTSE All World Developed Index and other companies EIRIS covers have been classified as High, Medium or No risk exposure and their management response will be assessed over the coming year.

6. Managing the risks

While companies are beginning to recognise the importance of human rights and how to manage their impact, respect for indigenous peoples' rights and how to successfully engage with them is less well understood by many companies.

EIRIS has identified 16 key indicators for assessing companies' management response to indigenous rights issues. Detailed definitions of these indicators are provided in Annex 9.1.1. The indicators fall into four categories: strategy & responsibility, engagement

& consent, employment, and reporting & dialogue.

These indicators are described in more detail at paragraph 9.2 below.

Strategy & responsibility

- Policy commitment to indigenous rights
- Commitment to the principles of free prior and informed consent/consultation (FPIC) for proposed projects
- Senior responsibility for indigenous rights issues
- Commitment to employee training on indigenous cultural issues
- Commitment to support indigenous rights laws

Engagement & consent

- Commitment to meaningful participation and early on-going consultation with relevant indigenous communities
- Indigenous Impact Assessment (IIA) involving indigenous communities
- Active participation in resettlement (incl. compensation proposals)
- Use of indigenous knowledge and preservation of culture
- Facilitation of free prior informed consent/consultation
- Dedicated communication channels

Employment

- Skills development and educational support
- Employing indigenous peoples

Reporting & dialogue

- Reporting on engagement activity
- Disclosure of incidents of non-compliance
- Public response to NGO allegations regarding breaches of indigenous rights (where relevant)

6.1 Snapshot of EIRIS findings

Assessed against the indicators described above, three out of seven companies' management response to indigenous rights issues are assessed as Intermediate, three as Limited and one has disclosed No Evidence of addressing the issue. No companies achieved an overall grading of Advanced or Good, although BHP Billiton and Suncor come closest to achieving a Good assessment. Two companies demonstrated a 'best practice' commitment to ILO 169 in their indigenous rights policy. Six of the seven companies have committed to undertake meaningful participation and ongoing consultation. Full results are shown in the table in section 8.

To further understand the business impact of indigenous rights issues on companies the following questions may be used. These questions are intended to assist analysts researching or engaging directly with companies but may be useful to others.

Questions for analysts

How does the company identify which indigenous peoples are affected by operations?

What methods does the company use for communicating with indigenous peoples (given that conventional channels may not necessarily work)?

How is the company evaluating regulatory developments?

How does the company distinguish between free prior informed consent and free prior informed consultation?

Does the company have policy to walk away from a project if consent is not freely given?

7. Good practice examples

While a comprehensive management response to indigenous rights issues may be lacking in most companies, below we explore a few examples of good practice.

BHP Billiton's 'Naonayaotit Traditional Knowledge Project' is a good example of investment in indigenous peoples' culture as well as supporting employment and sustainable development. The Naonayaotit Traditional Knowledge Project (NTKP) in Canada was developed jointly with the Inuit of the Kitikmeot Inuit Association for the purpose of integrating traditional Aboriginal knowledge into environmental management at the mine. Major outcomes of the NTKP to date include: a place names atlas, a series of illustrated reports on topics ranging from heritage and culture to Inuit opinion of exploration, research and development and a geographic information system (GIS) database for use by Inuit land managers.

Recognition of the importance of direct communication and crafting better indigenous communications is demonstrated by Suncor Energy in Canada. Following consultation with aboriginal leaders who stated that they were finding the consultation process on numerous new oil sands projects to be a burden, Suncor is now working with Alberta regulators, and First Nations and Métis representatives in the Wood Buffalo region to find more efficient and effective ways to consult with them.

In some cases companies have demonstrated an understanding of the risks by deferring decisions where adequate consultation and consent have not been achieved. Anglo American's policy on engaging with indigenous peoples includes a

commitment to "work with indigenous people around the world on the basis of consent, recognising their historical disadvantages and specific cultural norms."³¹ In 2002, the AngloAmerican exploration team planned to drill in the vicinity of Suggi Lake in Canada, a significant fish habitat, but has held off from doing so until gaining consent from the local indigenous community.

Rio Tinto also has a policy recognising the principles of free prior informed consent, not only for indigenous communities in the area but for all local people: "In all cases, this involves ongoing consultation with local people, public authorities and others affected. We accept that this may sometimes result in our not exploring land or developing operations, even if legally permitted to do so."³²

Rio Tinto recognised the Mirrar peoples' rights regarding the proposed uranium mine project at Jabiliuka in the Northern Territory, Australia, coming to an agreement not to mine until consent is obtained. A traditional owner said: "...This agreement lifts the shadow of Jabiluka off the Mirarr and other Aboriginal peoples in Kakadu. We now have a chance to solve some of the social problems like alcohol, unemployment and health. Jabiluka will never be mined unless the Mirarr give approval - in future the decision is ours alone for the first time."³³

Notes

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⁴ *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), Country list of ratifications <<http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>>

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<<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>

⁶ *Convention on Biological Diversity*

<<http://www.cbd.int/default.shtml#>>

⁷ Office of the High Commissioner for Human Rights, *Fact Sheet No.9 (Rev.1), The Rights of Indigenous Peoples*, 21 December 1995

<<http://www.unhchr.ch/html/menu6/2/fs9.htm>>

⁸ International Forum on Globalization, *The International Cancun Declaration of Indigenous Peoples*, 5th WTO Ministerial Conference, Cancun, Quintana Roo, Mexico, 12 September 2003,

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⁹ *Motupore Declaration*, Papua New Guinea, July 2003,

<www.minesandcommunities.org/Country/png2.htm>

¹⁰ Assembly of First Nations, *Charter of the Assembly of First Nations*, April 2003 <<http://www.afn.ca/article.asp?id=57>>

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<www.tebtebba.org/tebtebba_files/susdev/mining/eir/riodeclara tion.htm>

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¹⁴ Forest Peoples Programme, *Statement of Indigenous Participants at the Consultation on the World Bank's Draft Policy on Indigenous Peoples* (OP/BP 4.10), 14 November 2001

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¹⁷ ComLaw website, *Aboriginal Lands Rights (Northern Territory) Act 1976*, section 42(6)(a)

<[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilat ion1.nsf/0/C33803A9831C47C6CA25734C000D90EF/\\$file/Abl andRightNT76_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilat ion1.nsf/0/C33803A9831C47C6CA25734C000D90EF/$file/Abl andRightNT76_WD02.pdf)>

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²² For example, Round Table on Responsible Palm Oil website, *Background*, <<http://www.rspo.org/background.htm>>

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²⁴ A localised campaign turned global: see *Stand Up for Burrup* website. According to NGOs Woodside Petroleum and the Western Australian Government are planning to turn part of this globally significant site into a natural gas production facility <<http://www.standupfortheburrup.com/>>

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8. Company assessments

	Anglo Eastern Plantation	Barrick Gold	BHP Billiton	Suncor	Total	Weyer- haeuser	Woodside
Strategy & responsibility							
Commitment to indigenous rights policy		•	• (BP)	•	• (BP)	•	•
Commitment to the principles of free prior & informed consent/ consultation			• (BP)	• (BP)	• (BP)		
Senior responsibility			•	•			•
Commitment to employee training			•	•	•	•	•
Commitment to support indigenous rights laws				•			
Engagement & consent							
Commitment to meaningful participation & on-going consultation		•	•	•	•	•	•
Indigenous impact assessment (IIA)		•	•	•	•		•
Active participation in resettlement (incl. compensation proposals)			•				
Use of indigenous knowledge and preservation of culture			• (BP)	•		•	•
Facilitation of prior informed consent/consultation				•			
Dedicated communication channels			•	• (BP)			•
Employment							
Skills development & educational support		•	•	•			•
Employing indigenous peoples			•	•			•
Reporting & dialogue							
Reporting on engagement activity			•	•			
Disclosure of incidents of non-compliance & remedial actions				•			
Public response to NGO allegations		•	•			•	•
Assessment	NE	L	I	I	I	L	L

NE – no evidence; L – limited; I – intermediate; G – good; A – advanced; BP – best practice.

Detailed grading methodology is provided in Annex 9.1 and definitions in Annex 9.1.2. NB Assessments apply to companies and any subsidiaries and associated over 20% owned.

9. Assessment methodology

9.1 Grading methodology

	No evidence	Limited	Intermediate	Good	Advanced
Requirements	No indicators	Any one indicator	All marked indicators & one other	All marked indicators	All marked indicators
Strategy & responsibility					
Commitment to indigenous rights			•	•	• (at BP level)
Commitment to the principles of free prior & informed consent			•	• (at BP level)	• (at BP level)
Senior responsibility				•	•
Commitment to employee training				•	•
Commitment to support indigenous rights laws					•
Engagement & consent					
Commitment to meaningful participation & on-going consultation			•	•	•
Indigenous impact assessment (IIA)				•	•
Active participation in resettlement (incl. compensation proposals)				•	•
Use of indigenous knowledge					• (at BP level)
Facilitation of prior informed consent				•	•
Dedicated communication channels				•	• (at BP level)
Employment					
Skills development & educational support				•	•
Employing indigenous peoples					•
Reporting & dialogue					
Reporting on engagement activity				•	•
Disclosure of incidents of non-compliance & remedial actions					•
Public response to NGO allegations				•	•

9.1.2 Indicator definitions

Company assessments are based on publicly available information and company responses to EIRIS.

Strategy & responsibility

- Commitment to indigenous rights – public commitment to respecting the rights of indigenous peoples. At a best practice level this includes a commitment to the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169), the UN Declaration on the Rights of Indigenous Peoples, the Proposed American Declaration of the rights of indigenous peoples or Participation in UN Permanent Forum on Indigenous Issues (UNPFII)
- Commitment to the principles of free prior and informed consultation/ consent (FPIC) to proposed projects – public commitment to FPIC at each stage of the project. At a best practice level an explicit commitment to free prior and informed consent (rather than consultation) is required
- Senior responsibility for indigenous rights issues – board level (individual or committee) or senior responsibility
- Commitment to employee training on indigenous cultural issues – public commitment or evidence of employee training on indigenous cultural issues
- Commitment to support indigenous rights laws – public commitment not to obstruct the implementation of the recognised rights of indigenous peoples

Engagement & consent

- Commitment to meaningful participation and on-going consultation with relevant indigenous communities – specific public commitment
- Indigenous Impact Assessment (IIA) involving indigenous communities – commitment to undertake IIA or Social Impact Assessments (SIA) including indigenous rights for new projects or significant extensions of existing operations
- Active participation in resettlement (incl. compensation proposals where relevant) – public commitment not to

engage in forcible removal and commitment to fair compensation

- Use of indigenous knowledge – public commitment to or evidence of incorporating indigenous peoples' knowledge. At a best practice level this includes a public commitment to preserve indigenous peoples' culture
- Facilitation of prior informed consent/consultation – includes requirements to facilitate understanding e.g. through provision of independent translators and clearly identify negative impacts of proposed project e.g. on sacred sites
- Dedicated communication channel – at a best practice level this includes a clear grievance mechanism and evidence this is communicated to indigenous peoples

Employment

- Skills development and educational support provided to local indigenous communities – evidence of skills development in specified skills areas
- Employing indigenous peoples – evidence of targets or monitoring of indigenous workforce composition

Reporting & dialogue

- Reporting on engagement activity – examples of engagement conducted
- Disclosure of incidents of non-compliance and remedial actions – including incidents of violations involving indigenous rights, regulatory breaches etc. Disclosure must be public.
- Public response to allegations regarding breaches of indigenous rights - the company responds to allegations in relation to controversial high-profile incidents (if applicable)

See also section 6 – Managing the risk

Disclaimer

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**SEE risk briefing series**

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The purpose of this paper is to present the methodology and situation at the time of publication. Updated information on the Companies in this briefing and others will be available from clients@eiris.org.



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General Assembly

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Agenda item 68

Report of the Human Rights Council

Belgium, Bolivia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Estonia, Finland, Germany, Greece, Guatemala, Hungary, Latvia, Nicaragua, Peru, Portugal, Slovenia and Spain: draft resolution

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.



Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights¹ and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action,² affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

¹ See resolution 2200 A (XXI), annex.

² A/CONF.157/24 (Part I), chap. III.

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights³ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

³ Resolution 217 A (III).

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

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

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of

the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



ABOUT THE GUIDE	GUIDE TO HRIA	RESOURCES	COMMUNITY	LOGO
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INTRODUCTION

1. PREPARATION

Determining a company's human rights due diligence approach

Human Rights Scenarios

The business case for doing a human rights impact assessment

Scope the company's human rights impact assessment

What kind of HRIA should be conducted?

Who should coordinate the HRIA process?

Employing a third party

Where will the HRIA take place?

SCOPE THE COMPANY'S HUMAN RIGHTS IMPACT ASSESSMENT

Scoping a human rights impact assessment can be divided into two tasks:

First, the company may have to address some specific issues at the company's level that relate to:

- What are the triggers for conducting a HRIA?
- When should the HRIA start? Proactive vs. reactive
- What kind of HRIA should be conducted? Stand-alone vs. Integration
- Who should coordinate the HRIA process? In-house vs. external

Secondly, the company will need to identify and clarify the business context. This aspect is addressed in **Stage 2 - Identification**

What are the triggers for conducting a HRIA?

Two main factors may trigger a specific HRIA for a specific business activity:

- The context within which the business activity will take place
- The specific nature of human rights risks and impacts

The context of the business activity:

- **The human rights framework within which the company operates:** A HRIA will help the company meet its responsibility to respect all human rights, based on the International Bill of Human Rights. It will also help the company assess and address the legal requirements relating to its existing and/or potential human rights impacts. In addition, a HRIA will help the company avoid the repetition of past human rights infringements.

When should the HRIA start?

Checklist

2. IDENTIFICATION

3. ENGAGEMENT

4. ASSESSMENT

5. MITIGATION

6. MANAGEMENT

7. EVALUATION

GUIDE TO HRIAM TOOLS AND TABLES

- **Investors' expectations:** Investors increasingly expect the company to address human rights impacts that may impact companies' operational and financial results. In addition, local and international. A HRIA will help companies meet these expectations.
- **Monitoring from civil society organisations:** CSOs increasingly monitor the human rights impacts of the company and release articles and reports that may have an impact on their reputation and operations. A HRIA will help address human rights risks and impacts before they materialize and engage a discussion with local civil society organisations.
- **Initial stakeholders' perceptions:** A HRIA will help better identify affected stakeholders' concerns about their rights and, wherever possible, address them
- **Business relationships:** Joint venture partnerships, mergers, acquisitions, contractors and suppliers may represent an additional layer in the responsibility of companies to respect human rights that usually not covered by other traditional impact assessments or due diligence processes;
- **Industry sector:** Industry sectors with an important footprint on the environment and livelihoods of local communities may have an important impact on human rights as well
- **Country of operations:** Human rights risks, especially when they relate to complicity, may be important for companies operating in conflict-affected countries, weak governance zones and countries where international human rights commitments are poorly implemented

The specific nature and scope of human rights risks and impacts:

Specific human rights issues that are not covered by other impact assessments or due diligence processes may trigger a separate HRIA, for example:

- The human rights risks relating to **environmental impacts**, e.g. **Right to health** and, in extreme cases, **Right to life**; **Right to an adequate standard of living (Housing, Food, Water & Sanitation)**
- The human rights impact of the **intensive use of natural resources**, e.g. **Right to life**; **Right to an adequate standard of living (food, water)**
- The human rights impact of **resettlement or relocation** plans: e.g. **Right to an adequate standard of living (housing)**, **Right to freedom of movement**
- The human rights impact of **excessive use of force** on employees and local communities by security contractors, e.g. **Right to liberty and security**, **Right not to be subjected to torture, cruel, inhuman and/or degrading treatment and punishment**; **Right to access to effective remedies**; **Right to freedom of opinion, information and expression**; **Right to freedom of assembly**; **Right of detained persons to humane treatment**
- The human rights impacts of business activities on **stakeholders that are usually not considered** – or at least not in a comprehensive and systematic way – in other impact assessment and due diligence processes:
 - **Disadvantaged and vulnerable people**, e.g. **Right to equality before the law, equal protection of the law, non-discrimination**; **Right of protection for the child**
 - **Indigenous Peoples**: **Right to self-determination**; **Right of minorities**; **Right to own proper**

- Consumers and customers: Right to health; Right to equality before the law, equal protection of the law, non-discrimination

[Companies should refer to the [Human Rights Impact Assessment & Management Table](#) for a comprehensive overview of the human rights risks and impacts, based on the International Bill of Human Rights].

What makes a human rights impact assessment distinct?

Some issues that are not addressed in Environmental and Social Impact Assessments should be addressed in a human rights impact assessment, for example:

- The human rights context in which the company operates (at the international, regional, national and local levels);
- The business activities in relation to all the human rights risks and impacts outlined in the International Bill of Human Rights;
- Explicit consideration of the rights of disadvantaged and/ or vulnerable stakeholders;
- Specific consideration on complicity or acts of third parties that may be attributed to the company;
- Considerations of the legal, financial and reputational consequences of direct and indirect human rights risks and impacts on business activities and the company