

# **REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES ON EXTRACTIVE INDUSTRIES AND INDIGENOUS PEOPLES**

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## **TABLE OF CONTENTS**

SUMMARY .....	110
I. INTRODUCTION .....	110
II. A PREFERRED MODEL: RESOURCE EXTRACTION AND DEVELOPMENT THROUGH INDIGENOUS PEOPLES' OWN INITIATIVES AND ENTERPRISES.....	113
A. Natural resource extraction and development by indigenous peoples as an exercise of their self-determination and related rights .....	113
B. State support and preference for indigenous peoples' own initiatives and enterprises .....	114
III. THE STANDARD SCENARIO: WHEN STATES OR THIRD PARTY BUSINESS ENTERPRISES PROMOTE THE EXTRACTION OF NATURAL RESOURCES WITHIN INDIGENOUS TERRITORIES .....	116
A. The right of indigenous peoples to oppose extractive activities .....	116
1. Freedom from reprisals and violence .....	116
2. Freedom from undue pressures to accept extractive projects or engage in consultations.....	117
B. The principle of free, prior and informed consent .....	118
1. The general rule: consent is required for extractive projects within indigenous territories.....	118
2. The narrow scope of permissible exceptions to the general rule .....	120
C. Natural resource extraction in indigenous territories absent consent .....	122
IV. CONDITIONS FOR GETTING TO AND SUSTAINING INDIGENOUS PEOPLES' AGREEMENT TO EXTRACTIVE ACTIVITIES PROMOTED BY THE STATE OR THIRD PARTY BUSINESS ENTERPRISES .....	123
A. Establishment of State regulatory regimes that adequately protect indigenous peoples' rights .....	124
B. Regulation of extraterritorial activities of companies .....	124
C. Participation by indigenous peoples and respect for their rights in strategic State planning for resource extraction and development .....	125
D. Due diligence by extractive companies to respect indigenous peoples' rights .....	126
E. Fair and adequate consultation and negotiation procedures.....	127
1. Negotiations directly between extractive companies and indigenous peoples .....	128
2. Mitigation of power imbalances.....	129

3. Information gathering and sharing ..... 129

4. Timing ..... 130

5. Indigenous participation through representative institutions..... 130

F. Rights-centered, equitable agreements and partnership ..... 131

    1. Impact mitigation ..... 131

    2. Arrangements for genuine partnership and sharing of benefits ..... 132

    3. Adequate grievance procedures..... 133

V. CONCLUSIONS AND RECOMMENDATIONS ..... 133

ANNEX ..... 135

    A. Coordination with other human rights mechanisms and processes ..... 135

    B. Areas of work ..... 137

        1. Promotion of good practices ..... 137

        2. Country reports ..... 139

        3. Examination of specific allegations of human rights violations ..... 140

        4. Thematic studies ..... 141

**SUMMARY**

This is the final thematic report of James Anaya, the Special Rapporteur on the rights of indigenous peoples, submitted to the Human Rights Council in accordance with Council resolutions 6/12 and 15/14. Building upon previous reports, it addresses the human rights concerns of indigenous peoples relating to extractive industries. The Special Rapporteur seeks to further advance understanding of the content and implications of international human rights standards that are relevant to these concerns, identifying and building upon points of consensus that he has found in relation to these standards. He provides a series of observations and recommendations that draw from the experiences he has studied, and that point to new models for resource extraction that are or would be consistent with international standards and conducive to the fulfilment of indigenous peoples’ rights. The report does not address the issues and human rights standards that are particular to indigenous peoples in voluntary isolation.

**I. INTRODUCTION**

1. The worldwide drive to extract and develop minerals and fossil fuels (oil, gas and coal),<sup>a</sup> coupled with the fact that much of what remains of these natural

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<sup>a</sup> See World Bank, “The World Bank Group in extractive industries: 2011 annual review” (2011), pp. 8-14. Available from [http://siteresources.worldbank.org/INTOGMC/Resources/WBG\\_EI\\_Annual\\_Report\\_FY11\\_Final.pdf](http://siteresources.worldbank.org/INTOGMC/Resources/WBG_EI_Annual_Report_FY11_Final.pdf).

resources is situated on the lands of indigenous peoples,<sup>b</sup> results in increasing and ever more widespread effects on indigenous peoples' lives. As has been amply documented in previous reports by the Special Rapporteur (see, for example, A/HRC/18/35, paras. 30-55), indigenous peoples around the world have suffered negative, even devastating, consequences from extractive industries.

2. Despite such negative experiences, looking towards the future it must not be assumed that the interests of extractive industries and indigenous peoples are entirely or always at odds with each other. In the course of his examination of situations across the globe, the Special Rapporteur has found that in many cases indigenous peoples are open to discussions about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights. A number of situations have been brought to the attention of the Special Rapporteur in which indigenous peoples have agreed to industrial-scale resource extraction within their territories or have even themselves taken initiatives for mining or development of oil or gas.

3. On the other hand, there are certainly cases in which resource extraction is simply incompatible with indigenous peoples' own aspirations and priorities for development, or may impede their access to lands and natural resources critical to their physical well-being and the integrity of their cultures and livelihoods. In recent years private companies in the extractive sector and States have become increasingly sensitive to indigenous peoples' rights in this regard, and technological advances have allowed for a diminution of the environmental impacts of extractive activities. Nonetheless, in many places indigenous peoples remain sceptical of – and even hostile to – extractive industries, owing to negative experiences.

4. The Special Rapporteur further observes that the business model that still prevails in most places for the extraction of natural resources within indigenous territories is not one that is fully conducive to the fulfilment of indigenous peoples' rights, particularly their self-determination, proprietary and cultural rights in relation to the affected lands and resources. As stated in the Special Rapporteur's report to the Human Rights Council in 2012 (A/HRC/21/47, para. 74), the prevailing model of resource extraction is one in which an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation.

5. Increasing resource extraction and its mounting effects on indigenous peoples make it all the more imperative to reverse historical trends and secure indigenous peoples' rights in this context. As a starting point there should be broad understanding among all relevant actors about the content of the

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<sup>b</sup> International Work Group for Indigenous Affairs, "Indigenous peoples, transnational corporations and other business enterprises", briefing note (January 2012), p. 1. Available from [www.iwgia.org/iwgia\\_files\\_publications\\_files/0566\\_BRIEFING\\_2.pdf](http://www.iwgia.org/iwgia_files_publications_files/0566_BRIEFING_2.pdf).

internationally recognized rights of indigenous peoples, and about the principles that are to guide the actions of States and business enterprises when these rights are potentially affected by extractive activities. Further, new business models for natural resource extraction need to be examined and developed, models that are more conducive to the full enjoyment by indigenous peoples of their rights than the one that currently prevails in much of the world. In previous reports to the Human Rights Council the Special Rapporteur has endeavoured to shed light on the issues that indigenous peoples face in relation to extractive industries, and to contribute to understanding of the international human rights standards that apply in this context.<sup>c</sup>

6. In this his final report to the Council, the Special Rapporteur seeks to further advance understanding of relevant international standards, identifying and building upon points of consensus that he has found in relation to these standards. He provides a series of observations and recommendations that draw from the experiences he has studied and that point to new models for resource extraction that are or would be consistent with international standards and even conducive to the fulfilment of indigenous peoples' rights.

7. In producing the present report the Special Rapporteur has benefited from extensive consultations with representatives of indigenous peoples, States, business enterprises within the extractives sector, non-governmental organizations and experts. The Special Rapporteur is grateful to all those who contributed their views and insights through his questionnaires and requests for information, and to the indigenous and other organizations and Governments that hosted consultations.<sup>d</sup>

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<sup>c</sup> See A/HRC/18/35, paras. 22-89, and A/HRC/21/47, paras. 34-76 and 79-87.

<sup>d</sup> The Special Rapporteur would like to thank in particular, for their assistance in organizing relevant consultations, the National Congress of Australia's First Peoples, the Asia Indigenous Peoples Pact, the Saami Council, the Lowell Institute for Mineral Resources at the University of Arizona, the Barents Euro-Arctic Council, Peace Brigades International, Amnesty International, Indigenous Peoples Links, Almáciga, the International Council on Mining and Metals, the Harvard Project on American Indian Economic Development, Middlesex University School of Law, the Sustainable Development Strategy Group and RESOLVE; as well as the Governments of Norway, Spain and the United Kingdom of Great Britain and Northern Ireland, and the state of Western Australia (Australia). He would also like to thank the Cyrus R. Vance Center for International Justice, the University of Virginia International Human Rights Law Clinic, and the Indigenous Peoples Law and Policy Program at the University of Arizona for their assistance with background research used in the preparation for this report.

## **II. A PREFERRED MODEL: RESOURCE EXTRACTION AND DEVELOPMENT THROUGH INDIGENOUS PEOPLES' OWN INITIATIVES AND ENTERPRISES**

8. In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples<sup>e</sup> and other international sources of authority.<sup>f</sup>

### **A. Natural resource extraction and development by indigenous peoples as an exercise of their self-determination and related rights**

9. As part of their right to self-determination, "indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and territories".<sup>g</sup> This right necessarily implies a right of indigenous peoples to pursue their own initiatives for resource extraction within their territories if they so choose. In cases in which indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, ownership of the resources naturally includes the right to extract and develop them. But even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others.

10. The Special Rapporteur notes that the model by which indigenous peoples themselves initiate and control resource extraction in their own territories in accordance with their own development priorities has been gaining ground in a number of countries where indigenous peoples have developed the relevant business and technical capacity. There are several notable cases in North America, for example, in which indigenous nations or tribes own and operate companies that engage in oil and gas production, manage electric power assets, or invest in alternative energy. In many such cases they have partnered with non-indigenous

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<sup>e</sup> Inter alia, arts. 3, 5, 26 and 32.

<sup>f</sup> See, inter alia, International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, arts. 13-15; International Covenant on Civil and Political Rights, arts. 1 and 27; and International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (v).

<sup>g</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 32, para. 1.

companies to develop extractive enterprises in which they have or eventually gain majority ownership interests.

11. To be sure, even resource extraction by indigenous peoples' own enterprises may pose certain risks to the enjoyment of human rights of the members of indigenous communities, particularly in relation to the natural environment. Experience shows, however, that those risks may be minimized, and the enjoyment of self-determination and related rights enhanced, when indigenous peoples freely choose to develop their own resource extraction enterprises backed by adequate capacity and internal governance institutions.

### **B. State support and preference for indigenous peoples' own initiatives and enterprises**

12. In compliance with their obligation to promote and fulfil the rights of indigenous peoples, States should have programmes to assist indigenous peoples to develop the capacity and means to pursue, if they so choose, their own initiatives for natural resource management and development, including extraction. States have the obligation not only to respect human rights by refraining from conduct that would violate such rights, but also to affirmatively protect, promote and fulfil human rights.<sup>h</sup> This principle of international human rights law applies no less to the specific rights of indigenous peoples that are derived from broadly applicable human rights standards.

13. The mounting of enterprises for the extraction, development and marketing of natural resources depends on a range of business and technical skills. Additionally, projects for resource extraction are normally associated with substantial start-up investments, and they commonly generate profits only after several years. It is evident that the vast majority of indigenous peoples across the globe do not now have the capacity or financial means to develop their own resource extraction enterprises, or to build strategic partnerships with non-indigenous companies that would help develop their control over extractive enterprises. A long-term view should be taken to assist indigenous peoples who might want to go down this path as one of the alternatives that may be available to them, in contrast to the alternative of seeing the natural resources within their territories being extracted under the control of others. Indigenous peoples should not be viewed as being frozen at a certain stage of development or capacity, but rather should be supported in ways that enable them to develop and build capacity in accordance with their own designs and aspirations.

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<sup>h</sup> This obligation is grounded for all Member States in the Charter of the United Nations, articles 1, 2 and 56, among others, and is a general principle of international law; it applies in respect of those human rights found in treaties to which States subscribe and in other sources of international law.

14. The Special Rapporteur is aware that in several countries State-sponsored programmes exist to assist indigenous peoples to manage natural resources or develop their own income generating enterprises, as part of broader programmes for development assistance. These programmes provide various kinds of support, such as grants, loans, favourable tax treatment, advisory services, skills training and scholarships. Where these programmes exist they should be strengthened and specifically targeted to support capacity-building and to provide financial assistance for indigenous peoples' own initiatives for natural resource management and extraction. In those countries where they do not exist, such support programmes should be introduced and likewise developed by the State. International, regional and national donor and development agencies should also support indigenous peoples' own resource extraction and development initiatives.

15. State support for indigenous peoples, furthermore, should include providing assistance for acquiring any necessary licenses or permits. Also, in granting any licenses or permits, States should give preference to indigenous peoples' initiatives for resource extraction within their territories over any initiatives by third party business interests to pursue resource extraction within those same lands.

16. The justification for this preference is in the fact and nature of the indigenous presence. Characteristically, indigenous peoples have strong cultural attachments to the territories they inhabit, and their presence in those territories predates that of others. They have been stewards of the lands and resources within their territories for generations past, and have sought to safeguard the lands and resources for future generations. Very often indigenous peoples lay claim to all the resources, including subsurface resources, within their territories, under their own customs or laws, notwithstanding the laws of the State, and very often, those claims have not been adequately resolved. Given these factors, recognizing a priority for indigenous peoples for the extraction of resources within their territories is a matter of equity if not of entitlement.

17. Giving preference to indigenous peoples' initiatives for resource extraction within their territories is, moreover, a matter of good practice. Resource extraction carried out by indigenous peoples themselves maximizes the possibility of such extraction being pursued in manners respectful of the rights and interests of indigenous peoples. When indigenous peoples themselves control resource extraction, many of the challenges and elements of instability inherent in extractive activities by State or third party enterprises are necessarily diminished or altogether avoided. In addition, profits that the resource extraction project generates are more likely to stay within the State, and capacity enhancement benefits local people.

### **III. THE STANDARD SCENARIO: WHEN STATES OR THIRD PARTY BUSINESS ENTERPRISES PROMOTE THE EXTRACTION OF NATURAL RESOURCES WITHIN INDIGENOUS TERRITORIES**

18. Just as indigenous peoples have the right to pursue their own initiatives for resource extraction, as part of their right to self-determination and to set their own strategies for development, they have the right to decline to pursue such initiatives, as many do and no doubt will continue to do. Today, however, much more often than being faced with the choice of whether or not to pursue their own resource extraction initiatives, indigenous peoples face resource extraction projects that are advanced by the State and third party business enterprises, typically when the State claims ownership of the resources. Although in an increasing number of cases indigenous peoples are accepting such initiatives, it appears that in many more places around the world they are resisting them.

#### **A. The right of indigenous peoples to oppose extractive activities**

19. The rights to freedom of expression and to participation are firmly established in international human rights law.<sup>i</sup> By virtue of these rights, indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects, both in the context of State decision-making about the projects and otherwise, including by organizing and engaging in peaceful acts of protest. States are bound to respect and protect rights of freedom of expression and participation, and may impose limitations on the exercise of those rights only within narrow bounds and for reasons of public order.<sup>j</sup>

##### **1. Freedom from reprisals and violence**

20. Many cases have come to the attention of the Special Rapporteur in which indigenous individuals or communities have suffered repression for their opposition to extractive projects. In several of the cases, indigenous individuals and groups opposing extractive projects have been met with acts of intimidation or violence, including violence resulting in death.

21. It is imperative that States adopt the measures necessary to secure the right of indigenous peoples and individuals to peacefully express opposition to extractive projects, as well as to express themselves on other matters, free from any acts of intimidation or violence, or from any form of reprisals. States should provide adequate training to security forces, hold responsible those who commit

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<sup>i</sup> See, for example, International Covenant on Civil and Political Rights, arts. 19, 22 and 25.

<sup>j</sup> See *ibid.*, art. 19, para. 3.



or threaten acts of violence, and take measures to prevent both State and private agents from engaging in the unjustifiable or excessive use of force.<sup>k</sup> Additionally, criminal prosecution of indigenous individuals for acts of protest should not be employed as a method of suppressing indigenous expression and should proceed only in cases of clear evidence of genuine criminal acts. Instead, the focus should be on providing indigenous peoples with the means of having their concerns heard and addressed by relevant State authorities.

22. For their part, extractive companies should adopt policies and practices to ensure that security personnel employed by them act in accordance with relevant human rights standards and with sensitivity to indigenous cultural and social patterns. The Special Rapporteur emphasizes the responsibility of companies to respect human rights, in accordance with the Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in 2011, and that this responsibility is independent of whatever requirements the State may or may not impose on companies and their agents.

23. The Special Rapporteur takes note of the Voluntary Principles on Security and Human Rights, which are being promoted through a process involving a group of Governments, non-governmental organizations and companies in the extractive and energy sectors, including some of the world's major mining and oil and gas companies. The Voluntary Principles employ a human rights framework to address company relations with State and private security providers. This multi-stakeholder process is to be encouraged, although the Special Rapporteur considers that adherence to principles should not be considered voluntary. All extractive companies and relevant State authorities should become aware of and adhere to the Voluntary Principles along with all applicable human rights standards.

## 2. Freedom from undue pressures to accept extractive projects or engage in consultations

24. Apart from concerns over abusive use of force or direct reprisals, indigenous peoples should be free from pressure from State or extractive company agents to compel them to accept extractive projects. To this end, basic services for which the State is responsible, including for education, health and infrastructure, should not be conditioned upon acceptance of extractive projects. Furthermore, States and companies should guard against acts of manipulation or intimidation of indigenous leaders by State or company agents.

25. Finally, States should not insist, or allow companies to insist, that indigenous peoples engage in consultations about proposed extractive projects to which they have clearly expressed opposition. As is now well understood, States

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<sup>k</sup> See the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

have the obligation to consult with indigenous peoples about decisions that affect them, including decisions about extractive projects. In complying with this obligation States are required to make available to indigenous peoples adequate consultation procedures that comply with international standards and to reasonably encourage indigenous peoples to engage in the procedures. (See paras. 58-71 below). In the view of the Special Rapporteur, however, when States make such efforts to consult about projects and, for their part, the indigenous peoples concerned unambiguously oppose the proposed projects and decline to engage in consultations, as has happened in several countries, the States' obligation to consult is discharged. In such cases, neither States nor companies need or should insist on consultations, while, at the same time, they must understand that the situation is one in which indigenous peoples have affirmatively withheld their consent. The question then becomes what consequences for decisions about the project follow from the indigenous opposition and withholding of consent.

## **B. The principle of free, prior and informed consent**

26. Beyond being protected expression, indigenous peoples' opposition to extractive projects can have determinative consequences, in the light of the principle of free, prior and informed consent, a principal that is articulated in several provisions of the United Nations Declaration on the Rights of Indigenous Peoples and that is gaining increasing acceptance in practice.<sup>1</sup>

### **1. The general rule: consent is required for extractive projects within indigenous territories**

27. The Declaration and various other international sources of authority,<sup>m</sup> along with practical considerations, lead to a general rule that extractive activities

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<sup>1</sup> The Special Rapporteur has already devoted considerable attention to examining the contours of this principle and its relation to the duty of States to consult with indigenous peoples on decisions affecting them. See, for example, A/HRC/12/34, paras. 36-57; and A/HRC/21/47, paras. 47-53 and 62-71.

<sup>m</sup> See, for example, United Nations Declaration on the Rights of Indigenous People, art. 32, para. 2; Inter-American Court of Human Rights, *Saramaka People v. Suriname*, judgement of 28 November 2007, paras. 129-137 (interpreting the American Convention on Human Rights); Human Rights Committee, communication No. 1457/2006, *Poma v. Peru*, Views adopted on 27 March 2009, paras. 7.5, 7.7 (interpreting the International Covenant on Civil and Political Rights); Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997) on indigenous peoples (interpreting the International Convention on the Elimination of All Forms of Racial Discrimination); Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.74, para. 12 (interpreting the International Covenant on Economic, Social and Cultural Rights).

should not take place within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights. In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought, even if consent is not strictly required.<sup>n</sup>

28. The general rule identified here derives from the character of free, prior and informed consent as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories. As explained previously by the Special Rapporteur (A/HRC/21/47, paras. 47-53), together, principles of consultation and consent function as instrumental to rights of participation and self-determination, and as safeguards for all those rights of indigenous peoples that may be affected by external actors, including rights that indigenous peoples have under domestic law or treaties to which they have subscribed, or rights recognized and protected by authoritative international sources like the United Nations Declaration on the Rights of Indigenous Peoples and various widely ratified multilateral treaties. These rights include, in addition to rights of participation and self-determination, rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and the right of indigenous peoples to set and pursue their own priorities for development, including with regard to natural resources (See A/HRC/21/47, para. 50 and cited sources.) It can readily be seen that, given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of these rights is invariably affected in one way or another when extractive activities occur within indigenous territories – thus the general rule that indigenous consent is required for extractive activities within indigenous territories.

29. This general rule is reinforced by practical considerations. It is increasingly understood that when proposed extractive projects might affect indigenous peoples or their territories, it is simply good practice for the States or companies that promote the projects to acquire the consent or agreement of the indigenous peoples concerned. Such consent or agreement provides needed social license and lays the groundwork for the operators of extractive projects to have positive relations with those most immediately affected by the projects, lending needed stability to the projects.

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<sup>n</sup> See the Declaration, art. 19; ILO Convention No. 169, art. 6, para. 2.

30. Whereas the withholding of consent may block extractive projects promoted by companies or States, the granting of consent can open the door to such projects. But it must be emphasized that the consent is not a free-standing device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a yes to a predetermined decision, or as a means to validate a deal that disadvantages affected indigenous peoples. When consent is given, not just freely and on an informed basis, but also on just terms that are protective of indigenous peoples rights, it will fulfil its human rights safeguard role.

## 2. The narrow scope of permissible exceptions to the general rule

31. The general requirement of indigenous consent for extractive activities within indigenous territories may be subject to certain exceptions, but only within narrowly defined parameters. First, consent may not be required for extractive activities within indigenous territories in cases in which it can be conclusively established that the activities will not substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories<sup>o</sup> – perhaps mostly a theoretical possibility given the invasive nature of extractive activities, especially when indigenous peoples are living in close proximity to the area where the activities are being carried out. More plausibly, consent may not be required when it can be established that the extractive activity would only impose such limitations on indigenous peoples’ substantive rights as are permissible within certain narrow bounds established by international human rights law.

32. Within established doctrine of international human rights law, and in accordance with explicit provisions of international human rights treaties, States may impose limitations on the exercise of certain human rights, such as the rights to property and to freedom of religion and expression. In order to be valid, however, the limitations must comply with certain standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights. The United Nations Declaration on the Rights of Indigenous Peoples, in its article 46, paragraph 2, identifies the parameters of permissible limitations of the rights therein recognized with the following minimum standard:

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

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<sup>o</sup> See *Poma*, para. 7.6. (consultation and consent required for “measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community”).

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.

33. It will be recalled that consent performs a safeguard role for indigenous peoples' fundamental rights. When indigenous peoples freely give consent to extractive projects under terms that are aimed to be protective of their rights, there can be a presumption that any limitation on the exercise of rights is permissible and that rights are not being infringed.<sup>p</sup> On the other hand, when indigenous peoples withhold their consent to extractive projects within their territories, no such presumption applies, and in order for a project to be implemented the State has the burden of demonstrating either that no rights are being limited or that, if they are, the limitation is valid.

34. In order for a limitation to be valid, first, the right involved must be one subject to limitation by the State and, second, as indicated by the Declaration, the limitation must be necessary and proportional in relation to a valid State objective motivated by concern for the human rights of others. The Inter-American Court of Human Rights has pointed out that indigenous peoples' proprietary interests in lands and resources, while being protected the American Convention on Human Rights, are subject to limitations by the State, but only those limitations that meet criteria of necessity and proportionality in relation to a valid objective.<sup>q</sup>

35. The Special Rapporteur observes that in a number of cases States have asserted the power to expropriate indigenous property interests in land or surface resources in order to have or permit access to the subsurface resources to which the State claims ownership. Such an expropriation being a limitation of indigenous property rights, even if just compensation is provided, a threshold question in such cases is whether the limitation is pursuant to a valid public purpose. The Special Rapporteur cautions that such a valid public purpose is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain. It should be recalled that under various sources of international law, indigenous peoples have property, cultural and other rights in relation to their traditional territories, even if those rights are not held under a title deed or other form of official recognition.<sup>r</sup> Limitations of all those rights of indigenous peoples must, at a minimum, be backed by a valid public purpose within a human rights framework, just as with limitations on rights formally recognized by the State.

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<sup>p</sup> See *Saramaka People* (footnote m above), paras. 127-134.

<sup>q</sup> *Ibid.*, para. 127.

<sup>r</sup> See, for example, Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, judgement of 29 March 2006, para. 128 (traditional possession by indigenous people of their lands has the equivalent effect of full title granted by the State).

36. Even if a valid public purpose can be established for the limitation of property or other rights related to indigenous territories, the limitation must be necessary and proportional to that purpose. This requirement will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent. In determining necessity and proportionality, due account must be taken of the significance to the survival of indigenous peoples of the range of rights potentially affected by the project. Account should also be taken of the fact that in many if not the vast majority of cases, indigenous peoples continue to claim rights to subsurface resources within their territories on the basis of their own laws or customs, despite State law to the contrary. These factors weigh heavily against a finding of proportionality of State-imposed rights limitations, reinforcing the general rule of indigenous consent to extractive activities within indigenous territories.

### **C. Natural resource extraction in indigenous territories absent consent**

37. Whether or not indigenous consent is a strict requirement in particular cases, States should ensure good faith consultations with indigenous peoples about extractive activities that would affect them, and engage in efforts to reach agreement or consent, as required by the United Nations Declaration on the Rights of Indigenous Peoples (arts. 19 and 32, para. 2), ILO Convention No. 169 (art. 6, para. 2) and other sources.

38. When a State determines that it is permissible to proceed with an extractive project that affects indigenous peoples without their consent, and chooses to do so, it remains bound to respect and protect the rights of indigenous peoples and must ensure that other applicable safeguards are implemented, in particular steps to minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing. States should ensure good faith efforts to consult with indigenous peoples and to develop and reach agreement on these measures, in keeping with its general duty to consult. The adequacy of these measures and the consultations about them will also be factors in the calculus of proportionality in regard to any limitations on rights.

39. Any decision by the State to proceed with or permit an extractive project without the consent of indigenous peoples affected by the project should be subject to review by an impartial judicial authority. Judicial review should ensure compliance with the applicable international standards regarding the rights of indigenous peoples and provide for an independent determination of whether or not the State has met its burden of justifying any limitations on rights.

40. For their part, in keeping with their independent responsibility to respect human rights, companies should conduct due diligence before proceeding, or committing themselves to proceed, with extractive operations without the prior consent of the indigenous peoples concerned and conduct their own independent assessment of whether or not the operations, in the absence of indigenous consent,

would be in compliance with international standards, and under what conditions. If they would not be in compliance, the extractive operations should not be implemented, regardless of any authorization by the State to do so.

#### **IV. CONDITIONS FOR GETTING TO AND SUSTAINING INDIGENOUS PEOPLES' AGREEMENT TO EXTRACTIVE ACTIVITIES PROMOTED BY THE STATE OR THIRD PARTY BUSINESS ENTERPRISES**

41. As noted at the beginning of the present report, in most of the cases of extractive industries within or near indigenous territories that have been brought to the Special Rapporteur's attention, the indigenous peoples concerned have opposed the extractive project, owing to the negative or perceived negative impacts and the absence of adequate consultation or consent. The Special Rapporteur has learned of several other cases, however, in which indigenous peoples have entered into agreements with States or third party business enterprises for the extraction of resources within their territories. Evaluation of both the good and bad practices related to these cases of both indigenous opposition and agreement, in the light of the relevant international standards, contributes to understanding the conditions for arriving at and sustaining indigenous peoples' agreement to extractive activities promoted by the State or third party business enterprises – that is, for obtaining the free, prior and informed consent of indigenous peoples on just and equitable terms.

42. In chapter II of the present report, the Special Rapporteur indicated that, if extractive activities are to take place within indigenous peoples' territories, the activities are best carried out under the control of the indigenous peoples concerned through their own initiatives and enterprises, in contrast to the prevailing model of natural resource extraction initiated by and under the control of outside interests. The world in which we live, however, is one in which for the foreseeable future the financial and technical capacity for the extraction of natural resources will largely be in non-indigenous hands and the political forces will continue to empower the existing system of industry actors. Within this reality, it is necessary to identify, if possible, the conditions for resource extraction on indigenous territories by States or third party business enterprises that are fully respectful of indigenous peoples' rights.

43. While not exhaustive of all relevant considerations, the following discussion identifies key conditions that could lay the groundwork for developing and sustaining agreements with indigenous peoples. These conditions point to models of partnership with indigenous peoples that are respectful of their rights.

### **A. Establishment of State regulatory regimes that adequately protect indigenous peoples' rights**

44. As stressed above, States are obligated not just to respect, but also to protect, promote and fulfil human rights, and this obligation applies with respect to the rights of indigenous peoples (para. 12). In the context of extractive industries, the State's obligation to protect human rights necessarily entails ensuring a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in the behaviour of extractive companies; and that provides effective sanctions and remedies when those rights are infringed either by government or corporate actors. Such a regulatory framework requires legislation or regulations that incorporate international standards of indigenous rights and that operationalize them through the various components of State administration that govern land tenure, mining, oil and gas, and other natural resource extraction or development.

45. In examining relevant State laws and regulations across the globe, the Special Rapporteur has found deficient regulatory frameworks, such that in many respects indigenous peoples' rights remain inadequately protected, and in all too many cases entirely unprotected, in the face of extractive industries. Experience shows that, with such regulatory deficiencies, extractive operations in proximity to indigenous peoples are likely to put at risk or infringe their rights and contribute to persistently conflictive social environments.

46. Legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live, in order to adequately define and protect their rights over lands and resources, including rights over lands not exclusively under their use or possession, such as rights related to subsistence practices or to areas of cultural or religious significance, which may be affected by extractive industries. Additionally, new or strengthened regulatory mechanisms are needed to provide for consultations with indigenous peoples over extractive projects and to ensure that such consultations are in compliance with international standards, including the principle of free, prior and informed consent.

### **B. Regulation of extraterritorial activities of companies**

47. The Special Rapporteur has observed that in many cases in which extractive companies have been identified as responsible for, or at least associated with, violations of the rights of indigenous peoples, those violations occur in countries with weak regulatory regimes, and the responsible companies are domiciled in other, typically much more developed, countries. Even if States are not obligated under international law to regulate the extraterritorial activities of companies domiciled in their territory in order to compel or promote conformity with human rights standards, strong policy reasons exist for them to do so, as



affirmed by the Guiding Principles on Business and Human Rights.<sup>s</sup> These reasons include, in addition to preserving the States' own reputation, the simple morality of exercising the State regulatory power to advance human rights and reduce human turmoil whenever possible.

48. States should therefore adopt regulatory measures for companies domiciled in their respective jurisdictions that are aimed at preventing and, in appropriate circumstances, sanctioning and remedying violations of the rights of indigenous peoples abroad for which those companies are responsible or in which they are complicit. The Special Rapporteur observes that some States have adopted regulatory measures with extraterritorial reach in this vein to address human rights concerns within certain contexts, but with limited applicability for the specific concerns of indigenous peoples. Regulation of the extraterritorial activities of companies to promote their compliance with international standards concerning the rights of indigenous peoples will help establish a transnational corporate culture of respect for those rights and greater possibilities of healthy relationships between extractive companies and indigenous peoples.

### **C. Participation by indigenous peoples and respect for their rights in strategic State planning for resource extraction and development**

49. States typically regard mineral, oil and gas, and other natural resources to be strategic assets and, accordingly, in regulating the industries many engage in long- and short-term planning for the development of the resources, including resources within or near indigenous territories. Such strategic State planning influences the definition of laws, shapes regulatory controls, and determines the policies pertinent to resource extraction. It also establishes the basis for the decisions about the development and implementation of resource extraction projects. With these characteristics, strategic planning for resource development can have profound, even if not so immediate, effects on indigenous peoples and the enjoyment of their rights. The Special Rapporteur is concerned that, of the many cases of State resource development planning he has studied, he has found but a few notable instances in which indigenous peoples have been included and their specific rights addressed in the planning process.

50. Instead, by and large, the Special Rapporteur has found patterns of State planning for resource extraction that can be seen, in a number of ways, to set in motion decisions that prejudice indigenous peoples' ability to set their own priorities for the development of their lands and territories. Some planning regimes adhere to competitive bidding or other permitting schemes that allow for the distribution of licenses for resource exploration or other extractive activities in advance of any consultations with affected indigenous peoples. Furthermore, State planning typically reinforces existing industry practices in a way that is not

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<sup>s</sup> Principle 2, commentary.

conducive to alternative models, advocated in the present report, under which indigenous peoples have the opportunity to exercise greater control over resource extraction activities within their territories.

51. Patterns of State planning that marginalize indigenous peoples and their rights must be reversed, so that indigenous peoples may participate in strategic planning processes through appropriate representative arrangements, as has been done at least to some extent by a number of States or their political subdivisions. Indigenous participation in strategic planning for resource extraction will undoubtedly lend itself to greater possibilities of agreement with indigenous peoples on specific projects.

#### **D. Due diligence by extractive companies to respect indigenous peoples' rights**

52. Although States are ultimately responsible for ensuring respect for human rights, including the rights of indigenous peoples, today a number of regulatory and self-regulatory frameworks governing corporate responsibility reflect widespread understanding of the roles business enterprises may play in both the infringement and fulfilment of human rights in various contexts. Accordingly, the Guiding Principles on Business and Human Rights specify that business enterprises have a responsibility to respect internationally recognized human rights and that this responsibility is independent of State obligations. As explained previously by the Special Rapporteur (A/HRC/21/47, paras. 55-56), this responsibility to respect human rights extends to compliance with international standards concerning the rights of indigenous peoples, in particular those set forth in the United Nations Declaration on the Rights of Indigenous Peoples, no less than it applies to compliance with other international human rights standards.

53. Given their independent responsibility to respect human rights, business enterprises, including extractive companies, should not assume that compliance with State law equals compliance with the international standards of indigenous rights. On the contrary, companies should perform due diligence to ensure that their actions will not violate or be complicit in violating indigenous peoples' rights, identifying and assessing any actual or potential adverse human rights impacts of a resource extraction project.

54. Such due diligence entails identifying with particularity, at the very earliest stages of planning for an extractive project, the specific indigenous groups that may be affected by the project, their rights in and around the project area and the potential impacts on those rights. This due diligence should be performed preliminarily at the very earliest stages of determining the feasibility of the project, in advance of a more complete project impact assessment in later stages of planning or decision-making about the project. Additionally, extractive companies should employ due diligence to avoid acquiring tainted assets, such as permits previously acquired by other business enterprises in connection with prospecting for or extracting resources in violation of indigenous peoples' rights.

55. Due diligence also entails ensuring that the company is not contributing to or benefiting from any failure on the part of the State to meet its international obligations towards indigenous peoples. Thus, for example, extractive companies should avoid accepting permits or concessions from States when prior consultation and consent requirements have not been met, as stated above (para. 40).

56. Consistency and effectiveness of due diligence practices and respect for the rights of indigenous peoples requires that companies adopt formal policies to that end. A company's policy should outline how the company intends to operationalize the policy at all levels of decision-making, and how it will perform due diligence and act at the operational level to avoid violating or being complicit in violations of indigenous peoples' human rights.<sup>t</sup> The policy should also prescribe practices for engagement with indigenous peoples that is respectful of their rights.

57. The Special Rapporteur notes that a number of extractive companies, understanding the practical advantages of respect for the rights of indigenous peoples and related due diligence, have adopted company policies along the lines suggested, and that certain industry associations have promoted such policies. Although the indicated trend in corporate policymaking is encouraging, most corporate policies still fall short of adequately providing for compliance with international standards of indigenous rights. Moreover, notwithstanding the growing awareness among companies that they not only should respect indigenous peoples' rights, but may indeed benefit from doing so, the Special Rapporteur remains concerned that many corporations still do not commit to more than complying with national law and fail to independently conduct the relevant human rights due diligence. There is an urgent need for greater corporate awareness and resolve to embrace and implement policies and practices to ensure respect for the rights of indigenous peoples.

### **E. Fair and adequate consultation and negotiation procedures**

58. In affirming the general rule of consent for extractive activities within indigenous territories, the United Nations Declaration on the Rights of Indigenous Peoples emphasizes that, in order to obtain consent, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representatives" (art. 32, para. 2). The Declaration thus emphasizes that good faith consultations and cooperation are a precondition for agreements with indigenous peoples concerning extractive activities. As stated above (para. 25), indigenous peoples may decline to enter consultations about extractive industries, just as they may choose to withhold consent to them. But if consent or agreement on

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<sup>t</sup> See the 2011 report of the Special Rapporteur submitted to the General Assembly (A/66/288), para. 96.

extractive activities is to happen, it must be on the basis of adequate, good faith consultations or negotiations.

59. Consultation procedures regarding proposed extractive operations are channels through which indigenous peoples can actively contribute to the prior assessment of all potential impacts of the proposed activity, including the extent to which their substantive rights and interests may be affected. Additionally, consultation procedures are key to the search for less harmful alternatives or in the definition of mitigation measures. Consultations should also be mechanisms by which indigenous peoples can reach agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights.

60. While the Special Rapporteur has addressed the elements of good faith consultations in previous reports (see, in particular, A/HRC/12/34, paras. 46-49), he would like to emphasize a few points related to problematic aspects of consultations that he has observed with regard to extractive industries.

#### 1. Negotiations directly between extractive companies and indigenous peoples

61. The Special Rapporteur has observed that in many instances companies negotiate directly with indigenous peoples about proposed extractive activities that may affect them, with States in effect delegating to companies the execution of the State's duty to consult with indigenous peoples prior to authorizing the extractive activities. By virtue of their right to self-determination, indigenous peoples are free to enter into negotiations directly with companies if they so wish. Indeed, direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed-upon arrangements for extraction of natural resources within indigenous territories that are fully respectful of indigenous peoples' rights, and they may provide indigenous peoples opportunities to pursue their own development priorities.

62. In accordance with the responsibility of business enterprises to respect human rights, direct negotiations between companies and indigenous peoples must meet essentially the same international standards governing State consultations with indigenous peoples, including – but not limited to – those having to do with timing, information gathering and sharing about impacts and potential benefits, and indigenous participation. Further, while companies must themselves exercise due diligence to ensure such compliance, the State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures and therefore should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances between the companies and the indigenous peoples with which they negotiate.

## 2. Mitigation of power imbalances

63. Almost invariably, when State agencies or business enterprises that promote extractive projects enter into consultations or negotiations with indigenous peoples, there are significant imbalances of power, owing to usually wide gaps in technical and financial capacity, access to information and political influence. The Special Rapporteur regrets to observe that, overall, there seems to be little systematic attention by States or industry actors to address these power imbalances. He believes that, as a precondition to reaching sustainable and just agreements with indigenous peoples over the taking of resources from their territories, the imbalances of power must be identified as a matter of course and deliberate steps should be taken to address them.

64. The protective role of States is especially important in this context, while companies should exercise due diligence and develop policies and practices to ensure that they do not unfairly benefit from such power imbalances. Practical measures to address power imbalances could include, inter alia, employing independent facilitators for consultations or negotiations, establishing funding mechanisms that would allow indigenous peoples to have access to independent technical assistance and advice, and developing standardized procedures for the flow of information to indigenous peoples regarding both the risks and potential benefits of extractive projects.

## 3. Information gathering and sharing

65. As is now generally understood, environmental and human rights impact assessments are important preconditions for the implementation of extractive operations. Indigenous peoples should have full access to the information gathered in impact assessments that are done by State agencies or extractive companies, and they should have the opportunity to participate in the impact assessments in the course of consultations or otherwise. States should ensure the objectivity of impact assessments, either by subjecting them to independent review or by requiring that the assessments are performed free from the control of the promoters of the extractive projects.

66. Indigenous peoples should also have full access to information about the technical and financial viability of proposed projects, and about potential financial benefits. The Special Rapporteur understands that companies usually consider much of this information to be proprietary and thus are reluctant to divulge it. He recommends, nonetheless, that information that otherwise might be considered proprietary be shared with the indigenous peoples concerned, as a necessary measure to mitigate power imbalances and build confidence on the part of indigenous peoples in the negotiations over projects, and because of equitable considerations relating to indigenous peoples' historical disadvantages and connections to project areas. Such sharing of proprietary information could be done on a confidential basis.

#### 4. Timing

67. In accordance with the principle of free, prior and informed consent, consultations and agreement with indigenous peoples over an extractive project should happen before the State authorizes or a company undertakes, or commits to undertake, any activity related to the project within an indigenous territory, including within areas of both exclusive and non-exclusive indigenous use. As a practical matter, consultation and consent may have to occur at the various stages of an extractive project, from exploration to production to project closure.

68. The Special Rapporteur has observed that, in many cases, exploration activities for eventual extraction take place within indigenous territories, with companies and States taking the position that consultations are not required for the exploration phase and that consent need not be obtained, if at all, until a license for resource extraction is given. This position, in the view of the Special Rapporteur, is simply not compatible with the principle of free, prior and informed consent or with respect for the property, cultural and other rights of indigenous peoples, given the actual or potential effects on those rights when extractive activities occur. Experience shows that exploration and other activities without prior consultations or consent will often serve to breed distrust on the part of indigenous peoples, making any eventual agreement difficult to achieve.

69. Also in terms of time, consultations should not be bound to temporal constraints imposed by the State, as is done under some regulatory regimes. In order for indigenous peoples to be able to freely enter into agreements, on an informed basis, about activities that could have profound effects on their lives, they should not feel pressured by time demands of others, and their own temporal rhythms should be respected.

#### 5. Indigenous participation through representative institutions

70. A defining characteristic of indigenous peoples is the existence of their own institutions of representation and decision-making, and it must be understood that this feature makes consultations with indigenous peoples very different from consultations with the general public or from ordinary processes of State or corporate community engagement. The Special Rapporteur notes cases in which companies and States have bypassed indigenous peoples' own leadership and decision-making structures out of misguided attempts to ensure broad community support. Where indigenous peoples are concerned, however, international standards require engagement with them through the representatives determined by them and with due regard for their own decision-making processes. Doing so is the best way of ensuring broad community support. Indigenous peoples should be encouraged to include appropriate gender balance within their representative and decision-making institutions. However, such gender balance should not be

dictated or imposed upon indigenous peoples by States or companies, anymore than indigenous peoples should impose gender balance on them.

71. It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged, in the light of the multiple spheres of indigenous community and organization that may be affected by particular extractive projects, and also that in some instances indigenous representative institutions may be weakened by historical factors. In such cases indigenous peoples should be given the opportunity and time, with appropriate support from the State if they so desire it, to organize themselves to define the representative institutions by which they will engage in consultations over extractive projects.

## **F. Rights-centered, equitable agreements and partnership**

72. As stated above (para. 30), the principle of free, prior and informed consent does not fulfil its role as protective of and instrumental to indigenous peoples' rights unless consent, when it is given, is given on just and equitable terms. Accordingly, there is growing awareness that agreements with indigenous peoples allowing for extractive projects within their territories must be crafted on the basis of full respect for their rights in relation to the affected lands and resources, and provide for equitable distribution of the benefits of the projects within a framework of genuine partnership.

### **1. Impact mitigation**

73. Measures to safeguard against or to mitigate environmental and other impacts that could adversely affect the rights of indigenous peoples in relation to their territories are an essential component of any agreement for extractive activities within the territories of indigenous peoples. Experience shows that special attention is required for potential impacts on health conditions, subsistence activities and places of cultural or religious significance. Provisions for impact prevention and mitigation should be based on rigorous impact studies developed with the participation of the indigenous peoples concerned (see para. 65 above) and should be specific to the impacts identified with regard to particular rights that are recognized under domestic or international law. Additionally, they should include mechanisms for participatory monitoring during the life of the project, as well as provide for measures to address project closure.

74. The Special Rapporteur has learned of a number of instances in which indigenous peoples and companies have agreed to joint mechanisms to measure and address impacts on natural and cultural resources. Such mechanisms can provide for continual dialogue between indigenous peoples and companies about project impacts, thereby potentially strengthening indigenous peoples' confidence in the projects and helping to build healthy relationships.

## 2. Arrangements for genuine partnership and sharing of benefits

75. The Special Rapporteur has called for models of resource extraction on indigenous territories that are different from the classical one in which indigenous peoples have little control over and benefit minimally from the extractive projects. One such alternative model, discussed in chapter II above and identified as a preferred model, is the one in which indigenous peoples themselves initiate and engage in resource extraction. For extractive projects promoted by outside companies or States, other models that are preferable to the classical one are those based on agreements in which indigenous peoples' rights are fully protected and indigenous peoples are genuine partners in the projects, both participating in project decision-making and benefiting as such.

76. The justification for indigenous peoples to benefit from projects within their territories within a partnership model should be self-evident: even if they do not, under domestic law, own the resources to be extracted, they provide access to the resources and give up alternatives for the future development of their territories by agreeing to the projects. Direct financial benefits – beyond incidental benefits like jobs or corporate charity – should accrue to indigenous peoples because of the compensation that is due to them for the access to their territories and for any agreed-upon adverse project effects,<sup>u</sup> as well as because of the significant social capital they contribute under the totality of historical and contemporary circumstances. At the same time, while thus being entitled to benefit from extractive projects carried out by others within their territories, indigenous peoples should have the option of participating in the management of the extractive projects, in addition to whatever regulatory control they may exercise, in keeping with their right to self-determination.

77. In this regard, the Special Rapporteur notes a pattern of agreements in some parts of the world in which indigenous peoples are guaranteed a percentage of profits from the extractive operation or other income stream and are provided means of participation in certain management decisions. In some cases the indigenous people concerned is provided a minority ownership interest in the extractive operation, and through that interest is able to participate in management decisions and profits from the project. The Special Rapporteur looks forward to further developments along these lines toward models of genuine partnership. Also, he notes the need in most cases for indigenous peoples to be assisted in building their financial and management capacity as they accept such opportunities.

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<sup>u</sup> See *Saramaka People* (footnote m above), paras. 138-140.



### 3. Adequate grievance procedures

78. Adequate grievance procedures should also be included in agreements for extractive projects within indigenous peoples' territories, in accordance with the Guiding Principles on Business and Human Rights (principles 25-31). In cases in which a private company is the operator of the extractive project, company grievance procedures should be established that complement the remedies provided by the State. The grievance procedures should be devised and implemented with full respect for indigenous peoples' own justice and dispute resolution systems.

## V. CONCLUSIONS AND RECOMMENDATIONS

79. **Indigenous peoples around the world have suffered negative, even devastating, consequences from extractive industries. Despite such negative experiences, looking toward the future it must not be assumed that extractive industries' and indigenous peoples' interests are entirely or always at odds with each other. However, models of resource extraction that are different from the heretofore prevailing model are required if resource extraction within indigenous peoples' territories is to be carried out in a manner consistent with their rights.**

80. **A preferred model for natural resource extraction within indigenous territories is one in which indigenous peoples themselves control the extractive operations, through their own initiatives and enterprises. Indigenous peoples may benefit from partnerships with responsible, experienced and well-financed non-indigenous companies to develop and manage their own extractive enterprises.**

81. **When indigenous peoples choose to pursue their own initiatives for natural resource extraction within their territories, States and the international community should assist them to build the capacity to do so, and States should privilege indigenous peoples' initiatives over non-indigenous initiatives.**

82. **Just as indigenous peoples have the right to pursue their own initiatives for resource extraction, as part of their right to self-determination and to set their own strategies for development, they have the right to decline to pursue such initiatives in favour of other initiatives for their sustainable development, and they should be supported in such other pursuits as well.**

83. **Indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects promoted by the State or third party business interests. Indigenous peoples should be able to oppose or withhold consent to extractive projects free from reprisals or acts of violence, or from undue pressures to accept or enter into consultations about extractive projects.**

84. Indigenous peoples' free, prior and informed consent is required, as a general rule, when extractive activities are carried out within indigenous territories. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending on the nature of the activities and their potential impact on the exercise of indigenous peoples' rights.

85. In this way, free, prior and informed consent is a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities carried out within their territories.

86. The general requirement of indigenous consent for extractive activities within indigenous territories may be subject to certain limited exceptions, in particular, when any limitations on indigenous peoples' substantive rights comply with standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights.

87. When a State determines that it is permissible to proceed with an extractive project that affects indigenous peoples without their consent, and chooses to do so, that decision should be subject to independent judicial review.

88. Whether or not indigenous consent is a strict requirement in particular cases, States should ensure good faith consultations with indigenous peoples on extractive activities that would affect them and engage in efforts to reach agreement or consent. In any event, the State remains bound to respect and protect the rights of indigenous peoples and must ensure that other applicable safeguards are implemented as well, in particular steps to minimize or offset any limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing.

89. For their part, extractive companies should adopt policies and practices to ensure that all aspects of their operations are respectful of the rights of indigenous peoples, in accordance with international standards and not just domestic law, including with regard to requirements of consultation and consent. Companies should conduct due diligence to ensure that their actions will not violate or be complicit in violating indigenous peoples' rights, identifying and assessing any actual or potential adverse human rights impacts of a resource extraction project.

90. Conditions for States or third party business enterprises to achieve and sustain agreements with indigenous peoples for extractive projects include: adequate State regulatory regimes (both domestic and with extraterritorial implications) that are protective of indigenous peoples' rights; indigenous participation in strategic State planning on natural resource development and extraction; corporate due diligence; fair and adequate consultation procedures; and just and equitable terms for the agreement.

91. Necessary features of an adequate consultation or negotiation over extractive activities include the mitigation of power imbalances; information gathering and sharing; provision for adequate timing of consultations, in an environment free of pressure; and assurance of indigenous peoples' participation through their own representative institutions.

92. Agreements with indigenous peoples allowing for extractive projects within their territories must be crafted on the basis of full respect for their rights in relation to the affected lands and resources and, in particular, should include provisions providing for impact mitigation, for equitable distribution of the benefits of the projects within a framework of genuine partnership, and grievance mechanisms.

#### **ANNEX:**

#### **SUMMARY OF ACTIVITIES OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES, JAMES ANAYA, 2012-2013**

1. This following details the activities carried out by the Special Rapporteur on the rights of indigenous peoples pursuant to his mandate since he last reported to the Human Rights Council in 2012. Professor James Anaya is currently in the final year of his mandate, which ends 30 April 2014. Accordingly, the present report is the last report he submits to the Human Rights Council. However, he looks forward to bringing to the attention of the Council, through his successor, the activities undertaken during the remainder of his mandate.

2. The Special Rapporteur is grateful for the support provided by the staff at the United Nations Office of the High Commissioner for Human Rights. He would also like to thank the staff and researchers of the Special Rapporteur support project at the University of Arizona for their on-going assistance with all aspects of his work. Further, he would like to thank the many indigenous peoples, Governments, United Nations bodies and agencies, non-governmental organizations, and others that have cooperated with him over the past years in the implementation of his mandate.

#### **A. Coordination with other human rights mechanisms and processes**

3. Before detailing the tasks carried out under his own areas of work over the past year, the Special Rapporteur would like to describe to the Human Rights Council his efforts to coordinate with the other United Nations mechanisms that deal with indigenous issues, in particular the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples. Coordination with these and other institutions is a fundamental aspect of the mandate of the Special Rapporteur, as the Human Rights Council calls on him "To work in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the

Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies and regional human rights organizations; [and] to work in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session” (Council resolution 15/14, para. 1 (d) and (e)).

4. As in past years, the Special Rapporteur has participated in the annual sessions of these mechanisms, during which he has held parallel meetings with the numerous indigenous representatives and organizations that attend these sessions. These meetings provide a valuable opportunity for indigenous peoples to present cases of specific allegations of human rights violations and often result in action taken by the Special Rapporteur through the communications procedure, addressed below, or other follow up. During the sessions of the Permanent Forum and the Expert Mechanism, the Special Rapporteur also gave statements and participated in a lengthy interactive dialogue with Governments, indigenous representatives, and others present.

5. Also with respect to coordination with United Nations processes, on several occasions over the past year, the Special Rapporteur has participated in preparations for the World Conference on Indigenous Peoples, which will be convened by the General Assembly in 2014. In this connection, in December 2012, the Special Rapporteur, together with members of the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples met in Guatemala to discuss their respective roles in preparation for and during the World Conference. The meeting included participation in ceremonies to mark the Oxlajuuj B’aqtun, the change of the era in the Maya calendar. In addition, in June 2013, the Special Rapporteur spoke at a preparatory session for the World Conference, held in Alta, Norway, which was hosted by the Sami Parliament of that country. The Alta meeting was attended by hundreds of indigenous peoples from around the world and resulted in an outcome document detailing their collective their expectations and proposals for the World Conference.

6. The Special Rapporteur has also continued to coordinate his work with regional human rights institutions. Most significantly, in April 2013, he participated in an “Exchange Workshop on Indigenous Peoples’ Rights Between the Inter-American Commission on Human Rights, the ASEAN Inter-Governmental Commission on Human Rights and the African Commission on Human and Peoples’ Rights” in Banjul, the Gambia. During the meeting, the Special Rapporteur presented his work in the African context and globally, and exchanged information with the regional mechanisms on common challenges and objectives for the promotion of the rights of indigenous peoples in their respective work areas. He also continues to dialogue with the African Commission and the Inter-American Commission on cases of common concern, and has followed up with several Governments regarding the status of implementation of decisions previously made by these bodies.

## **B. Areas of work**

7. The Special Rapporteur has engaged in a range of activities within the terms of his mandate to monitor the human rights conditions of indigenous peoples worldwide and promote steps to improve those conditions. He has sought to incorporate a gender perspective, and be attentive to the particular vulnerabilities of indigenous children and youth. Overall, the Special Rapporteur has tried to develop work methods oriented towards constructive dialogue with Governments, indigenous peoples, non-governmental organizations, relevant United Nations agencies and other actors, in order to address challenging issues and situations and to build on advances already made. As detailed in previous reports to the Human Rights Council, the various activities that he has carried out in this spirit can be described as falling within four, interrelated spheres of activity: promoting good practices; country reports; cases of alleged human rights violations; and thematic studies.

### 1. Promotion of good practices

8. A first area of the Special Rapporteur's work follows from the directive given by the Human Rights Council "To examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples ... and to identify, exchange and promote best practices" (Council resolution 15/14, para. 1 (a)). The Special Rapporteur has been focused on working to advance legal, administrative, and programmatic reforms at the domestic level to implement the standards of the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments.

9. In this connection, the Special Rapporteur has continued to provide technical assistance to Governments in their efforts to develop laws and policies that relate to indigenous peoples. Most often, this technical assistance has dealt with the development of procedures surrounding the duty to consult with indigenous peoples about decisions that affect them. For example, at the request of the Government of Chile, he provided detailed comments on a draft regulation on indigenous consultation and participation, which he made public and discussed with government and indigenous representatives in November 2012. Also, in April 2013, the Special Rapporteur gave a keynote speech at the conference, "The Right of Indigenous Peoples to Prior Consultation: The Role of the Ombudsmen in Latin America", which was convened by the Ibero-American Federation of Ombudsmen, in Lima, Peru. The conference brought together the Ombudsmen and heads of national human rights institutions throughout Latin America, as well as indigenous leaders and government officials from Peru. While in Lima the Special Rapporteur followed up on previous technical assistance regarding the development of a law on consultation with indigenous peoples and a corresponding regulation.

10. More broadly, the Special Rapporteur has continued to encourage Governments to promote the United Nations Declaration on the Rights of Indigenous Peoples at the national level. In this regard, he gave the keynote address at the Commonwealth International Human Rights Day expert panel entitled “Strengthened Rights Protection for Indigenous Peoples”, which was organized by the Commonwealth Secretariat to commemorate International Human Rights Day, on 10 December 2012 in Geneva, Switzerland. In his statement, the Special Rapporteur emphasized that the Declaration presents the way forward for engagement with indigenous peoples in a succession of steps in the process of shedding the legacies of colonization. He urged the Commonwealth countries to reflect on the Declaration with a view towards developing measures to implement its terms.

11. Also in furtherance of his mandate to promote good practices, the Special Rapporteur has, on an on-going basis, provided inputs into various United Nations processes and activities that relate to indigenous peoples. Of note in this regard since last reporting to the Human Rights Council are the following:

- In March 2013, the Special Rapporteur participated in an “Expert Focus Group Seminar on Free, Prior and Informed Consent of Indigenous Peoples” and a “High Level Meeting on Engagement and Dialogue with Indigenous Peoples”, hosted by the World Bank. The meetings, which took place in Manila, Philippines, were carried out in the context of the World Bank’s review of its environmental and social safeguard policies, including its Operational Policy 4.10 on indigenous peoples, which apply to the Bank’s lending for investments in specific projects. In his statements at the meetings, the Special Rapporteur emphasized that the revised policy should be consistent with rights of indigenous peoples affirmed in the United Nations Declaration on the Rights of Indigenous Peoples. He further urged that the policies that apply to all the Bank’s financial and technical assistance, and not just its investment lending, be reviewed to ensure consistency with the Declaration.
- In February 2013, the Special Rapporteur provided the keynote address at the indigenous panel that opened the current session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in Geneva. This Committee of the World Intellectual Property Organization was meeting to discuss a draft instrument on intellectual property rights and the protection of genetic resources and associated traditional knowledge. In his statement, the Special Rapporteur examined how the concepts of state sovereignty and property, which have been central to discussions at the Intergovernmental Committee, relate to the rights of indigenous peoples.
- In December 2012, The Special Rapporteur participated in the first Forum on Business and Human Rights in Geneva, Switzerland. The

Special Rapporteur spoke at a panel on business affecting indigenous peoples. In his statement, Professor Anaya emphasized that there is a “need for change in the current state of affairs if indigenous rights standards are to have a meaningful effect on State and corporate policies and action as they relate to indigenous peoples”. He also provided an update on his on-going study on the issue of extractive industries affecting indigenous peoples.

- Finally, the Special Rapporteur has on numerous occasions, at the request of various United Nations institutions and specialized agencies, provided inputs into document being prepared that relate to indigenous peoples. These documents have mostly related to policies on consultation and free, prior and informed consent, as was the case with documents developed by the Food and Agriculture Organization of the United Nations and the United Nations Global Compact, for which the Special Rapporteur provided orientations and comments.

## 2. Country reports

12. A second area of the Special Rapporteur’s work involves investigating and reporting on the overall human rights situations of indigenous peoples in selected countries. The reports of the country situations include conclusions and recommendations aimed at strengthening good practices, identifying areas of concern, and improving the human rights conditions of indigenous peoples. The reporting process involves a visit to the countries under review, including to the capital and selected places of concern within the country, during which the Special Rapporteur interacts with Government representatives, indigenous communities from different regions and a cross section of civil society actors that work on issues relevant to indigenous peoples.

13. Since the Special Rapporteur’s last report to the Human Rights Council, he has completed country visits to El Salvador, Namibia, and Panama. The reports on the situation of indigenous peoples in Namibia and El Salvador are included as addendums to the main thematic report (A/HRC/24/41/Add.1 and A/HRC/24/41/Add.2, respectively). The Special Rapporteur is in the process of drafting his report on the situation of indigenous peoples in Panama, following a visit to that country in July 2013, and that report will be presented to the Human Rights Council in 2014.

14. In addition, in March 2013, the Special Rapporteur held a consultation in Kuala Lumpur, Malaysia with indigenous representatives from countries throughout the Asia region, and on the basis of these consultations, prepared a report, which will be published as an addendum to the present report (A/HRC/24/41/Add.4). The Special Rapporteur was very pleased with the comprehensive information that was provided by indigenous representatives during the consultation, and was grateful for the assistance of the Asia Indigenous

Peoples Pact and the Malaysia National Human Rights Institution, SUHAKAM, for their work in hosting and organizing that event.

15. Later this year the Special Rapporteur will be carrying out a visit to Peru, and he hopes also to receive confirmation from Canada for dates to visit that country before the end of 2013. He also looks forward to visiting one or two additional countries before his mandate ends in May 2014.

### 3. Examination of specific allegations of human rights violations

16. On an on-going basis, the Special Rapporteur has responded to specific cases of alleged human rights violations. A fundamental aspect of the mandate of the Special Rapporteur is to “To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples” (Council resolution 15/14, paragraph 1 (b)).

17. Within the resources available to him, the Special Rapporteur does his best to act on all submissions that include complete and well-documented information, in cases that involve violations of the rights of indigenous peoples that may not be adequately addressed by domestic authorities. Full copies of letters sent and replies received are contained in the Joint Communications Report of Special Procedures Mandate Holders issued periodically by the Office of the United Nations High Commissioner for Human Rights (A/HRC/22/67 and Corrs. 1 and 2, and A/HRC/23/51). Over the past year, the Special Rapporteur examined a total 37 cases in the following countries: Australia, Bangladesh, Botswana, Brazil, Cameroon, Canada, Chile, Colombia, Costa Rica, Ethiopia, Guatemala, Israel, Kenya, Mexico, Nepal, New Zealand, Nicaragua, Peru, Philippines, Russian Federation, Suriname, United Republic of Tanzania, United States of America, and the Bolivarian Republic of Venezuela.

18. The Special Rapporteur has placed a special importance on following up on the situations reviewed, issuing in numerous cases observations and recommendations to the Governments concerned. Summaries of all letters sent by the Special Rapporteur and replies received by Governments since last reporting to the Human Rights Council, as well as observations and recommendations issued by the Special Rapporteur in these cases, are contained in an addendum to the present report (A/HRC/24/41/Add.5).

19. The cases addressed over the past year reveal that many ongoing barriers to the full enjoyment of the rights of indigenous peoples persist throughout the world. These cases involve threats to the enjoyment of indigenous peoples' rights to their traditional lands and resources, acts of violence against indigenous peoples and individuals, including against indigenous women and children, the forced removal of indigenous peoples for large-scale development projects, the suppression of indigenous peoples own forms of organization and self-



government, and conditions of poverty and related social ills that are perpetuated by patterns of discrimination.

20. Also, on several occasions since last reporting to the Human Rights Council, the Special Rapporteur has issued public statements concerning situations that, in his view, require immediate and urgent attention by the Governments concerned. Public statements were issued in relation to the following situations: acts of violence between indigenous Tagaeri-Taromenane and Waorani peoples of the Yasuní Biosphere Reserve, Ecuador; rising tensions and violence against indigenous peoples by non-indigenous settlers in the Bosawas Reserve, Nicaragua; protests by First Nations and a month-long hunger strike by the Chief of the Attawapiskat First Nation, in Canada; violent clashes between indigenous protesters and members of the military that resulted in the death of six indigenous persons, in Guatemala; the imminent sale of land that encompasses a site of spiritual significance to indigenous peoples in South Dakota, United States; and a process of dialogue to address the military presence in the Nasa territory, Colombia.

#### 4. Thematic studies

21. For the past three years, the thrust of the thematic focus of the Special Rapporteur has been on the issue of extractive industries affecting indigenous peoples. The Special Rapporteur's last report on this issue is contained in the main report presented to the Human Rights Council this year. As detailed in the main report, over the past year, the Special Rapporteur has participated in numerous meetings to gather perspectives on the issue from indigenous peoples, Governments, and companies, including meetings in Australia, Norway, Sweden, the United Kingdom of Great Britain and Northern Ireland, and the United States. Additionally, as part of his study, he launched an online forum to gather examples of specific extractive projects that are being carried out in or near indigenous peoples territories. The Special Rapporteur is grateful for the numerous contributions provided through these media from indigenous peoples, Governments, companies, and non-governmental organizations from around the world.

22. A second area of thematic focus of the Special Rapporteur has been to provide comments on the need to harmonize the myriad activities within the United Nations system that affect indigenous peoples. In 2012, the Special Rapporteur's report to the General Assembly (A/67/301) provided an overview of the various processes and programmes within the United Nations system that are of particular relevance to indigenous peoples or about which indigenous peoples have expressed concern. These include processes and programmes related to UNESCO; the Food and Agriculture Organization of the United Nations; the World Intellectual Property Organization; and the World Bank Group; as well as processes carried out within the framework of United Nations treaties like the

Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.

23. The Special Rapporteur notes that the United Nations has done important work to promote the rights of indigenous peoples but that greater effort is needed to ensure that all actions within the United Nations system that affect indigenous peoples are in harmony with international standards, particularly those standards articulated in the United Nations Declaration on the Rights of Indigenous Peoples.