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A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements.

Summary

At the Sixth Session of the United Nations Permanent Forum on Indigenous Issues, the Permanent Forum appointed Michael Dodson, one of its members, as a special rapporteur to prepare a draft guide to Indigenous land tenure and management arrangements, based on principles contained in the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organisation Convention No. 169 to assist Indigenous peoples, States and United Nations agencies in negotiating Indigenous land tenure and management arrangements.

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PREFACE

At the Sixth Session of the United Nations Permanent Forum on Indigenous Issues, the Forum appointed Michael Dodson, one of its members, as a special rapporteur to prepare a draft guide to Indigenous land tenure and management arrangements, based on principles contained in the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organisation Convention No. 169 to assist Indigenous peoples, States and United Nations agencies in negotiating Indigenous land tenure and management arrangements.

The Forum received advice from the International Labour Organisation that International Labour Organisation Convention No. 107 is still relevant and binding on a number of countries that have ratified it and should be examined in relation to Indigenous land tenure and management arrangements. As the special rapporteur was unable to complete and present the paper at the appointed time, the Forum granted an extension of time to report at its Seventh Session in order for the report to be available to its current Eighth Session.

The revised mandate from the Permanent Forum for Indigenous Issues was to prepare a draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, taking into account the provisions of International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements in order to assist Indigenous peoples, States and the United Nations agencies in negotiating Indigenous land tenure and management arrangements and to present this paper at its Eighth Session in 2009.

This paper has been prepared with the assistance of the International Labour Organisation particularly in identifying useful case studies to shed light on the practical relevance of the theoretical aspects of this paper. Invaluable assistance has also been provided by Ms. Jo-Anne Weinman, Research Associate of the National Centre for Indigenous Studies at the Australian National University, Australia.

INTRODUCTION

General Notes about the Scope of the Paper

In the three instruments considered (the Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107), those provisions relating to lands, territories and natural resources can typically be characterised into:

1. Provisions that bear direct relevance to principles relating to lands, territories and natural resources, either via express inclusion of the words themselves (Example A) or by necessary implication (Example B).

Example A: Article 26(1) of the Declaration states:

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

It expressly includes direct reference to lands territories and resources, which is the focus of the provision.

Example B: Article 11(1) of the Declaration is about “the right to practise and revitalize ... cultural traditions and customs [which] 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”. While it does not expressly include the terms ‘land’, ‘territories’ or ‘natural resources’, any consideration of the right to maintain and protect archaeological and historical sites¹ unavoidably must take into account Indigenous peoples’ rights over those lands or territories which would be the locus of such sites of significance.

– cf –

2. Provisions that bear indirect relevance, of which there are two sub-sets: those that are largely administrative or general provisions applicable to the entire instrument (Example A), as well as those provisions that focus mainly on another aspect but may perhaps have repercussions for Indigenous peoples’ interests in lands, territories and natural resources, depending on the construction that gains credence in international jurisprudence (see Examples B and C).

Example A: Article 46(3) of the Declaration:

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

¹ Those Indigenous peoples whose ceremonies are tied to significant areas would equally be able to submit that this Article relates to interests in land by necessary implication.

While this provision makes no express reference to lands, waters, territories or resources, it does apply to the interpretation of the whole instrument which does contain provisions about Indigenous lands, territories and natural resources.

Example B: Article 4 of the Declaration:

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

This provision also does not expressly mention Indigenous lands, territories or natural resources. Moreover, it appears that its focus is ensuring Indigenous peoples' capacity, both in terms of procedure and material means, to fund the outward expressions of "the right to autonomy or self-government". This could take various forms but conceivably it could be construed as including an implied reference to Indigenous land tenure and management arrangements as one of the "ways and means for financing their autonomous functions".

Example C: Article 46(1) adds the following proviso to Article 3 of the Declaration which provides for the right of Indigenous peoples to self-determination:

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 authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

There is some dissent among member States as to the meaning of this particular aspect of the right to self-determination. While taking the floor to explain its position on voting on the Declaration, for instance, Australia espoused the view that the reference to self-determination in the Declaration was relevant in the context of secession, with a few others like New Zealand adopting a similar stance. The preponderance of evidence from statements by other States when voting however indicates that there is near universal consensus that the express reference to territorial integrity in Article 46(1) is sufficient to exclude the right of Indigenous peoples to secede. Even at this early stage, less than two years after the adoption of the Declaration, it is unlikely that any other construction would prevail. Nevertheless, the interpretation of this (and similar provisions) naturally has consequences for defining the limits of Indigenous rights over lands, territories and natural resources.

Without diminishing the importance of some provisions bearing indirect relevance to this issue, this paper concentrates its analysis in Section IV on provisions that either expressly or by necessary implication refer to Indigenous land tenure and management arrangements, including associated interests such as in waters, coastal areas and resources. Other implied or indirect terms such as the general interpretive provisions pertaining to the reading of the full instrument are not focussed on unless they contribute specifically to the principle at issue, as is the case with the principle of non-discrimination against Indigenous peoples' interests.

It is worth nonetheless acknowledging the interdependence of provisions within each instrument and, indeed, of these three instruments along with other international instruments. Article 37(1) of the Declaration observes the right of Indigenous peoples

to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors² 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.

Articles 43 which asserts that the rights within the Declaration “constitute ... minimum standards” and Article 45 which prevents construction of the instrument in ways that would diminish or extinguish “the rights indigenous peoples have now or may acquire in the future” are both referring to the body of international human rights law already contained in various treaties and agreements. Article 46(2) and (3) reiterates the importance of “fundamental freedoms”, “international human rights obligations” and, *inter alia*, “the principles of ... equality [and] non-discrimination”, all of which are embodied and explicated in various other instruments of international law.

Accordingly, all provisions are considered holistically in Section IV of this paper when determining principles contained in all three instruments that might facilitate negotiations over lands, territories and natural resources between Indigenous peoples, States and the United Nations agencies. This includes even those indirect provisions that are of a general nature (such as, for instance, an interpretive provision that refers to the entire instrument). For ease of reference, they have also been listed in Sections I, II and III although they have less clearly foreseeable implications for Indigenous interests in and principles relating to lands, territories and natural resources.

Indigeneity – Definitions & Language Use

When referring to all three instruments throughout this paper, I use the term ‘Indigenous peoples’ both for convenience and because it is the term used in the most recent and comprehensive international instrument concerning this group: the Declaration on the Rights of Indigenous Peoples. It is acknowledged, however, that the term and its interpretation have been the subject of frequent and protracted debate in academic and legal literature as well as by States, State agencies, the United Nations and its agencies in the past and that it has been substituted or used in connection with alternative phrasing such as ‘Indigenous and tribal’ or ‘semi-tribal’, ‘people’ and ‘populations’, each with varying meanings and legal implications.

There is no definition of ‘indigenous peoples’ contained in the most recent instrument, the Declaration.

² As well as States, the Declaration refers to non-State actors in Articles 40 (“States or other parties”), 41 (the “organs and specialized agencies of the United Nations system and other intergovernmental organizations”) and 42 (the “United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level”).

The two Conventions both establish parameters for their application early in the documents. Article 1 of Convention 107 states that it applies to:

[m]embers of tribal or semi-tribal populations in independent countries which 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 and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

Convention 169, as mentioned previously, departs from Convention 107 in the use of the term ‘peoples’.³ It applies to people who are nationally recognised and self-identify as Indigenous:

(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.

Rather than a definition, this provides a statement of coverage indicating a class of people who fall within its terms of reference. Self-identification is a fundamental criterion.

Taking these provisions under advisement in relation to the separate Conventions, it is safe to use the characterisation of indigeneity that enjoys the widest currency among international organisations, jurists and scholars: the José Martínez Cobo definition which the United Nations Permanent Forum on Indigenous Issues also employs occasionally, having asserted the prevalent view that fixing a more conclusive definition of ‘Indigenous peoples’ is unnecessary.⁴

³ Article 1(3) Convention 169.

⁴ UN Doc. E/CN.4/Sub.2/1986/7 This comprehensive study spanned fourteen years and thirty seven monographs. It is one of the most cited documents regarding the concept of Indigeneity. The lack of a formal definition in the six decades or so of developing international law within the United Nations framework has not hampered the recognition of the right to self-determination or other rights attached to the term.

Executive Summary

Sections I, II and III of this paper provide a brief overview of the following aspects relating to the Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107:

- legal status
- endorsement or ratification by member States
- provisions relevant to engagement with Indigenous peoples over lands, territories and natural resources

It is important to note that these concise summaries are intended only to provide a framework for the discussion in Section IV about the principles contained in these three instruments. Controversies and contrary legal or academic authorities have been alluded to where relevant.

Section IV discusses principles identified in the Declaration, having regard to the two relevant International Labour Organisation Conventions, with reference to specific provisions. There is inevitable overlap in the notions contained within or implied by principles as well as the provisions relating to them, but for ease of discussion these concepts have been separated into the following broad categories:

- A.** Indigenous peoples' right to self-determination;
- B.** full and direct consultation and participation of Indigenous peoples concerned;
- C.** free, prior and informed consent of Indigenous peoples;
- D.** right of Indigenous peoples to traditional lands, territories and natural resources;
- E.** respect for Indigenous cultural practices, traditions, laws and institutions;
- F.** reparation for injury to or loss of Indigenous interests;
- G.** non-discrimination against Indigenous peoples' interests;
- H.** respect for the rule of law.

I. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A. Status & Application

This instrument was endorsed by a resolution adopted by the United Nations General Assembly on 13 September 2007, 144 States voting for it, 4 against (Australia, Canada, New Zealand and the United States) and 11 abstaining (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine).⁵

In the strict legal sense, as a United Nations Declaration, this is a non-binding instrument at this stage. However, there are various factors that mitigate this and have repercussions for the influence this instrument currently has and is likely to have in the future. This particular international instrument has a highly visible body overseeing it – the United Nations Permanent Forum on Indigenous Issues – which increases the likelihood that it will maintain conspicuous place in the international arena, especially given the current second International Decade of the World’s Indigenous Peoples. Although the text is commonly understood as creating no new rights at international law, it does draw together and, in some cases elaborate on, a comprehensive range of rights in relation to Indigenous peoples (some of which reflect the dynamic development of international legal norms that emerged more clearly since the previous International Labour Organisation Conventions), which arguably expands its application even to States who have abstained or voted against it because of its near-universal acceptance as codification of current international human rights law in relation to Indigenous peoples. The latter also indicates widespread commitment and expectation by States regarding the interpretation of the principles enshrined in the Declaration, which will impact on the speed with which some emergent norms contained in the Declaration crystallise. The human rights standards now contained in the Declaration are now the internationally accepted minimum standards on the rights and fundamental freedoms of the Indigenous peoples of the world. Finally, it is noted that the instrument is crafted employing specific language more characteristic of binding treaties than declarations which tend to have an aspirational, humanitarian character.

B. Relevant Articles

Provisions that are directly relevant to and make express mention of Indigenous sites, lands, territories or natural resources in the Declaration on the Rights of Indigenous Peoples include

⁵ States voting in favour were as follows: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Bahamas, Bahrain, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, China, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Micronesia (Federated States of), Moldova, Monaco, Mongolia, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe.

Articles 8(2)(b), 10, 11, 25, 26, 27, 28, 29(1) and (2), 30 and 32. Several provisions, while not expressly mentioning lands, territories or natural resources, do give rise to a strong argument that they have implications for Indigenous interests in relation to lands, territories or natural resources. Among these are Articles 2, 3, 9, 12(1), 14(3), 17(1), 18, 20(1), 24(1), 31, 34, 36, 37 and 46.

The following remaining provisions do not expressly refer to, but could have implications for, Indigenous interests in lands, territories or natural resources: Articles 1, 4, 5, 7, 8(1), 8(2)(a), (c), (d) and (e), 12(2), 13(1), 14(1), 15, 19, 20(2), 21, 23, 24(2), 29(3), 38, 39, 40, 41, 42, 43 and 45.

II. INTERNATIONAL LABOUR ORGANISATION CONVENTION NO. 169 1989 INDIGENOUS & TRIBAL PEOPLES

A. Status & Application

International Labour Organisation Convention No. 169 has been ratified by 20 countries including the 9 that denounced International Labour Organisation Convention No. 107 (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay and Peru) as well as Chile, Denmark, Dominica, Fiji, Guatemala, Honduras, Nepal, Netherlands, Norway, Spain and Bolivarian Republic of Venezuela.

This remains the only legally binding international instrument open to ratification which deals specifically with rights of Indigenous and tribal peoples. As it is drafted as a treaty, it is legally binding on States that have ratified it. However, until ratified, it serves as a set of minimum standards or guidelines for all States.

B. Relevant Articles

The main provisions in Convention 169 regarding Indigenous lands, territories and resources are contained in Part II entitled 'Land' and encompass Articles 13 to 19, inclusive. Additionally, Articles 4, 7, 25 and 32 either makes reference to or potentially has important implications for those interests.

In addition, the following provisions either have indirect or arguably foreseeable relevance to Indigenous interests in lands, waters, territories and resources: Articles 1, 2, 3, 5, 6, 8, 12 and 23. Administration and application provisions in Articles 33, 34 and 36 and interpretive provisions in Article 35 are also relevant.

III. INTERNATIONAL LABOUR ORGANISATION CONVENTION NO. 107 1957 INDIGENOUS & TRIBAL POPULATIONS

A. Status & Application

International Labour Organisation Convention No. 107 is a legally binding international instrument. Countries that ratify it have one year to align legislation, policies and programmes to the Convention before it becomes legally binding.

However, it is no longer open for ratification. A committee of experts convened in 1986 by the International Labour Organisation governing body concluded “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world.”⁶ It was revised during 1988-9 through the adoption of International Labour Organisation Convention No. 169.

This Convention was originally ratified by 27 countries but automatically denounced by 9 upon their ratification of International Labour Organisation Convention No. 169 (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, and Peru).

The 18 countries where International Labour Organisation Convention No. 107 remains in force are: Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia.

B. Relevant Articles

The main provisions that make express mention of, or necessarily have consequences for, Indigenous interests in lands, waters, territories and resources are Articles 11, 12, 13 and 14.

Although these do not explicitly make reference, Articles 1 to 7 (inclusive) and Articles 17, 18 and 20 could have a foreseeable impact on Indigenous interests in lands, waters, territories and resources.

⁶ As per International Labour Organisation website <http://www.International Labour Organisation.org/indigenous/Conventions/noNo. 107/lang--en/index.htm> An important difference between them is that International Labour Organisation Convention No. 107 was founded on the assumption that Indigenous and tribal peoples were temporary societies destined to disappear with ‘modernisation’ whereas International Labour Organisation Convention No. 169 has a starting point that they are permanent societies.

IV. PRINCIPLES IN THE DECLARATION & ILO CONVENTIONS 169 & 107

FOR ENGAGING WITH INDIGENOUS PEOPLES OVER LANDS, TERRITORIES & NATURAL RESOURCES

A. Indigenous Peoples' Right to Self-Determination

International Labour Organisation Convention No. 169 created no new rights in relation to external self-determination at the time of its enactment. Rather, its provisions are explicitly oriented towards measures undertaken within the framework of States that Indigenous peoples reside in. In fact, the Convention refrains from any interpretation of the concept of self-determination while focussing on notions of self-management or enabling conditions for Indigenous control of and decisions over aspects of their own lives. Although it uses the term 'peoples', thereby distinguishing it from Convention 107 which uses 'populations' and did not support the principle of self-determination in relation to Indigenous peoples, Article 1(3) of Convention 169 denies construction of the term "as having any implications as regards the rights which may attach to the term under international law".

However, as it does not restrict the right to self-determination and is not inconsistent with it Convention 169, given its focus on Indigenous peoples' right to develop priorities for their own development and to retain their distinctiveness as peoples, remains open to currently be construed as being in congruence with the Declaration and any other later international instruments which *do* apply this right to Indigenous peoples. This is especially true given that the right to self-determination is commonly considered by international jurists and scholars to have crystallised as a norm of customary international law and arguably even a *jus cogens* or peremptory norm.⁷ Although Indigenous peoples historically were excluded from the development of this norm (which was established early in the United Nations Declaration of Human Rights and subsequently in the first Articles of the legally binding Conventions of 1966, ICCPR and ICESCR), international law has since developed to incorporate Indigenous interests within this right.

Article 3 of the Declaration on the Rights of Indigenous Peoples recognises the principle of self-determination, by virtue of which right Indigenous peoples may "freely determine their political status and freely pursue their economic, social and cultural development." This right is moderated by Article 46(1) which limits the right to what is commonly referred to as *internal* self-determination because it does not include the right to secede from a sovereign State:

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

⁷ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, at 23 UN Doc E/CN.4/Sub.2/404/Rev.1 (1981) (Auerliu Cristescu, Special Rapporteur).

which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Article 46(1) of the Declaration notwithstanding, the right to self-determination clearly encompasses various other rights that affect many aspects of Indigenous people's lives including (but not limited to):

- the right to representative political institutions;⁸
- sufficient access to Indigenous lands, territories and natural resources in order to pursue and maintain cultural practices and traditions and to preserve cultural institutions and laws;
- the right to be free of adverse discrimination against cultural practices and traditions including the right to just and equitable reparation for breach of this right;
- the right to just and equitable reparation for Indigenous interests in sites, lands, waters, territories, natural resources, traditional knowledge or cultural heritage having been adversely affected without free, prior and informed consent;
- the right to have the necessary means to ensure Indigenous peoples' equitable economic, social and cultural development; and
- the right to determine the priorities and strategies for and course of their own development.

The Declaration draws together many of these rights that are directly referable to the principle of self-determination,⁹ all of which may potentially influence engagement over Indigenous lands, territories and natural resources.

This right is therefore one of the fundamental guiding principles regarding Indigenous peoples' lands, territories and natural resources.¹⁰

⁸ Article 4 of the Declaration enshrines the "right to autonomy or self-government in matters relating to their international and local affairs" and this is reinforced by the right to determine Indigenous peoples' own priorities for development (Articles 23 and 32 of the Declaration and Article 7(1) and (3) of Convention 169) which States must support with material resources and the means for this to occur (Article 4 of the Declaration and Article 19(b) of Convention 169).

⁹ Each is discussed under separate headings below.

¹⁰ Erica-Irene Daes 'Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous peoples and their relationship to land' C/CN.4/Sub.2/2001/21 11 June 2001.

B. Full & Direct Consultation & Participation of Indigenous Peoples Concerned

All three instruments adopt the approach that Indigenous peoples as a group should be free to direct as many aspects of their own lives as possible and that States should either remove legislative or administrative impediments or provide whatever means are necessary to enable this. As such, all three instruments endorse this general principle of States enlisting the full and direct consultation and participation of Indigenous peoples. Nonetheless, it should be noted that the International Labour Organisation itself has been criticised by Indigenous peoples for its repeated failure to include sufficient participation by the global Indigenous community in the creation of both Convention 107 and 169.¹¹

Full and direct consultation and participation of Indigenous peoples is a persistent theme expressly stated in numerous provisions throughout the Declaration. Moreover, it is an implied pre-condition of the principle of free, prior and informed consent and, arguably, connected to other principles such as equal respect for Indigenous cultural practices, traditions, laws and institutions and the right of Indigenous peoples to traditional lands, territories and resources.¹² From a reading of the Declaration it appears that in order for consultation and participation to be effective, it must be conducted in good faith by States, involve the Indigenous peoples concerned and wherever possible their representative institutions or representatives chosen in accordance with their own procedures.

This principle of consultation and participation is specifically applied to dealings over Indigenous lands, territories and resources in, *inter alia*, the context of military activities,¹³ hazardous materials,¹⁴ “any project ... in connection with the development, utilization or exploitation of mineral, water or other resources”¹⁵ and in relation to reparation, redress, restitution or compensation.¹⁶ Perhaps the clearest and most comprehensive articulation of this principle in relation to Indigenous lands, territories or resources in the Declaration lies in 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.

Indigenous peoples therefore have the right to participate in establishing processes for recognising their laws, traditions, customs and land tenure systems and, furthermore, in

¹¹ World Council of Indigenous Peoples 1977 conference rejected Convention 107 and the accompanying Recommendation No. 104. The Indigenous Peoples Preparatory Meeting to the Working Group on Indigenous Populations in 1989 adopted a resolution strongly criticising the International Labour Organisation's revision process which they considered “reduced indigenous peoples to indirect and demeaning levels of participation [in ways that indicated that the International Labour Organisation] only wanted indigenous peoples to lend credibility to the process”; “indigenous peoples were in the halls commenting on the discussions ... occurring behind closed doors. On all the major provisions of Convention 169, the negotiations took place out of public view. Decisions were then merely reported to the meetings.” Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169 II Without Prejudice* 53, 54 (1989) at 64-66.

¹² See below for further discussion under the headings ‘Free, Prior and Informed Consent of Indigenous Peoples’, ‘Respect for Indigenous Cultural Practices, Traditions, Laws and Institutions’ and ‘Right of Indigenous Peoples to Traditional Lands, Territories and Natural Resources’.

¹³ Article 30 Declaration.

¹⁴ Article 29 Declaration.

¹⁵ Article 32(2) Declaration.

¹⁶ Articles 28 and 29(3) Declaration.

establishing processes for adjudicating Indigenous rights to lands, territories and resources currently or previously owned, occupied or used. Legislative schemes protecting these rights from adverse dealings, setting out the procedures by which any disputes in relation to them might be settled (for instance in tribunals or courts), and outlining the means for reparation for breach or loss of these rights (such as a monetary compensation scheme or procedures for the return of the land or similar lands of equal value and quality) would appear to fall squarely within this Article requiring States to work “in conjunction with indigenous peoples concerned” and reiterating Indigenous peoples’ right to participate in such processes.

The principle of full and direct consultation and participation in decision-making processes is clarified by minimum standards such as States acting in good faith¹⁷ and providing information in a timely manner sufficiently prior to decisions to enable valid and free consent. These other principles influence the interpretation of both the degree and quality of consultations required in order that they are considered effective.¹⁸ Indigenous peoples’ “own representative institutions”¹⁹ or “indigenous decision-making institutions” and “representatives chosen by themselves in accordance with their own procedures”²⁰ should be incorporated into effective consultations and the administration of programmes “as far as possible”.²¹

It is a highly persuasive submission that the right to consultation and participation is implied in the negative right expressed in Article 8: “the right not to be subjected to forced assimilation or destruction of their culture”²² or any “forced assimilation or integration”,²³ violation or undermining of which right merits “effective mechanisms for prevention ... and redress” for “depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities”.²⁴

However, even if this analysis of Article 8 is disputed, there are other positive expressions of this principle in addition to the express inclusion of terms such as ‘consult/consultation’, ‘cooperate/cooperation’ and ‘in conjunction with’ which are employed in Articles 12(2), 15(2), 19, 27, 30(2), 31(2), 32(2), 36(2) and 38 of the Declaration. Article 18, for instance, talks about the “right to participate in decision-making in matters which would affect their rights” and “the right to be actively involved in developing and determining ... programmes affecting them” is enunciated in Article 23. Article 29(3) also confirms this obligation on States by its inclusion of the phrase “as developed and implemented by the peoples affected” in relation to programmes or materials used by States for monitoring, maintaining and restoring Indigenous peoples’ health.

As discussed under ‘Free, Prior and Informed Consent of Indigenous Peoples’, provisions such as Article 28(2), 29(2) have the additional requirement of States acquiring the genuine consent of

¹⁷ See for instance Article 19 (“consult and cooperate in good faith”) and Article 32 (“States shall consult and cooperate in good faith”) of the Declaration; see also Article 6(2) of Convention 169: “The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances”.

¹⁸ Article 30(2) of the Declaration refers to “effective consultations ... through appropriate procedures” and “effective measures” is used in Articles 14(3) and 15(2). Article 12(2) similarly talks about the “fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”.

¹⁹ Article 19 of the Declaration.

²⁰ Article 18 of the Declaration.

²¹ Article 23 of the Declaration.

²² Article 8(1) of the Declaration.

²³ Article 8(2)& (d) of the Declaration.

²⁴ Article 8(2) (a) of the Declaration.

the Indigenous peoples concerned. This is clearly predicated on their full and direct consultation and participation.

In Convention 169, consultation and participation is also frequently referred to. The crucial difference between the Convention and the Declaration is the requirement to consult with the objective of obtaining the free, prior and informed *consent* of Indigenous peoples. Rather, participation and consultation are stipulated with the objective of the State informing and equipping itself to make a decision affecting Indigenous interests: “consult ... with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting ... programmes”²⁵ or for the State to attempt to obtain consent.²⁶

The main general consultation and participation provision in Convention 169 is Article 6(1) which obliges States to:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resource necessary for this purpose.

Articles 6 echoes the Declaration in mandating governments to consult Indigenous peoples in all matters affecting them but adds the word ‘directly’ after “matters affecting them”, a distinction conspicuously absent from the Declaration and one which appears to present a narrower field of areas where Indigenous peoples must be consulted or participate in decision-making. The use of the word ‘directly’ at the end of Article 6(1)(a) might be narrowly construed as qualifying the class of legislative or administrative measures that give rise to an obligation to consult Indigenous peoples; it is conceivable that there be legislative measures that affect Indigenous peoples indirectly but substantially or significantly. However, it does not preclude consultation or participation in matters indirectly concerning Indigenous peoples and could reasonably be submitted that this general principle, prevalent throughout Convention 169, encourages a wide construction incorporating matters indirectly affecting Indigenous peoples as an implied term. Article 6(1) (b) which follows omits ‘directly’ from the right to freely participate in decision-making “for policies and programmes which concern them”, although Article 7 does include this possible qualifier to the right to “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them”.

Similar to the Declaration, States must consult Indigenous peoples concerned in a *bona fide* manner in Convention 169 (“through appropriate procedures”²⁷). This includes the consultation and participation of Indigenous representative institutions. In order to adequately discharge the

²⁵ Article 15(2), Convention 169.

²⁶ Article 16 of Convention 169.

²⁷ Article 6(1) (a) Convention 169.

obligation, States must make available “the resource[s] necessary for this purpose”²⁸). Article 2 of Convention 169 is another general provision enshrining the principle of participation and coordination between governments and Indigenous peoples to protect the latter’s rights.

The participatory and consultative rights expressly relating to lands, territories and natural resources in Convention 169 are primarily contained in Articles 15 and 17.

Article 15(1) of Convention 169 protects Indigenous rights to “participate in the use, management and conservation” of “the natural resources pertaining to their lands” and 15(2) mandates States “shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.” Article 17(2), which deals with the alienation or other transmission of Indigenous lands outside Indigenous communities, clearly states that the Indigenous peoples concerned “shall be consulted whenever consideration is being given to their capacity” to deal with their interests in these ways.

Although Article 7 of Convention 169 does not expressly mention Indigenous interests in lands, waters, territories or natural resources, its protection of Indigenous peoples’ right to “participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly” has clearly foreseeable implications for these interests.

Convention 107 is less focussed on the consultation and participation of Indigenous peoples than the other two instruments considered. It nonetheless contains provisions directing governments to take their interests into consideration in decisions and to “seek the collaboration of these populations and of their representatives”.²⁹

²⁸ Article 6(1) (c) Convention 169.

²⁹ Article 5 Convention 107.

C. Free, Prior & Informed Consent of Indigenous Peoples Concerned

This principle could be regarded as connected to and an extension of the principle of full and direct consultation and participation. It resembles, in effect, a right of veto in certain matters affecting Indigenous peoples. States must act in good faith and engage with the Indigenous peoples directly concerned and with their genuine representatives or representative institutions.

In addition to the principle that States are to consult with Indigenous peoples in matters affecting them, there is the more rigorous requirement of obtaining their free, prior and informed consent in certain matters, which is a central theme that forms the overarching framework for the Declaration. This principle is consistently referred to in numerous provisions in terms of States being mandated (expressed through the use of ‘shall’) to obtain the free, prior and informed consent of Indigenous peoples concerned in various matters affecting them, depending on which provision is examined.

Article 10 of the Declaration refers to the “free, prior and informed consent of the indigenous peoples concerned” being required before Indigenous peoples are relocated from their lands or territories.

Article 11(2) details States obligations to “provide redress ... [for] cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent”. Similarly, Article 28(1) refers to redress for lands, territories and resources “taken, occupied, used or damaged without their free, prior and informed consent” and 28(2) opens “Unless otherwise freely agreed upon by the peoples concerned...” when stipulating the form compensation or redress take.

Article 29(2) mandates States to take effective measures to prevent hazardous materials being stored or disposed on Indigenous lands or territories without their free, prior and informed consent.

Article 19 goes further by requiring States to “consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them.” It has similar language to Article 32(2) which is aimed more specifically at actions that might affect lands, territories, waters and natural resources. It requires States to consult and cooperate in good faith “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.”

It appears that Article 6(2) of the International Labour Organisation Convention No. 169 *prima facie* mandates consent, similar to Articles 19 and 32(2) of the Declaration, in “consultations carried out in application of this Convention [which] shall be undertaken ... with the objective of achieving agreement to consent to the proposed measures.” However, this is a very wide provision impacting on all consultation and participation provisions in this Convention. It would be valid to submit that differentiating between consultation and participation provisions in Convention 169 from a consent provision such as its Article 16 is reliant on construing Article 6(2) (and, accordingly, all other consultation and participation provisions) in a way which

encourages, as a guiding principle, but does not mandate States to obtain consent from Indigenous peoples.

The language in Article 16 of this Convention however tends more to the idea that consent is compelled when States affect Indigenous interests in land in relation to relocation. These interests may be affected “*only* with their free and informed consent [emphasis added]” (or where this is unable to be obtained, in accordance with appropriate national laws and procedures including public inquiries). Provision is also made for “the right to return to their traditional lands”, or where this is not possible, to:

lands [being provided that are] of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where [there is] a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

Article 16 of Convention 169 therefore provides the strongest basis for supporting the principle of States having to obtain the free, prior and informed consent of Indigenous peoples, although it is unlikely that this could be construed in this manner, as discussed.

Article 4 of Convention 169 which allows “special measures ... for safeguarding the ... property ... cultures and environment of the peoples concerned” in a way that is “not contrary to [their] freely-expressed wishes” might be interpreted as a negatively expressed right to consent but its language (the use of “freely-expressed wishes” instead of ‘consent’ where consent is used elsewhere in the Convention) suggests that this would not be a favoured construction.³⁰

Convention 107 only mentions consent once in Article 12 which is substantially similar to Article 16 of Convention 169; both concern relocation of Indigenous peoples from their traditional or habitual lands or territories, stipulating that this must not be done without free consent or in accordance with national laws and outlining measures for compensation or in money or in kind, or the provision of lands of equal quality.³¹

Phrases such as “unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned” in the Declaration,³² read together with the positive right to expressions of self-determination such as in Article 32 (“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”), further strengthen the contention that the principle of obtaining the free, prior and informed consent of Indigenous peoples is one which States and United Nations agencies should be conscientious about complying with.

Moreover, it appears to be a logical extension that implicit in the principle of Indigenous peoples having a right to free, prior and informed consent is the notion of capacity; Indigenous peoples who lack the requisite capacity would be unable to consent in a free and informed manner. This

³⁰ According to a rule of interpretation: *expressio unius personae vel rei est exclusio alterius* (Latin: the express mention of one person or thing means the exclusion of another).

³¹ Convention 107 is arguably more restrictive than Convention 169 as it stipulates only three kinds of national laws that might enable the forced (i.e. without consent) relocation of Indigenous peoples: “national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.”

³² Article 30(1) of the Declaration.

principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.

The term ‘in good faith’ is used in addition to the phrase “free, prior and informed consent” or “free and informed consent prior to ... approval” in Articles 19 and 32, respectively. Article 46(3) of the Declaration reinforces the importance of the principle of ‘good faith’ as a guide to interpreting all provisions. This indicates that ascertaining the quality of the requisite consent may well depend on demonstrating the *bona fide* nature of the engagement with Indigenous people. Very likely, for this principle of free, prior and informed consent to be adequately adhered to, information must be relevant, complete and presented in a manner able to be understood by the peoples directly concerned and consent will have to be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their behalf. Such requirements have long been accepted as international best practice.³³ So States or United Nations agencies acting in accordance with this principle might, for instance, provide or refer the Indigenous peoples concerned to independent legal and technical advice and adequate translation services in a timely manner, and require all parties concerned to undertake adequate cross-cultural communication training. This notion has some support from the measures mentioned in Article 13(2) of the Declaration, which outlines States obligations to “take effective measures 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.

Interestingly, the Declaration is the first instrument to enshrine this right in relation to certain aspects of Indigenous peoples’ lives. Neither of the International Labour Organisation Conventions 169 nor 107 contain any provisions that enable Indigenous peoples an effective right of veto or solely require their consent³⁴ in any particular. However, as mentioned previously, Convention 169 does require and encourage consultation in multiple provisions, some of which include the “objective” (although quite possibly not the outcome) of consensus or consent, and Convention 107 similarly encourages consent to be obtained when removing people from their habitual territories in Article 12 stating that such removal may proceed nonetheless if it is in accordance with national laws and regulations for reasons relating to national security, or in the interests of national economic development or their own health.

³³ See for instance *Indigenous and Tribal Peoples: A Guide to ILO Convention 169* by Manuela Tomei and Lee Swepston, International Labour Office, Geneva 1996, p9.

³⁴ As mentioned previously, consent is rather a guiding principle than a stipulation in Conventions 169 and 107 which both allow for States to act contrary to the consent of Indigenous peoples (in relation to forcible relocation from their lands and territories) as long as it is in accordance with certain national laws.

D. Right of Indigenous Peoples to Traditional Lands, Waters, Territories & Resources

A special relationship with particular lands and waters is widely accepted as being fundamental to the historical development of Indigenous peoples and to the existence of Indigenous collective customs, culture, traditions, laws and beliefs.³⁵ The defining Martinez Cobo report recognised that Indigenous peoples “have a natural and inalienable right to keep the territories they possess and to claim the land of which they have been deprived.”³⁶ Furthermore, property has been affirmed as an international human right.³⁷ These rights are protected, to varying degrees, within the three instruments.

Respect for Indigenous peoples’ cultural practices, traditions, laws and institutions is an adjunct to the right to maintain connection with those areas that have traditionally been integral to their identity as a group and to the development of their customs.³⁸ Both stem from the principle of non-discrimination against Indigenous peoples which derives from long-settled international human rights law notions of equality and non-discrimination.³⁹ The associated notion of fair reparation, redress, restitution or compensation for breach of these rights is an expected corollary for injury to or loss of traditionally significant Indigenous lands and waters.⁴⁰ Each will be dealt with in other sections separately from the principle that Indigenous peoples have a right to their traditional lands, waters, territories and natural resources.

Convention 169, via Article 13(2), retains the use of the term ‘territory/territories’ contained in Convention 107 and considered contentious but Convention 169 also adds the word ‘land/lands’ to the terminology it uses. The Declaration uses ‘land/lands’, ‘waters’, ‘territories’, ‘sites’ and ‘resources’.

The Declaration canvasses an array of rights over sites, lands, waters, territories and natural resources. Its formulations of this principle vary noticeably from those in both Conventions. It is worth recalling here that the Declaration is rather unique in its mode of expression; it employs specific language that resembles provisions in Conventions or legally-binding treaties much more than it does other Declarations. The Conventions on the other hand are unambiguously legally binding on those States that have ratified them and also provide highly persuasive guidelines for the international community in dealings with Indigenous peoples and land. Many international jurists and academic commentators consider the International Labour Organisation Conventions such as Conventions 107 and 169 as setting well-established international minimal standards in certain areas of engagement with Indigenous peoples. As such, it pays to examine the intersecting articulations of this principle in all three instruments with particular care.

Use, Develop, Control, Own & Name

Article 26(1) of the Declaration recognises “the right to the lands, territories and resources ... traditionally owned, occupied or otherwise used or acquired”. This right incorporates the power

³⁵ UN doc. E/CN.4/Sub.2/1984/22, Para 196. Article 13(1) of Convention 169 asks governments to “respect the special importance for the cultures and spiritual values of ... their relationship with the lands or territories, or both ... which they occupy or otherwise use”.

³⁶ UN doc. E/CN.4/Sub.2/1984/22, Para 198.

³⁷ Article 17 of the Universal Declaration of Human Rights.

³⁸ See below ‘Respect for Indigenous Cultural Practices, Traditions, Laws and Institutions’.

³⁹ See below ‘Non-Discrimination Against Indigenous Peoples Interests’.

⁴⁰ See below ‘Respect for Indigenous Cultural Practices, Traditions, Laws and Institutions’.

to “use, develop and control” as well as to “own”.⁴¹ Article 32 spells out some aspects of control as “the right to determine and develop priorities and strategies for the development or use” of lands, territories and resources. It also incorporates the right “to designate and retain their own names for ... places”.⁴²

It is this principle and right – of Indigenous peoples to their traditional lands, territories and natural resources – that gives rise to the obligation in the Declaration on States to consult, encourage participation in decision-making and in some cases to obtain the free, prior and informed consent of Indigenous peoples in any project that would affect their interests in lands, territories or resources. Thus, hazardous materials must not be stored or disposed of,⁴³ or military activities conducted on,⁴⁴ nor Indigenous peoples be forcibly removed from or dispossessed of,⁴⁵ their lands, territories or natural resources without free, prior and informed consent from the people concerned and their representative institutions or representatives chosen according to their own procedures. Article 16 of Convention 169 endorses the general principle that Indigenous peoples should not be removed from lands they occupy except with their free and informed consent or after appropriate procedures established by domestic law. Relocation must also be an exceptional and necessary measure, although, unlike Convention 107’s Article 12, Convention 169 does not specify when relocation might be considered necessary. It is also telling that the more recent Declaration chose to exclude the added possibility in Convention 169 for States to legally enact domestic law to enact forcible relocation of Indigenous peoples if consent were unable to be obtained.

Terms such as ‘ownership’ and ‘possession’ are included in all three instruments. Although Convention 169 does not preclude full title normally associated with rights of ownership, it appears to allude more often to restricted rights of ownership, whereas the Declaration’s insistence on States acquiring the free, prior and informed consent of Indigenous peoples concerned resembles the rights of full owners more closely. Convention 169 Article 14 refers to ‘ownership and possession’ rights in relation to lands Indigenous peoples *traditionally* occupied. Although it does allow for ‘special measures’ to be enacted “in appropriate cases to safeguard the right ... to *use* [emphasis added] lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”, this right to use is clearly less robust than a right of ownership. The word ‘ownership’ in Convention 169 is only used in the context of *Indigenous* ownership in this Article 14, which canvasses ownership of lands traditionally occupied; elsewhere in the Convention ownership is used in the context of State⁴⁶ or third party ownership.⁴⁷

Convention 107 recognises the right of ownership, collectively or individually held, over lands traditionally occupied;⁴⁸ Article 13, similar in substance to Article 17 of Convention 169, protects customary Indigenous procedures for transmission of ownership and use of land so long as they

⁴¹ Article 26(2) of the Declaration.

⁴² Article 13(1) Declaration.

⁴³ Article 29(2) Declaration.

⁴⁴ Article 30 Declaration.

⁴⁵ Article 10 and 8(2) (b) Declaration.

⁴⁶ As in Article 15(2) Convention 169 regarding the State’s retention of ownership of mineral, sub-surface or other resources.

⁴⁷ As in Article 17 Convention 169 regarding securing ownership of land belonging to Indigenous peoples, which is similar in content to Article 13(2) of Convention 107.

⁴⁸ Article 11 Convention 107.

fit within the framework of domestic laws. The collective aspect of Indigenous relationships to land is also acknowledged in Convention 169 Article 13(1) as is the government's obligation to provide the "means required to promote the development of ... lands ... already possess[ed]"⁴⁹

Resources – Exploitation, Use & Development

Resources are specifically mentioned in Article 32(2) of the Declaration which clarifies the need for free, prior and informed consent in dealings with Indigenous lands, territories and resources "particularly in connection with the development, utilization or exploitation of mineral, water or other resources". The notion of maintaining and developing economic systems through the use of lands, territories and resources is referred to in Article 20: "Indigenous peoples have the right ... to be secure in the enjoyment of their own mean of subsistence and development and to engage freely in all their traditional and other economic activities."

This should be compared with Convention 169, which does not recognise the exclusive right to natural resources on Indigenous lands and territories. Article 14(1) recognises "the rights of ownership and possession ... over the lands which they traditionally occupy". However, in relation to natural resources, the Convention protects only the right of Indigenous peoples "to participate in the [use], management and conservation of these resources"⁵⁰ and their right to be consulted before States undertake mineral or subsurface resource exploration or exploitation. This contrasts starkly with the Declaration which expressly stipulates that States are obliged to obtain the free, prior and informed consent of Indigenous peoples in this regard.⁵¹

Coastal & Other Waters

Article 25 of the Declaration confirms the applicability and extension of this principle to Indigenous waters and coastal areas:

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

Traditional & Continuing Indigenous Interests

Significantly, the rights of Indigenous peoples to lands, territories and resources applies in respect of areas "possess[ed] by reason of *traditional* ownership or other traditional occupation or use, as well as [areas] *otherwise acquired*",⁵² and notably includes resources as well. Conceivably therefore, this provision covers Indigenous peoples who have been forced off their traditional lands, perhaps due to deliberate State policies, laws or through the effects of colonisation and settlement processes, and who over time acquired or were resettled to different areas than those traditionally owned, occupied or used.

Convention 169 in Article 14(1) makes explicit that it is not only lands *traditionally occupy* which should be recognised but "in appropriate cases ... [also] lands not exclusively occupied by them, but to which they *have traditionally had* [emphasis added] access for their subsistence and

⁴⁹ Article 14 Convention 107.

⁵⁰ Article 15 Convention 169.

⁵¹ Article 32 (2) Declaration.

⁵² Article 26(2) Declaration (emphasis added)).

traditional activities [with particular attention ... to nomadic peoples and shifting cultivators”. This provisions suggests that Indigenous peoples need to be currently in possession of traditional lands, whether as exclusive possessors or not, in order to qualify under this section. The inclusion of the word ‘exclusively’ between ‘not’ and ‘occupied’ (rather than merely ‘not occupied’) might suggest that Indigenous peoples who have been dispossessed of their lands will not have the benefit of this provision.

Conservation & Protection

Entitlements to conservation and protection measures are safeguarded in Article 29(1) of the Declaration which also recognises the right of Indigenous peoples to “the productive capacity of their lands or territories and resources.” Provisions relating to traditional healing practices, medicines, medicinal plants, animals, minerals, seeds and knowledge of the properties of fauna and flora clearly also bear indirect relevance to Indigenous interests in land,⁵³ as do references to the protection of customary laws or cultural or religious values.⁵⁴

Sites of Historic Importance

The Declaration protects the right to “maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts [and] ceremonies”.⁵⁵ Although there is no clear counterpart to this provision in the Conventions, there is sufficient scope in provisions for special measures dealing with safeguarding property, cultures, modes of cultural expression and traditions to encompass these aspects.⁵⁶

⁵³ See Article 25(2) of Convention 169 and Articles 24(1) and 31 of the Declaration.

⁵⁴ See below ‘Respect for Indigenous Cultural Practices, Traditions, Laws and Institutions’.

⁵⁵ Article 11 Declaration.

⁵⁶ See for instance Article 4 of Convention 169 or Articles 3 and 18 of Convention 107.

E. Respect for Indigenous Cultural Practices, Traditions, Laws & Institutions

In a very real sense, respect for the equal importance of Indigenous peoples' cultures, traditions, laws⁵⁷ and institutions underlies the recognition of all Indigenous rights and of principles regarding engagement with Indigenous peoples. There are clear associations between this principle and those of non-discrimination and equality, both of which coincide with Indigenous rights and relationships to lands, waters and coastal seas, territories, sites and natural resources. Moreover, this principle of respect for Indigenous cultural practices, traditions, laws and institutions informs the obligation on States to seek participation, consultation or consent in good faith in engagements with Indigenous peoples over their interests.

The starting point or basis for this principle of respect espoused in the Declaration is the "right to belong to an indigenous community or nations, in accordance with the traditions and customs of the community or nation concerned [without] discrimination of any kind ... from the exercise of such a right".⁵⁸ Indigenous peoples have "integrity as distinct peoples" whose "cultural values or ethnic identities" warrant protection.⁵⁹

As land plays a central part in Indigenous peoples' lives and collective identity, this principle as expressed in the Declaration has widespread impact on interests in lands, waters, territories and resources through Indigenous peoples' use of these areas for, *inter alia*, practising customs, traditions and ceremonies, for learning and teaching law,⁶⁰ cultural heritage,⁶¹ histories,⁶² language,⁶³ philosophies,⁶⁴ spiritual and religious⁶⁵ and other forms of traditional knowledge as well as for maintaining privacy in and control over sites of cultural significance, ceremonial objects, vital medicinal seeds, plants, animals and minerals⁶⁶ and human remains.⁶⁷ Article 11(1) captures some of these:

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.

So too do Articles 7(2), 8(2)(a), 10, 12(1) and (2), 13, 14(1) and (3), 24(1), 25, 27, 34 and 36 of the Declaration.

⁵⁷ See also Section H 'Respect for the Rule of Law' and Section D 'Right of Indigenous Peoples to Traditional Lands, Waters, Territories and Natural Resources'.

⁵⁸ Article 9 Declaration.

⁵⁹ Article 8(2) (a) Declaration. See also Article 5(b) Convention 169 which uses similar language.

⁶⁰ Article 27 Declaration.

⁶¹ Article 31(1) Declaration.

⁶² Article 13 Declaration.

⁶³ Article 14 (1) and (3) Declaration.

⁶⁴ Article 13 Declaration.

⁶⁵ Article 12 (1) and 25 of the Declaration are focussed on protecting this aspect, which is also mentioned in Articles 34 and 36. Article 25 talks about 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."

⁶⁶ Articles 24 (1) and 31 (1) Declaration.

⁶⁷ Article 12 (2) Declaration.

Respect for Indigenous institutions stems partly from the right to participate in decision-making affecting them through their own elected or representative decision-making bodies.⁶⁸ There is strong support in the Declaration for States and international agencies addressing Indigenous peoples' *own* institutions and own representatives "chosen in accordance with their own procedures".⁶⁹ Article 33(2) acknowledges the right to "determine the structures and ... select the membership of their institutions".

Beyond this, however, the term 'institutions' is not defined in the Declaration. Article 5 does list Indigenous peoples' "distinct political, legal, economic, social and cultural institutions" but does not restrict interpretation of 'institution/s' to these categories. It is referred to many times, sometimes contextualised by the focus of a given provision, but mostly undefined. As such, 'institutions' or 'institutional structures' could conceivably encompass cultural, social, educational or kinship institutions, economic, legal and juridical institutions, systems that give rise to land tenure laws or governance and political structures, among others (all of which may well be interrelated).

The right of Indigenous peoples to maintain, strengthen and develop their own institutions, protected under Articles 5, 18, 20(1) and 34, must be supported and encouraged by States through active engagement, consultation, participation and cooperation with these institutions in matters affecting Indigenous peoples⁷⁰ or their rights⁷¹ and also by the provision of "ways and means for financing [the] autonomous functions" or "self-government in matters relating to [Indigenous peoples'] international and local affairs".⁷²

Indigenous representative institutions are the bodies that States must consult and cooperate with when using Indigenous lands and territories for certain activities such as military activities or developing, utilizing or exploiting mineral, water or other resources.⁷³ More comprehensive protection in relation to this principle's effect on Indigenous lands and waters is provided in 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.

Convention 169 uses similar language as the Declaration in the types of rights protected under this principle: "social, economic and cultural rights ... with respect for their social and cultural identity, their customs and traditions and their institutions";⁷⁴ "safeguarding the persons, institutions, property, labour, cultures and environment"⁷⁵; "religious and spiritual values and

⁶⁸ Articles 18 and 30 2) Declaration.

⁶⁹ Article 18 Declaration.

⁷⁰ Article 19 Declaration.

⁷¹ Article 18 Declaration.

⁷² Article 4 Declaration.

⁷³ Articles 30 (2) and 31 (2) Declaration.

⁷⁴ Article 2(2) (b) Convention 169.

⁷⁵ (Article 4(1)) Convention 169. Similar to Article 3 (1) of Convention 107.

practices”⁷⁶, the “integrity of the values, practices and institutions”,⁷⁷ “customs or customary laws”.⁷⁸ Reference is likewise made to “institutions”,⁷⁹ “representative institutions”⁸⁰ and “representative bodies” in the protection of these rights.⁸¹

Governments are required to assess the social, spiritual, cultural and environmental impact of development activities on Indigenous peoples before proceeding,⁸² and are further directed to consult Indigenous peoples concerned through their institutions in matters affecting them in order to ensure their participation in all levels of decision-making.⁸³ Article 6(1) (b) and (c) of Convention 169 oblige governments to aid Indigenous peoples in the development of their own institutions and in participation in decision-making by establishing the means “and in appropriate cases provid[ing] the resource[s] necessary for this purpose”.

Respect for Indigenous laws are referred to in relation to interests in land and “procedures established by the peoples concerned for the transmission of land rights”,⁸⁴ in the recognition of the importance of “subsistence economy and traditional activities ... such as hunting, fishing, trapping and gathering” in the maintenance of Indigenous cultures and Indigenous peoples’ development,⁸⁵ and more widely as being of special importance to Indigenous peoples’:

*governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.*⁸⁶

Additionally, as noted in relation to the Declaration above, lands and waters remain relevant in the diverse expression of religious, social and cultural practices and customs enacted in traditional areas or on sites of significance to Indigenous peoples.

Convention 107 gives governments the “primary responsibility for developing coordinated and system action ... promoting the social, economic and cultural development” of Indigenous peoples⁸⁷ and acknowledges that “due account shall be taken of the cultural and religious values” of Indigenous peoples.⁸⁸ Indigenous participation in or establishment of elective institutions should be “stimulate[d] by all possible means” by governments.⁸⁹ The Convention provides for the preservation of “cultural heritage” and the development of handicrafts and other modes of cultural expression.⁹⁰

⁷⁶ Article 5(a) Convention 169.

⁷⁷ Articles 5(b) Convention 169

⁷⁸ Article 8(1) Convention 169.

⁷⁹ Article 8 (2) Convention 169.

⁸⁰ Article 6(1) (a) Convention 169.

⁸¹ Article 12 Convention 169.

⁸² Article 7(3) Convention 169.

⁸³ Article 6(1)(a) and (b) Convention 169.

⁸⁴ Article 17 Convention 169. See also Article 13(1) of Convention 107 which is similarly worded.

⁸⁵ Article 23(1) Convention 169.

⁸⁶ Article 13(1) Convention 169.

⁸⁷ Article 2(1) and (2)(b) Convention 107.

⁸⁸ Article 4(a) Convention 107.

⁸⁹ Article 5 Convention 107.

⁹⁰ Article 18(2) Convention 107.

While all three instruments demonstrate respect for Indigenous cultural practices, traditions, laws and institutions, there is a clear difference in the primacy afforded to this principle between the two Conventions, and this becomes even more apparent in light of the most recent instrument, the Declaration.

The language of Convention 107 appears to be much weaker than the other two instruments. Where the Declaration and Convention 169 use the language of rights in relation to Indigenous peoples, Convention 107 is focussed much more on States' (or rather, governments') rights when outlining what might be bestowed on Indigenous peoples in the context of governments taking due account of certain aspects of Indigenous peoples' lives. Article 8(2) of Convention 169, for instance, asserts Indigenous peoples' "*right to retain* [emphasis added] their own customs and institutions" in comparison with Article 7(2) of Convention 107: "[t]hese populations *shall be allowed to retain* [emphasis added] their own customs and institutions". Similarly, while the Declaration and Convention 169 are bolder in asserting the positive *rights* of Indigenous peoples to their *own* institutions, Convention 107 instead demonstrates the principle of respect for Indigenous customs and institutions by noting "the danger involved in disrupting [them] unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept".⁹¹

Convention 107 does use the language of Indigenous rights, albeit in a more qualified form and less frequently than Convention 169 and even less so in comparison with the Declaration. Article 7(1) of Convention 107, for example, stipulates regard should be had to customary laws in defining the rights and duties of Indigenous populations. Again, merely having regard to them ensures neither protection nor recognition. Notwithstanding this shift in emphasis however, all three instruments do support this principle of respect for Indigenous traditional cultural practices, laws and institutions, but to varying extent.

⁹¹ Article 4(b) Convention 107.

F. Reparation for Injury to or Loss of Indigenous Interests

Reparation is a concept with numerous intersections. It is expressly found in partnership with consent provisions and often with participation and consultation provisions. There is some overlap also in provisions asserting a right to equality or non-discrimination against Indigenous interests.

This principle is phrased using the notion of ‘reparation’ because, specific legal meanings in some domestic contexts notwithstanding, it is sufficiently wide to encompass a variety of mechanisms for redress, relief, remedy, restitution, compensation, recompense, satisfaction or restoration for a wrong, injury, loss or infringement of rights or interests. As it is not used in any of the instruments under examination, it also serves the function of saving confusion as a general encompassing term used when examining particular mechanisms that include a variety of terms referring to this notion. The jurisprudence attached to many of those terms in different domestic jurisdictions could inform, without restricting, an understanding of the three international instruments’ approach to this principle.

There are provisions in all three instruments that expressly mention reparation using some terms rather consistently: the Declaration makes multiple references to just, fair and equitable ‘redress’,⁹² ‘compensation’⁹³ and ‘effective remedies’;⁹⁴ Convention 169 also refers to fair ‘compensation’⁹⁵ and stipulates ‘penalties’⁹⁶ and the provision of land as means of reparation;⁹⁷ and Convention 107, which has the least number of express provisions regarding reparation, also talks about ‘compensation in money or in kind’⁹⁸ and includes the provision of land as reparation.⁹⁹ It is notable that all three instruments, in different ways, employ language indicating that reparation is not limited to monetary compensation, but incorporates wider notions of fairness and justice, of effective remedies that may include compensation in kind, and of reparation appropriately adapted to the loss or injury (for instance, through the option for return to land or the provision of other lands, territories and resources equal in quality, size and legal status).

Many of the possible forms that reparation might take and that are mentioned in the three instruments (such as monetary redress, compensation in kind, restoration of lands, territories and resources) are covered within Article 28 of the Declaration due to the variety and breadth of terms that it employs (‘restitution’, ‘just, fair and equitable compensation’, ‘compensation or other appropriate redress’): 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

⁹² Articles 8(2), 11(2), 20(2), 28 and 32(3) of the Declaration.

⁹³ Articles 10 and 28 of the Declaration.

⁹⁴ Articles 8(2), 11, 20, 28(1) and 32 all use ‘redress’, some in conjunction with ‘just and fair’ preceding it (eg Articles 20 and 32); Articles 10 and 28(2) refer to ‘compensation’ and Article 40 talks about ‘effective remedies’.

⁹⁵ Article 15.

⁹⁶ Article 18 of Convention 169.

⁹⁷ Articles 16(4) and 19 of Convention 169.

⁹⁸ Article 12(2) of Convention 107.

⁹⁹ Articles 12(2) and 14(a) of Convention 107.

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.

In the three international instruments considered here, reparation is often expressed in tandem with provisions stipulating that States acquire the consent of Indigenous peoples, as a corollary of failing to do so: Articles 10, 11, 28, 29, 32 of the Declaration, Article 16 in Convention 169 and Article 12 in Convention 107. Reparation also occurs in association with participation and consultation provisions but with much less frequency than consent provisions. Indeed, the only instance in which the Declaration stipulates consent is required but does not clearly include some form of reparation is Article 19, dealing with legislative or administrative measures affecting Indigenous peoples.¹⁰⁰ This supports the contention that reparation is necessarily implicit in the principle that States must acquire the consent of Indigenous peoples in certain instances.

Provisions that assert equality or the negative right of Indigenous peoples to be free from discrimination against their interests or in the exercise of their rights also, possibly, imply reparation.¹⁰¹ Such provisions aim to bestow the same level of protection upon Indigenous interests (including, for instance, property interests) that other people enjoy which, it could be submitted, often incorporates reparation for breach of a right or injury to or loss of an interest.

It may be submitted that it is implicit when both asserting any positive right and even a negative right that breach of those rights should give rise to a right to reparation or else those rights would not be effectively recognised and safeguarded at law.¹⁰² Read broadly, reparation might then take a range of forms, from financial compensation to the right to have any such dispute adjudicated in an appropriate forum or via adequate procedures.¹⁰³

¹⁰⁰ It is submitted that Article 29, dealing with the storage and disposal of hazardous materials, includes a form of reparation by requiring States to “take effective measures to ensure ... programmes for monitoring, maintaining and restoring the health of indigenous peoples ... affected by such materials”. However, if ‘effective measures’ are to be distinguished from other forms of reparation (such as ‘effective remedies’, ‘compensation’ and ‘redress’), then Article 29 would join Article 19 as the only exceptions where consent is mentioned in these three legal instruments but reparation for failure to obtain it is not.

¹⁰¹ Eg Article 2 of the Declaration.

¹⁰² Article 26(3) of the Declaration states: “States shall give legal recognition and protection to these lands, territories and resources”. See also Article 27 (“States shall establish and implement ... a fair, independent, impartial, open and transparent process ... to recognize ... the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used”); Article 31(2) also mandates States to “take effective measures to recognize and protect the exercise of these rights.” See also Article 14(3) of Convention 169 and 13(1) of Convention 107.

¹⁰³ See for example the Declaration’s Article 14(3): “Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned” and Article 27: “States shall establish and implement ... a fair, independent, impartial, open and transparent process ... to ... adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.” 169 & 107 EGS! 14(3)

G. Non-Discrimination against Indigenous Peoples' Interests

Underpinning many of the Indigenous rights recognised at international law is this basic and longstanding human right to be free from discrimination. There have been many eminent studies of this principle, including the landmark study by José Martínez Cobo¹⁰⁴ highlighting the links between the rapid decline in Indigenous peoples' numbers and the systemic and widespread discrimination experienced as well as the definitive study by Erica-Irene Daes¹⁰⁵ on Indigenous land rights. Given the depth and breadth of these and similar inquiries, this section will draw attention to the intersections between this principle and others (including its relevance to Indigenous interests in lands, waters, territories and resources) in a cursory way before discussing the emergence of this principle in the three international instruments under consideration.

This principle of non-discrimination or its positively expressed counterpart – the right to equality – is based on respect for human rights and the rule of law. As others mentioned above have shown, it is now incontrovertible that disregard for or abuse of this principle has detrimental effects on Indigenous peoples' collective survival and right to self-determination through the erosion of respect for Indigenous cultural practices, traditions, laws and institutions. At its extreme, it can lead to systematic exclusion and persecution.

In addition to its underpinning and investing other principles with an ethical basis for engagement with Indigenous peoples – reflecting once again the universality, indivisibility and inter-relatedness of all human rights – the principle of equality or non-discrimination appears explicitly in all three international instruments via references to the terms 'equal/equality' or 'discrimination'.

Article 46(3) is an interpretive provision incorporating this principle of non-discrimination (among others) into the construction of the entire Declaration. Article 2 affirms very early in the text that

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.

Discrimination in the form of “propaganda designed to promote or incite racial or ethnic discrimination [must not be] directed against [Indigenous peoples]”¹⁰⁶ and, indeed, there is a positive duty on States to

*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.*¹⁰⁷

The inclusion of “effective measures”, as well as contemporary understandings of the right to equality within the international human rights law framework of instruments and jurisprudence,

¹⁰⁴ United Nations Special Rapporteur.

¹⁰⁵ Special Rapporteur appointed by the then United Nations Subcommission on Prevention of Discrimination and Protection of Minorities.

¹⁰⁶ Article 8(2)(e) Declaration.

¹⁰⁷ Article 15(2) Declaration. This positive duty is echoed in Article 2(1) of Convention 169.

strongly tends towards the notion that States must enact measures that ensure not merely equality in form but in substance as well.

Conventions 169 and 107 are equally unambiguous in their insistence on Indigenous peoples enjoying “the full measure of human rights and fundamental freedoms without hindrance or discrimination”.¹⁰⁸ As such, the accommodation for ‘special measures’ clearly does not extend to measures that discriminate or prejudice “in any way ... the general rights of citizenship”¹⁰⁹ or the human right to belong to a community or nation “in accordance with the traditions and customs of the community or nation concerned.”¹¹⁰

Some of the many repercussions this principle has on Indigenous interests in lands, waters and resources is addressed expressly in Article 29(1) of the Declaration that asserts Indigenous peoples’ right to the “conservation and protection of the environment and the productive capacity of their lands or territories and resources ... without discrimination”, and Articles 19 of Convention 169 and 14 of Convention 107, both of which relate to the provision of more land for Indigenous peoples under national agrarian programmes in a way that ensures “treatment equivalent to that accorded to other sectors of the population”.

The principle of equality or non-discrimination applied to Indigenous interests in lands, waters and resources entails those interests being of equal value and weight at law and in fact as other people’s comparable interests. This is in keeping (albeit to varying degrees) with my reading of the majority of provisions in the three instruments regarding lands, waters and natural resources (both those that expressly mention those interests or by necessary or contingent implication make reference to them).¹¹¹

¹⁰⁸ Article 3(1) Convention 169.

¹⁰⁹ Article 4(3) read in conjunction with Articles 2(2)(a) and 4(1) of Convention 169 and Articles 3, 2(2)(a) and 7(3) of Convention 107.

¹¹⁰ Article 9 Declaration.

¹¹¹ See Sections D ‘Right of Indigenous Peoples to Traditional Lands, Waters, Territories and Resources’ and E ‘Respect of Indigenous Cultural Practices, Traditions, Laws & Institutions’.

H. Respect for the Rule of Law

This principle is somewhat akin to the notion that parties act in good faith in the sense that, although it has been explicitly stated in some provisions, it has such widespread acceptance and is so fundamental to any legal and juridical system that it underlies entire instruments and indeed the systems that give rise to them. Whereas the duty to act in good faith has previously been discussed in association with the specific principles that mention it instead of as a separate principle underlying all three instruments, this principle of respect for the rule of law is treated separately because of its added relevance to Indigenous peoples' laws and legal and juridical systems, which delineate Indigenous interests in sites of significance and lands, waters, territories and natural resources.

There are two aspects of this principle, then: as an overarching provision of general significance to the interpretation of an entire instrument, and as a related component of the principle of respect for Indigenous cultural practices, traditions, laws and institutions discussed earlier. It is the latter that I will concentrate on in this section.

The Declaration stipulates States should protect and give due recognition to Indigenous peoples' "laws, traditions, customs and land tenure systems", developing a "fair, independent, impartial, open and transparent process ... to adjudicate the rights ... pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used" in collaboration with Indigenous peoples.¹¹² Any legal recognition bestowed by States protecting Indigenous lands, territories and resources "shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".¹¹³ Although the term 'due respect' does not mandate, for instance, that domestic legal notions be bound by Indigenous laws or legal and juridical notions, nonetheless the incorporation of the principle of due respect for Indigenous laws when read with other provisions couched in strong rights-based language regarding Indigenous participation, consultation and the right to consent all contribute to this principle's force of authority.

Similar to the respect for the rule of law that founds non-Indigenous legal systems, this principle of respect for law, encompassing respect for Indigenous laws and land tenure systems, is fundamentally significant to Indigenous rights to lands, territories, waters and resources. Moreover, it reflects the principle of equality or non-discrimination against Indigenous interests.

Article 1 of the Declaration affirms the right of Indigenous peoples to all human rights and fundamental freedoms at international human rights law and it is reinforced in Article 46(3) that all provisions in the Declaration are to be interpreted in accordance with the principles of "justice, democracy, respect for human rights, equality [and] non-discrimination".

Article 45 of the Declaration states:

¹¹² Article 27 Declaration.

¹¹³ Article 26(3) of the Declaration. See also Article 40 of the Declaration which mentions "due consideration" and Article 7 of Convention 107: "regard shall be had to their customary laws..." The latter however affirms the primacy of the national legal system where there is an incompatibility with domestic fundamental rights.

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

This provision, read with Article 40 which stipulates that States should give “due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”, constitutes a strong direction to States to adopt and protect in domestic national law those Indigenous interests in lands, waters, territories and resources that are recognised by Indigenous laws and land tenure systems, in a way that – consistent with the principle of non-discrimination – does not discriminate against Indigenous peoples by lessening the weight or value of their interests.

CONCLUSION

This conclusion summarises the compatibility of the United Nations Declaration on the Rights of Indigenous Peoples with the two International Labour Organisation Conventions 169 and 107 in regards to overarching principles in those three instruments that States and United Nations agencies must seriously consider or adhere to when engaging with Indigenous peoples about their land tenure interests and management arrangements. As this a still developing area of customary international law, there are some notable differences between the first and latest instruments, the most noticeable being the welfare-based approach of Convention 107 in comparison to the rights-based approach of Convention 169 and the Declaration.

Indigenous Peoples' Right to Self-Determination

Although the right to self-determination was not extended to Indigenous peoples when Convention 107 was enacted, the Declaration on the Rights of Indigenous Peoples is clearly guided by this foundational principle. Furthermore, as the Declaration is widely regarded as not giving rise to any new rights for Indigenous peoples but rather assembling and clarifying the current position at law, its application of the right to self-determination to Indigenous peoples must be taken to reflect the most recent developments regarding this principle's relevance to Indigenous peoples. Given the development of Indigenous international rights jurisprudence since the creation of Convention 107, the presence of numerous provisions in Convention 169 indicating that Indigenous peoples as distinct communities have the right to autonomously decide their own priorities and strategies for development (and the absence of any provisions indicating that Indigenous peoples do not possess this right), it is both possible and reasonable to construe Convention 169 in harmony with the Declaration regarding this principle. The provisions of Convention 169 are compatible with those of the Declaration on this point.

Full & Direct Consultation & Participation of Indigenous Peoples Concerned

This principle, as it is currently expressed, finds much support in the Declaration and Convention 169 but, arguably, not in Convention 107, which refers to notions of collaboration and aspects of Indigenous peoples' interests that governments should consider in lieu of requiring the full and direct consultation and participation of Indigenous peoples in matters affecting them.

Two factors ameliorate this, however. Firstly, that the phrasing of this principle captures what is essentially an attitude or approach which each instrument enunciates in slightly different ways. The use of the words 'consultation' and 'participation' are therefore an amalgam of different actions encouraged by the instruments in this principle. If the principle were to be phrased more loosely as 'full and direct involvement with Indigenous peoples concerned', then there is certainly room to maintain that all three instruments do encourage and contain the principle to varying degrees and in varying situations.

Secondly, and more significantly, the international climate regarding Indigenous peoples has changed considerably since the creation of Convention 107 which has contributed to these and similar paternalistic, integrationist aspects of the Convention being popularly condemned.

Although it is in force still in some States, to a large extent its application as a standard-setting guide has been superseded by Convention 169. Thus, either a generous reading of Convention 107 construed in harmony with current standards and rights at international law (contained in Convention 169 and the Declaration) is advocated or, where this is impossible due to provisions clearly to the contrary, confining its application to those States to whom it still is binding rather than as standard-setting guidelines for the wider international community.¹¹⁴

Additional notions governing the interpretation of this principle include parties acting in good faith (including providing the resources and environment and building the capacity necessary for full and direct consultation and participation), and engaging with the Indigenous peoples *concerned*, including their genuine¹¹⁵ representatives or representative institutions when engaging over land tenure interests and management arrangements.

Free, Prior & Informed Consent of Indigenous Peoples Concerned

The Declaration contains the strongest articulation of this principle regarding consent, although it could also be considered to be a guiding principle of the two International Labour Organisation Conventions. That the Conventions 169 and 107 most likely do not compel States to act subject to the consent of Indigenous peoples (even in the case of forcible relocation) does not preclude their support for this principle, which is nonetheless encouraged in both Conventions and expressed much more uncompromisingly in several provisions of the Declaration.

As with the previous discussion in relation to consultation and participation, there are similar reasons for reading these provisions widely so that they comply with current international law or, where impossible, confining the construction of this principle to member States subject to those Conventions.

States and United Nations agencies must act *bona fide* in relation to the Indigenous peoples concerned or their own representatives or representative institutions in dealings over lands, waters and resources. Genuinely informed consent would depend on relevant and complete information being made available in a manner both timely and suitable or appropriate for the Indigenous peoples concerned, and might require the provision of independent legal or technical advice, resources and cross-cultural awareness training.

Right of Indigenous Peoples to Traditional Lands, Waters, Territories & Resources

All three instruments recognise this right which is associated with the human right to property, to freedom from discrimination and to the collective right of self-determination of a peoples. The strong ties that Indigenous peoples have to their significant areas is acknowledged via a number of related rights, including the right to be consulted or to participate in and possibly to have free, prior and informed consent sought before rights in lands, waters and resources are affected. Diverse aspects of this right to Indigenous lands, waters and resources, are therefore covered by the three instruments, and also protected to differing degrees as regards ownership, possession or levels of use and control over areas. Nonetheless, read together, these three instruments provide thorough vindication of the validity of this principle.

¹¹⁴ www.ilo.org/indigenous www.pro169.org

¹¹⁵ That is, representatives or representative institutions chosen in accordance with their own procedures.

As with other provisions, this principle must be read indivisibly from others that influence and are influenced by it, such as the principle of respect for Indigenous cultural practices, traditions, laws and institutions and respect for the rule of law. Indigenous lands, territories and resources – especially those areas necessary for subsistence, development or special for environmental or cultural reasons – should be identified and protected at law, with effective and just reparation being provided for breach or damage to the right.

Principle of Respect for Indigenous Cultural Practices, Traditions, Laws & Institutions

As with other principles mentioned herein, the depth of recognition afforded by Convention 107 is more qualified and less robust than in Convention 169 and the Declaration. Its focus is also more oriented towards governments than Indigenous peoples. However, Convention 169, the Declaration and Convention 107 all nonetheless endorse this principle, which protects the cultural integrity of Indigenous peoples by promoting respect for their economic, social and cultural practices, traditions and laws and for their political, legal, religious, customary and other institutions (including the members, responsibilities and priorities for development of those institutions) and by ensuring legal acknowledgement of them. The relevance of Indigenous peoples' interests in lands, waters and resources is great given their inextricable ties between traditional areas and numerous expressions of cultural practice, custom and law. States and United Nations agencies demonstrate appropriate respect through the legal recognition of these rights in domestic systems and utmost consideration of Indigenous viewpoints in all dealings over land tenure and management arrangements.

Right to Reparation for Injury to or Loss of Indigenous Interests

All three instruments endorse reparation of some sort for injury to or loss of Indigenous interests in and relating to, *inter alia*, lands, waters and resources, particularly when this occurs without their consent or approval. Given Indigenous peoples' right to their lands, waters and resources and their right to equal treatment as other citizens, satisfactory or effective reparation must account for notions of fairness, justice or equity in all the circumstances including consideration of the relative economic value, legal weight and other significant similarities to the interest damaged or destroyed.

Right to Non-Discrimination against Indigenous Peoples' Interests

This principle is unanimously and unambiguously present throughout all three international instruments, both as a general interpretation provision and in particular inclusion in certain provisions including many dealing with land tenure and management arrangements. The documents take care to ensure that even provisions for so-called 'special measures' to be enacted for Indigenous people should not erode the rights and interests Indigenous peoples already have nor their right to be treated equally to other citizens. Formal as well as substantial equality must therefore be maintained, including in relation to Indigenous rights to land, water and resources which must be comparably weighted at law and economically as other similar non-Indigenous interests. Respect for Indigenous peoples' distinctiveness is preserved in this principle, as is their right to pursue their own visions of economic, social, cultural and political development.

Principle of Respect for the Rule of Law

As a corollary to the principle of respect for the rule of law, all three instruments discussed here encourage States to give due consideration to, recognition and protection of, Indigenous laws,

customs and land tenure systems via fair and mutually acceptable procedures for resolving conflict between States and Indigenous peoples.

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Relevant Articles in Declaration on the Rights of Indigenous Peoples

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 Rights 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 international 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 7(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.

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 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 nations, 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, 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 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.

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particular 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 17(1) Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

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 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 is 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(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 the 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 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(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 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 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, and respect for human rights, equality, non-discrimination, good governance and good faith.

Relevant Articles in International Labour Organisation Convention No. 169

Article 1

(1) This 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;

(3) 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.

Article 2

(1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

(2) Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the people concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

(1) Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

(2) No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

(1) Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

(2) Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

(3) Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5 In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

(1) In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resource necessary for this purpose.

Article 7

(1) The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

(3) Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Article 8

(1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

(2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 12 The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II: LAND

Article 13

(1) In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship

with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

(2) The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

(1) The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

(2) Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

(3) Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

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

(2) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The people concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

(1) Subject to the following paragraphs of this Article, the people concerned shall not be removed from the lands which they occupy.

(2) Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

(3) Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

(4) When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status as least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

(5) Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

(1) Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected

(2) The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

(3) Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18 Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19 National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART IV: VOCATIONAL TRAINING, HANDICRAFTS & RURAL INDUSTRIES

Article 23

(1) Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

(2) Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V: SOCIAL SECURITY & HEALTH

Article 25(2) Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventative care, healing practices and medicines.

PART VI: EDUCATION & MEANS OF COMMUNICATION

Article 30

(1) Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

(2) If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

PART VII: CONTACTS & CO-OPERATION ACROSS BORDERS

Article 32 Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and rival peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII: ADMINISTRATION

Article 33

(1) The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.

(2) These programmes shall include:

(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;

(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX: GENERAL PROVISIONS

Article 34 The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35 The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X: FINAL PROVISIONS

Article 36 This Convention revises the Indigenous and Tribal Populations Convention, 1957.

**Relevant Articles in
International Labour Organisation Convention No. 107**

PART I: GENERAL POLICY

Article 1

1. This Convention applies to –
 - (a)
 - (b) Members of tribal or semi-tribal populations in independent countries which 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 and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

Article 2

1. Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.
2. Such action shall include measures for –
 - (a) Enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
 - (b) Promoting the social, economic and cultural development of these populations and raising their standard of living;

Article 3

1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.
2. Care shall be taken to ensure that such special measures of protection –
 - (a) are not used as a means of creating or prolonging a state of segregation; and
 - (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

Article 4 In applying the provisions of this Convention relating to the integration of the populations concerned –

- (a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;
- (b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;

- (c) policies aimed at mitigating the difficulties experienced by these populations in adjusting themselves to new conditions of life and work shall be adopted.

Article 5 In applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall –

- (a) seek the collaboration of these populations and of their representatives;
- (b) provide these populations with opportunities for the full development of their initiatives;
- (c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions.

Article 6 The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development of the areas in question shall also be so designed as to promote such improvement.

Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.
2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of the integration programmes.
3. The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.

PART II: LAND

Article 11 The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the

framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14 National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to –

- (a) the provision of more land for these populations when they have not the area necessary for providing the essentials for a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these populations already possess.

PART IV: VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 17

- 1.
2. These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the said populations; they shall, in particular, enable the persons concerned to receive the training necessary for occupations for which these populations have traditionally shown aptitude.

Article 18

1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.
2. Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

PART V: SOCIAL SECURITY AND HEALTH

Article 20

- 1.
2. The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.
3. The development of such services shall be co-ordinated with general measures of social, economic and cultural development.

Selected References

Books & Journal Articles

Anaya, S James, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1st ed, 1996; 2nd ed, 2004).

- 'International Human Rights and Indigenous Peoples: the Move towards the Multicultural State' 21(1) *Arizona Journal of International & Comparative Law* 2004.
- 'Indigenous Rights Norms in Contemporary International Law' 8(2) *Arizona Journal of International & Comparative Law* 1991.

Baer, Lars-Anders, *The Sami – an indigenous people in their own land in The Sami national minority in Sweden*, Stockholm, Rattsfonden (Legal Rights Foundation), 1982.

Barsh, Lawrence Russel, 'Indigenous Peoples in the 1990s: from Objects to Subject of International Law?' 7(33) *Harvard Human Rights Journal* 1994.

Brierly, J L *The Law of Nations* Oxford University Press 1960.

Brundtland, Gro *Our common future* Oxford University Press 1987.

Burger, Julian, *Report from the Frontier: the State of the World's Indigenous Peoples* (London: Zed Books, 1987).

Burman, Roy Indigenous and Tribal Peoples in World System Perspective *Stud. Tribes Tribals* 1 (1): 7-27 2003.

Daes, Erica-Irene A. Native people's rights, in *Les droits des minorités, Les cahiers de droit*, Vol. 27, No. 1, Faculté de Droit, Université Laval, Quebec, Mars 1986.

- 'Some Considerations on the Rights of Indigenous Peoples to Self-Determination' (1993) 3(1) *Transnational Law & Contemporary Problems* 1.
- The United Nations and indigenous peoples from 1969 to 1994 in *Becoming Visible – Indigenous Politics & Self-Government*, Proceedings of the Conference on Indigenous Politics & Self-Government 8-10 November 1993, the University of Tromsø Sami Duktamiid Guovddas, Centre for Sami Studies, Tromsø, Norway, 1995.
- Protection of the world's indigenous peoples and human rights in *Human rights: concept and standards*, edited by J Symoides, UNESCO Publ. Ashgate, Dartmouth, Aldershot, Burlington, United States of America, 2000.
- 'The Spirit and Letter of the Right to Self-Determination' in Pekka Aikio and Martin Scheinin (Eds), *Operationalizing the Right of Indigenous Peoples to Self-determination* (Åbo, Finland: Institute for Human Rights Åbo Akademi University, 2000).
- Report of the Special Rapporteur on Indigenous Peoples and their Relationship to Land, UN Doc. E/CN.4/Sub.2/2001/21 (2001).

Dodson, Michael 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination' (1994) 35(4) *Race & Class* 65.

- Human rights and the extinguishment of native title, Aboriginal & Torres Strait Islander Commission (Australia) July 1995.

Hannum, Hurst Self-determination as a human right, *Virginia Journal of International Law* 28, 1988.

- New Developments in Indigenous Rights *Virginia Journal of International Law* 28, 649 1987-1988.

International Labour Organization, ILO Convention on Indigenous and Tribal Peoples, 189 (N°169): a Manual; Project to Promote ILO Policy on Indigenous and Tribal Peoples (Geneva: International Labour Organization, 2003).

Martinez Cobo, José R. Study of the problem of discrimination against indigenous populations, Volume V, Conclusions, proposals and recommendations. The United Nations publication (Sales No. E.86.XIV.3), New York, United Nations, 1987.

- UN Doc. E/CN.4/Sub.2/1986/7.
- UN doc. E/CN.4/Sub.2/1984/22.

Newton, Nell At the whim of the sovereign: Aboriginal title reconsidered *Hastings Law Journal* 31:1215, 1980.

Plant, Roger Addressing indigenous land rights & claims: the role of international technical assistance, paper prepared for the Expert Seminar on practical experiences regarding Indigenous land rights and claims, Whitehorse, Canada, 24-28 March, 1996.

Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent, and Indigenous Peoples, New York, 17-19 January 2005, UN Doc E/C.19/2005/3 (2005).

Report of the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance, UN Doc E/C.19/2006/7 (2006).

Sambo, D, 'Indigenous Peoples and International Standard-setting Processes: Are State governments listening?' (1993) 3(1) *Transnational Law and Contemporary Problems* 13.

Sanders, Douglas & others, Common law rulings on the customary land rights of Aboriginal or indigenous people, unpublished paper on file with the Special Rapporteur, 6 August 1999.

Tomei, Manuela, and Swepston, Lee, *Indigenous and Tribal Peoples: a Guide to Convention N°169* (Geneva: International Labour Office and International Centre for Human Rights and Democratic Development, 1996).

Torres, Raidza 'The Rights of Indigenous Populations: The Emerging International Norm' *Yale Journal of International Law* Vol. 16 No. 127 1991.

United Nations Centre for Human Rights The effects of racism and racial discrimination on the social and economic relations between indigenous peoples and the States, Report of a seminar, Geneva, 16-20 January 1989 (HRI/PUB/89/5).

United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right of Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, at 23 UN Doc E/CN.4/Sub.2/404/Rev.1 (1981) (Auerliu Cristescu, Special Rapporteur).

Venne, Sharon, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169* II Without Prejudice 53, 54 (1989) at 64-66.

Wiessner, Siegfried Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis *Harvard Human Rights Journal* Vol. 12 No. 58 1999.

Williams, Robert A. 'Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world *Duke Law Journal* 1990.

Pritchard, Sarah (Ed) *Indigenous Peoples, the United Nations & Human Rights* NSW, The Federation Press, 1998.

International Instruments

United Nations Declaration on the Rights of Indigenous Peoples 2007

<http://iwgia.synkron.com/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf>

International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries 1989 (No. 169)

<http://www.ilo.org/ilolex/english/convdisp1.htm>

International Labour Organisation Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (No. 107)

<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>

Online Resources

Guide to International Labour Standards, International Labour Standards Department, Geneva, 2008

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_086223.pdf

International Labour Organisation website

www.ilo.org/indigenous

United Nations Development Group Guidelines on Indigenous Peoples' Issues, Feb 2008

<http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>