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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya

Summary

The present report is the third annual report submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, pursuant to Human Rights Council resolution 6/12. In the report, the Special Rapporteur presents a summary of the activities carried out during the second year of his mandate, including cooperation with other international and regional mechanisms in the field of indigenous rights, and the activities carried out in his four principal areas of work: promoting good practices; thematic studies; country reports; and communications relating to alleged human rights violations.

The Special Rapporteur devotes the second half of the report to an analysis of corporate responsibility with respect to indigenous rights, in the framework of the international community's expectations in that regard.

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I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, pursuant to Human Rights Council resolution 6/12.

2. The first part of the report presents a summary of the activities carried out by the Special Rapporteur pursuant to his mandate. In the second part of the report, the Special Rapporteur presents an analysis of corporate responsibility in relation to respect for the human rights of indigenous peoples, in the framework of existing international standards. The report also presents the activities and evaluations carried out by the Special Rapporteur within his areas of work (see paragraphs 10 to 25).

3. 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 programme at the University of Arizona for their ongoing 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 (NGOs), and others that have cooperated with him over the past year in the implementation of his mandate. The Special Rapporteur would, lastly, like to thank the NGOs Kreddha and UNESCO-Catalunya for their support in the preparation of the present report.

II. Summary of activities

A. Cooperation with other global and regional mechanisms and bodies

4. During the second year of his mandate, the Special Rapporteur continued his cooperation with the other United Nations system mechanisms dealing with the theme of indigenous peoples, in particular, the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples, pursuant to the mandate of the Human Rights Council.¹

5. As part of his efforts to coordinate and cooperate with those mechanisms, in January 2010, the Special Rapporteur participated in a meeting in New York together with representatives of the Permanent Forum and the Expert Mechanism. At that meeting information was exchanged concerning the respective working agendas, and ways of channelling their different activities and making them more effective were discussed.

6. With a view to assisting the Expert Mechanism in its work, the Special Rapporteur participated, together with members of the Expert Mechanism, in a regional consultation in Thailand in January 2010, organized by the NGO Asia Indigenous Peoples Pact. At the meeting, the Special Rapporteur presented his contribution to the study that the Expert Mechanism is currently conducting on indigenous peoples' right to participation.

7. During the past year, the Special Rapporteur has also endeavoured to coordinate efforts with other human rights bodies in the United Nations system. To that end, he participated in meetings in Trinidad and Tobago, in December 2009, convened by the Office of the United Nations High Commissioner for Human Rights, and in Thailand, in

¹ Human Rights Council resolution 6/12, para. 1 (e).

January 2010, convened by the United Nations Development Programme and the Office of the High Commissioner.

8. As part of the coordination efforts, meetings were held, parallel to the sessions of the Permanent Forum and the Expert Mechanism, with representatives of indigenous peoples and organizations, which gave them an opportunity to inform the Special Rapporteur about the specific situations in their respective countries. Those meetings took place during the ninth session of the Permanent Forum, in April 2010, and the third session of the Expert Mechanism, in July 2010. At those sessions, the Special Rapporteur also had the opportunity to meet with representatives of States and of United Nations bodies to address matters relating to his mandate.

9. In the regional sphere, the Special Rapporteur met in 2010 with members of the Inter-American Commission on Human Rights to discuss various forms of coordination and cooperation on aspects relating to his mandate. Similarly, in June 2010, he participated in a seminar, organized by the secretariat of the Inter-American Commission, on training North American indigenous leaders in the area of international and inter-American human rights mechanisms.

B. Areas of work

10. In conjunction with his efforts to cooperate with other international mechanisms, the Special Rapporteur has continued to carry out work in four principal areas: promoting good practices; thematic studies; country reports; and communications relating to alleged human rights violations.

1. Promoting good practices

11. Pursuant to the mandate entrusted to him by the Human Rights Council to “identify ... and promote best practices”,² the Special Rapporteur has continued to promote legal, administrative and programmatic reforms at the domestic level to give effect to the standards of the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments.

12. The Special Rapporteur has on occasion undertaken these promotion activities at the request of Governments which have asked him to provide technical assistance for domestic law reform. For example, the Government of Ecuador invited the Special Rapporteur to visit the country in December 2009 to provide technical assistance in the drafting of new legislation aimed at harmonizing indigenous and ordinary jurisdictions. That visit also provided an opportunity to follow up the visit that the Special Rapporteur had made to the country the previous year, as a result of which he had submitted a series of observations on the constitutional reform process that had then been taking place in the country.³ In the wake of his follow-up activities, the Special Rapporteur prepared a report which contained additional observations and recommendations to the Government.⁴

13. Among the Special Rapporteur’s efforts to promote good practices was his dialogue with the Governments of States which, in 2007, had not voted in favour of the adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples. In that regard, the Special Rapporteur notes with satisfaction that the Government

² Ibid., para. 1 (a).

³ A/HRC/9/9/Add.1, Annex 1.

⁴ A/HRC/15/37/Add.7.

of New Zealand officially declared its support for the Declaration at the most recent session of the Permanent Forum.

14. The Special Rapporteur also wishes to express his satisfaction at the statement made by the representative of the United States, also during the session of the Permanent Forum, that his Government had revised its position with regard to the Declaration in the light of its domestic legislation and policies. Similarly, the Special Rapporteur takes note that on 3 March 2010, the Governor General of Canada, in her Speech from the Throne, said that Canada “will take steps to approve” the Declaration “in a manner consistent with the Constitution and laws of Canada”. Once these measures have taken effect, the United States and Canada will join the great majority of Member States of the United Nations that support the Declaration, and opposition to it will become a thing of the past.

15. In May 2010, the Special Rapporteur participated in a seminar on “Interculturality and the gas and petroleum industry in Latin America and the Caribbean”, held in Cartagena, Colombia, and sponsored by the Asociación Regional de Empresas de Petróleo y Gas Natural en Latinoamérica y el Caribe (ARPEL). The seminar provided the Special Rapporteur with an opportunity to present to representatives and heads of petroleum and gas companies in the region his considerations with respect to the responsibility of private companies to be aware of and respect international standards concerning the rights of indigenous peoples.

16. In July 2010, the Special Rapporteur participated in an advisory capacity in the process of drawing up a draft bill on consultation with indigenous peoples, which is currently under way in Colombia. The Special Rapporteur’s advisory services were part of an initiative by the Colombia Office of the United Nations High Commissioner for Human Rights which, at the request of the Working Party on Prior Consultation of the Ministry of the Interior and Justice of Colombia, is carrying out a participatory process in compliance with the State’s duty to consult indigenous peoples and Afro-Colombian communities.

2. Thematic studies

17. Recognizing the central role played by the Expert Mechanism on the Rights of Indigenous Peoples in the preparation of thematic studies, the Special Rapporteur has continued to support the Expert Mechanism’s work in that regard (see paragraph 6 above). In addition, the Special Rapporteur, just as he had done in previous years, has continued to pursue his own investigations into questions which tend to arise repeatedly in relation to the different activities he carries out under his mandate and which reflect widespread patterns or common problems faced by indigenous peoples in the enjoyment of their human rights. During the past year, the Special Rapporteur has taken special interest in analysing the role of companies with regard to indigenous rights, a question that is examined in detail in the second part of this report (see paragraphs 26 to 91 below).

18. As part of that investigation, and following a recommendation by the Permanent Forum, the Special Rapporteur suggested and participated in a meeting of experts held in October 2009 in Sitges, Spain, and sponsored by the NGOs Kreddha and UNESCO-Catalunya, during which the participants analysed sources of conflicts arising from extractive activities carried out by companies in indigenous territories, and possible ways of preventing and resolving such conflicts. The meeting debates served as a highly valuable contribution to the preparation of the present report.

19. Among the other themes that the Special Rapporteur is studying or plans to study are legal pluralism and indigenous customary law, the situation of voluntarily isolated indigenous peoples, and the situation of indigenous communities and individuals living in urban areas.

3. Country reports

20. During this period, the Special Rapporteur has continued to examine, and prepare reports on, the human rights situation of indigenous peoples in specific countries, at the invitation of their respective Governments.

21. Since submitting his previous report to the Human Rights Council, the Special Rapporteur has prepared reports on the situation of indigenous peoples in Botswana, Colombia and Australia,⁵ and has visited the Russian Federation,⁶ the Sápmi region, which covers the traditional territory of the Sami people in the Nordic countries,⁷ and New Zealand,⁸ with a view to gathering information on the general situation of the indigenous people in those countries. In the past year, the Special Rapporteur has received positive signs from the Governments of the Republic of the Congo and El Salvador concerning possible visits in the future.

4. Cases of alleged human rights violations

22. The Special Rapporteur has continued, pursuant to his mandate from the Council, to gather, request, receive and exchange “information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms”.⁹ To that end, the Special Rapporteur continues his practice of formulating long-term strategies in the context of a “regular cooperative dialogue with all relevant actors”.¹⁰

23. In some of the cases examined, the Special Rapporteur has drafted a series of detailed observations and recommendations regarding the action which, in his view, States and, as appropriate, other interested parties should take to address those situations, in the framework of the relevant international rules. These observations are included in his report on communications (Add.1), together with summaries of the Special Rapporteur’s communications to Governments and the replies received, or in special reports. By this practice, the Special Rapporteur endeavours to identify the substantive issues in specific cases and to encourage cooperation between States and indigenous peoples in the search for constructive solutions to those problems.

24. It was in that context that, during his visit to Australia in August 2009, the Special Rapporteur conducted a special follow-up to earlier communications concerning the effects on indigenous rights of the Australian Government’s Northern Territory Emergency Response. The Special Rapporteur prepared a special report containing his observations on that matter, which was annexed to his report on the situation of indigenous peoples in Australia.¹¹

25. Similarly, as part of his work to follow up specific allegations, the Special Rapporteur visited Guatemala, in June 2010, to investigate the situation of indigenous peoples affected by the Marlin mine in the Sipacapa and San Miguel Ixtahuacán districts. During his visit, the Special Rapporteur also examined general questions concerning

⁵ A/HRC/15/37/Add.2, 3 and 4, respectively.

⁶ A/HRC/15/37/Add.5.

⁷ A/HRC/15/37/Add.6.

⁸ A/HRC/15/37/Add.9.

⁹ Human Rights Council resolution 6/12, para. 1 (b).

¹⁰ *Ibid.*, para. 1 (f).

¹¹ A/HRC/15/37/Add.4, appendix B.

application of the principles of consultation with indigenous peoples in the country, in particular in relation to extractive industries.¹²

III. Corporate responsibility with respect to indigenous rights

26. One of the questions that arises most frequently in the course of the different activities carried out by the Special Rapporteur under his mandate is the impact of corporate activities and in particular those of transnational corporations on the rights of indigenous people. After analysing various situations in different parts of the world, the Special Rapporteur considered that it was necessary to focus his thematic investigation during the past year on that question, with a view to clarifying the responsibility of business in this specific sphere, in accordance with international rules.

27. The role of companies with regard to human rights is a complex question which has provoked growing interest on the part of the international community. This interest has been reflected *inter alia* by the establishment by the Commission on Human Rights and the subsequent renewal by the Human Rights Council of the mandate of the Special Representative on the issue of human rights and transnational corporations and other business enterprises.¹³ The Special Representative has shown particular interest in the role of companies with regard to the human rights of indigenous peoples.¹⁴ The Special Rapporteur and the Special Representative's team have begun to work together on this issue, as was seen at the Sitges expert meeting on mechanisms to prevent and resolve conflicts arising from extractive activities (see paragraph 18 above).

28. Despite the common elements characterizing this question, the role of companies with regard to indigenous rights includes a number of specific aspects, as demonstrated by the various initiatives launched by the former Working Group on Indigenous Peoples, the Permanent Forum on Indigenous Issues¹⁵ and the Office of the United Nations High Commissioner for Human Rights.¹⁶ The impact of the so-called "megaprojects" on indigenous peoples was also analysed in a thematic report prepared by the former Special Rapporteur.¹⁷ The various international initiatives carried out to date have analysed how lack of awareness of indigenous rights gives rise repeatedly to serious situations of dispossession, environmental contamination, forced displacement and permanent damage to the culture, spirituality and traditional knowledge of indigenous peoples.

¹² A/HRC/15/37/Add.8.

¹³ Human Rights Council resolution 8/7.

¹⁴ See summary report on the consultations held by the Special Representative on the issue of human rights and transnational corporations and other business enterprises (Bogota, 18 and 19 January 2007): www2.ohchr.org/english/issues/trans_corporations/docs/Ruggie-Latin-America-Consultation-18-19-January-2007.pdf.

¹⁵ See report of the international workshop on perspectives of relationships between indigenous peoples and industrial companies (Salekhard, Russian Federation), 1 to 4 July 2007: www.un.org/esa/socdev/unpfii/documents/workshop_PRIPIC_Report.pdf; and report of the international expert group meeting on extractive industries, indigenous peoples' rights and corporate social responsibility (Manila, 27 to 29 March 2009) (E/C.19/2009/CRP.8).

¹⁶ See report of the workshop on indigenous peoples, private sector natural resources, energy and mining companies and human rights (Geneva, 5 to 7 December 2001) (E/CN.4/Sub.2/AC.4/2002/3), and report on the international workshop on natural resource companies, indigenous peoples and human rights: setting a framework for consultation, benefit-sharing and dispute resolution (Moscow, 3 and 4 December 2008) (A/HRC/EMRIP/2009/5).

¹⁷ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (E/CN.4/2003/90).

29. With ever increasing frequency, as discussed at the expert meeting in Sitges, corporate activities in indigenous territories are causing serious social conflicts, which spark circles of violence and, in turn, new human rights violations. In such situations, as the Special Rapporteur has already demonstrated, indigenous peoples are not the only victims: social conflicts relating to corporate activities in indigenous territories have a negative impact on the economic interests and the image of the corporations themselves, and on the interests of the Governments concerned.¹⁸

30. Such situations are frequently linked to an absence of adequate knowledge on the part of companies about their responsibility with regard to the rights of indigenous peoples and the contents of those rights.¹⁹ In many cases, companies tend to argue that their responsibility is limited to compliance with the legislation in force in the countries in which they are operating; however, this is clearly a limited argument and one that does not provide adequate solutions in cases where existing standards are inadequate or non-existent in relation to international standards or, simply, where the indigenous peoples affected are not officially recognized as such.

31. Faced with the constant refusal to recognize their rights in the context of corporate activities on their territories, many indigenous peoples have demonstrated their opposition to, or even their overt rejection of, such activities. However, as has been demonstrated in many international and national fora, the majority of indigenous peoples and communities are not opposed to corporate activity per se or to the potential benefits of such activity for their own economic and social development. Indeed, experience has shown that corporate activity may become a key factor in indigenous peoples' development when they themselves can control such activity in the exercise of their rights to autonomy and self-government. What indigenous people are opposed to, understandably, is development which is carried out without respect for their basic rights, which brings with it only adverse impacts and which does not result in any visible benefits for their communities.

32. The Special Rapporteur considers therefore that there is an urgent need to reach a minimum understanding of what corporate responsibility is with regard to the rights of indigenous peoples. Such a debate should be based on the same premises as the current international and multilateral debate on corporate responsibility and human rights in general.

A. Corporate responsibility with respect to human rights

33. While there is at present no clear international legal framework concerning corporate responsibility with respect to human rights, the international community as a whole has at least reached a certain normative consensus with regard to the existence of some type of responsibility. This consensus is reflected in the many regulatory and self-regulatory frameworks governing corporate responsibility that have appeared in recent decades, at

¹⁸ A/HRC/6/12, para. 56.

¹⁹ This aspect was highlighted by the Special Rapporteur, for example, in 2009 with regard to the case of the construction of the hydroelectric project Chan 75 in Panama. See report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Addendum: Observations on the situation of the Charco la Pava community and other communities affected by the Chan 75 hydroelectric project in Panama (A/HRC/12/34/Add.5), paras. 54 to 59.

both the international and domestic level, as well as the standard-setting debate currently under way.²⁰

34. Above and beyond their legal status, the various existing instruments and mechanisms clearly reflect the existence of social expectations with regard to corporate responsibility and the need to exercise it in relation to human rights. Current international debate on the subject tends to emphasize that corporate responsibility with respect to human rights is related to but fundamentally distinct from States' responsibilities.²¹ Indeed, the conceptual framework drawn up by the Special Representative of the Secretary-General distinguishes between three types of duties: the State duty to protect, the corporate responsibility to respect and the shared responsibility to remedy.²²

35. The State has the duty to protect against potential human rights abuses by business enterprises, including transnational corporations, as well as the duty to investigate and punish such abuses.²³

36. Companies, for their part, have a general duty to respect international human rights rules, within the framework of the due diligence which must govern their activities.²⁴ As the Special Representative of the Secretary-General has observed, if companies are to exercise human rights due diligence, they must consider three sets of factors.

37. The first is the country context in which their business activities take place, to highlight any specific human rights challenges it may pose. The second is what human rights impact their own activities may have within that context, for example, in their capacity as producers, service providers, employers and neighbours. The third is whether they might contribute to abuse through relationships connected to their activities, such as with business partners, suppliers, State agencies and other non-State actors.²⁵

38. The duty of companies to respect human rights and the concept of due diligence in that regard are reflected in the United Nations Global Compact, the most important international initiative to date aimed at ensuring corporate social responsibility. Principles 1 and 2 of the Global Compact state that businesses "should support and respect the protection of internationally proclaimed human rights" and should ensure that "they are not complicit in human rights abuses".²⁶

B. International standards relating to corporate responsibility to respect indigenous rights

39. International instruments relating to indigenous rights primarily deal, as do human rights instruments in general, with State responsibility. That is the case of the United Nations Declaration on the Rights of Indigenous Peoples and Convention 169 of the International Labour Organization (ILO) on indigenous and tribal peoples in independent countries. Along with States' obligations, these instruments also set out rights that both companies and other private stakeholders must respect.

²⁰ This subject is analysed in detail in the reports of the Special Representative. See, in particular, documents E/CN.4/2006/97, A/HRC/4/35 and A/HRC/8/5, of 2006, 2007 and 2008 respectively.

²¹ E/CN.4/2006/97, paras. 56 to 69.

²² A/HRC/8/5.

²³ See A/HRC/4/35, paras. 10 to 18, and A/HRC/8/16, paras. 27 to 50 and 82 to 103.

²⁴ *Ibid.*, paras. 51 to 81.

²⁵ A/HRC/8/16, para. 19.

²⁶ See www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

40. In its General Recommendation XXIII on the rights of indigenous peoples, the Committee on the Elimination of Racial Discrimination placed special emphasis on the problem of the loss of indigenous lands and resources to, *inter alia*, “commercial companies” and the threat that such loss posed to the “preservation of their culture and their historical identity”.²⁷ That concern has been duly reflected in the practice of the Committee and of other treaty bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights which, as reported by the Special Representative, have emphasized the need for States to take measures to regulate and investigate the activities of extractive industries and, as appropriate, to sanction them for any abuses of indigenous rights.²⁸

41. Regulatory or self-regulatory frameworks governing corporate responsibility with regard to indigenous peoples have been more fully developed than in other specific human rights fields.²⁹ Various international financial institutions, including the World Bank and its International Finance Corporation (IFC), have developed special performance requirements or policies to encourage public or private companies to ensure a minimum level of respect for international indigenous rights standards in their activities, in such key areas as consulting or territorial rights.³⁰

42. Various corporate social responsibility (CSR) initiatives by civil society or by the corporate sector, referring either to individual or sectoral responsibility, include specific standards concerning respect for and promotion of indigenous rights. For example, under its Principles and Criteria for Forest Management, used for forest certification, the Forest Stewardship Council (FSC) has included respect for the customary rights of indigenous peoples to own, use and manage their lands and territories.³¹ The multisectoral Global Reporting Initiative (GRI) also includes indigenous rights in its guidelines for the voluntary submission of sustainability reports³² and specifically in relation to the mining and metals sector.³³ The International Council on Mining and Metals (ICMM), an international organization which brings together leading companies in the sector, has adopted a position statement on mining and indigenous peoples.³⁴

43. According to the information gathered by the Special Representative of the Secretary-General on human rights and transnational corporations, the corporate social responsibility policies of individual private companies, especially the extractive industries, include broader commitments to indigenous communities than to other social sectors. Such commitments range from respect for local cultures and communities, to improving the economic conditions of those communities and, at times, to requiring free, prior and informed consent.³⁵

²⁷ A/52/18, annex V, para. 3.

²⁸ A/HRC/4/35/Add.1, para. 17.

²⁹ *Loc. cit.* (see footnote 14 above).

³⁰ World Bank, Operational Policy OP 4.10 and Bank Procedure BP 4.10 (2005); IFC, Performance Standard PS-7, Asian Development Bank, Social Requirement SR-2 (1998, under revision); Inter-American Development Bank, Operational Policy OP-765 (2006); European Bank for Reconstruction and Development, Performance Requirement PR-7 (2008).

³¹ Forest Stewardship Council (FSC), Principles and Criteria for Forest Management (2002): www.fsc.org/standards_criteria/.

³² Available at: www.globalreporting.org/ReportingFramework/SectorSupplements/MiningAndMetals/.

³³ Available at: www.globalreporting.org/NR/rdonlyres/54851C1D-A980-4910-82F1-0BDE4BFA6608/2729/G3_SP_RG_Final_with_cover.pdf.

³⁴ ICMM, position statement on mining and indigenous peoples (2009), available at: www.icmm.com/document/293.

³⁵ A/HRC/4/35/Add.3, paras. 60 to 62.

44. Of particular interest is the fact that a series of important official initiatives have been taken nationally to encourage corporate responsibility with regard to indigenous peoples, either within the countries themselves or in other countries. The Australian Human Rights Commission, for example, has actively promoted negotiations between business and indigenous peoples in the framework of corporate social responsibility.³⁶ The Human Rights Compliance Assessment (HRCA), developed by the Danish Institute for Human Rights, includes a set of indigenous rights criteria, based on ILO Convention No. 169.³⁷ Some policies for bilateral cooperation with indigenous peoples, such as those of the Danish International Development Assistance Agency (DANIDA),³⁸ or the Spanish Agency for International Development Cooperation (AECID),³⁹ also include a commitment to promote corporate responsibility, including of multinational corporations, in this area.

45. The growing interest shown by various stakeholders in the establishment of regulatory or self-regulatory frameworks in relation to indigenous rights demonstrates awareness of the adverse effects of specific types of business practices on indigenous peoples, and the expectation, increasingly widely shared, that companies bear responsibilities for respecting indigenous rights, as guaranteed by existing international standards. The international community expects companies, as part of the due diligence they must exercise in relation to human rights, to be proactive by identifying the rights of indigenous peoples in the areas in which they operate and by determining how those peoples would be affected by their activities. There is at the same time a clear expectation that companies, in carrying out their activities, will respect indigenous rights, fostering rather than blocking States' compliance with the obligation to protect those rights.

C. Due diligence and the duty to respect indigenous rights

46. In the context of indigenous peoples, the corporate responsibility to respect human rights means that companies must exercise due diligence by identifying, prior to commencing their activities, various matters relating to the basic rights of indigenous peoples, and by paying adequate attention to those matters as the activities are being carried out. Such matters include recognition of the existence of indigenous peoples and of their own social and political structures; indigenous possession and use of land, territory and natural resources; exercise by the State of its duty to consult indigenous peoples in relation to activities that might affect them, and the related responsibility of business; impact studies and mitigation measures; and benefit sharing with indigenous peoples.

47. As observed by the Special Representative of the Secretary-General, due diligence is not limited to respect for the domestic regulations of States in which companies operate, which are inadequate in many cases, but should be governed by the international standards that are binding on those States and on the international community as a whole.⁴⁰ Consequently, companies wishing to exercise due diligence with respect to indigenous rights should be guided in their activities by the rights recognized under the relevant international rules, including the United Nations Declaration and ILO Convention No. 169, even if they operate in countries that have not formally accepted or ratified these rules.

³⁶ See: www.hreoc.gov.au/social_justice/publications/corporateresponsibility/index.html.

³⁷ See: <https://hrca.humanrightsbusiness.org/>.

³⁸ DANIDA, *Strategy for Danish Support to Indigenous Peoples* (2004): www.um.dk/Publikationer/Danida/English/DanishDevelopmentCooperation/StrategyforDanishSupport/strategyforDanishSupport.pdf, p. 16.

³⁹ AECID, *Estrategia Sectorial de la Cooperación Española con los Pueblos Indígenas* (2007): <http://194.140.3.20/export/sites/default/web/galerias/programas/Indigena/descargas/ecepi.pdf>, p. 67.

⁴⁰ A/HRC/8/5, para. 54.

48. Due diligence also means that companies must not contribute to States' failure to meet their international obligations in relation to indigenous rights, nor should they endeavour to replace States in the fulfilment of those obligations. This point is particularly relevant in relation to the State's duty to consult indigenous peoples, a procedural obligation associated with the duty to protect indigenous peoples' substantive rights (see paragraphs 60 to 70 below).

1. Recognition of indigenous peoples

49. One of the fundamental difficulties facing companies that operate in indigenous territories, or whose operations affect those territories, is the absence of formal recognition of indigenous peoples by the State in which they live, or recognition limited solely to certain groups. Nevertheless, a generally accepted principle of international human rights law holds that the existence of distinct ethnic, linguistic or religious groups, including indigenous peoples, can be established by objective criteria and cannot depend on a unilateral decision by a State.⁴¹

50. Businesses cannot use limited recognition, or absence of explicit recognition, of indigenous peoples in the countries in which they operate as an excuse not to apply the minimum international standards applicable to indigenous rights, including in cases where States are opposed to the application of such standards. Due diligence therefore requires that companies identify in advance the existence of indigenous peoples potentially affected by their activities and how they might be affected by such activities.

51. This responsibility has been expressly included in World Bank and International Finance Corporation (IFC) policies concerning indigenous peoples. World Bank policy emphasizes that the term indigenous peoples is used in a generic sense to refer to "a distinct, vulnerable, social and cultural group" with its own special characteristics, and takes note of the fact that such peoples may be referred to by different terms depending on the specific context.⁴² In relation to that question, both policies require borrowers to conduct technical studies prior to their operations, as necessary.⁴³

52. In the absence of a universally accepted definition, companies may have recourse to the definition provided in ILO Convention No. 169, which has been also been used by States that have not ratified the Convention in their legislation or policies concerning indigenous people, and by numerous international organizations and some companies. Other instruments available to businesses for the identification of indigenous peoples potentially affected by their activities, including in the absence of official recognition, are the criteria defined by World Bank and International Finance Corporation (IFC)⁴⁴ policies.

2. Rights to land, territories and natural resources

53. A second feature of the due diligence incumbent on companies whose activities have a potential impact on indigenous peoples is identification of indigenous forms of ownership and use of land, territories and natural resources, a question of vital importance to the effective enjoyment of human rights by indigenous peoples.

54. According to international standards and practice, indigenous people have a sui generis right to communal ownership of the land, territories and natural resources which

⁴¹ Human Rights Committee, general comment No. 23: "Rights of minorities (art. 27)", CCPR/C/21/Rev.1/Add.5 (1994), para. 5.2.

⁴² World Bank, OP 4.10, paras. 3 and 4.

⁴³ Ibid., para. 4; PS-7, para. 6.

⁴⁴ OP 4.10, para. 4; PS-7, para. 5.

they have traditionally used or occupied, that is, in accordance with their culturally distinct patterns of use and occupation (Declaration, arts. 24–29; ILO Convention No. 169, arts. 13–17). Such patterns include a broad spectrum of activities not necessarily limited to economic subsistence activities but which also include cultural and spiritual uses of the territory, and the resources necessary for their economic and social development as peoples. According to the international normative consensus, the right of indigenous peoples to lands, territories and natural resources originates in their own customary law, values, habits and customs and, therefore, is prior to and independent of State recognition in the form of an official property title.

55. The absence of official recognition of indigenous communal ownership, either because such ownership has failed to be established through demarcation or title granting processes or any other legal mechanism, or owing to the lack of adequate legislation, cannot be used as grounds or as an excuse by companies that claim to be exercising due diligence in relation to indigenous rights. Due diligence therefore requires that companies conduct an independent assessment of the rights to which indigenous people may lay claim in accordance with the criteria laid down in international rules, especially if such criteria are not fully applicable under domestic law.

56. The same line of reasoning informs World Bank and IFC policies concerning indigenous peoples, according to which a set of special criteria apply when borrowers' projects have any kind of impact on the territories or natural resources traditionally used by indigenous peoples. For example, projects which depend on the recognition of indigenous communal ownership or which involve land acquisition, require prior documentation, prepared by experts, of indigenous patterns of land use and occupation. Under these policies, indigenous customary land tenure must be treated on a equal footing with legally titled ownership.⁴⁵

57. Given that customary land tenure is one of the specific features characterizing the large majority of indigenous peoples worldwide, and a basic factor in the international recognition of their rights, the mere existence of such groups in the areas where companies plan to carry out their activities must be considered by those companies as a strong indication that those groups have *some sort of rights* over the land and resources that they occupy or otherwise use. Furthermore, companies cannot, in the exercise of due diligence, assume that the absence of official recognition of indigenous communal ownership rights implies that such rights do not exist.

58. It is also particularly important to include in corporate activities special guarantees of compensation for the removal of indigenous communities and peoples from their lands, including in projects that involve the acquisition of indigenous lands held under individual titles. In such cases, international standards require that alternatives that limit or avoid such relocation should be sought and that compensation should be provided as a priority in the form of other land (Declaration on the Rights of Indigenous Peoples, art. 10; ILO Convention No. 169, art. 16). Moreover, under the Declaration, States must obtain the consent of indigenous peoples before they can authorize their collective relocation (art. 10).

59. Due diligence exercised by business in relation to indigenous lands, territories and resources requires that companies bring to bear an intercultural understanding that goes far beyond mere legal considerations. International standards have highlighted the special relationship existing between indigenous peoples and their traditional territories, which form the basis of their distinct identity and culture. Companies must understand that, independent of the rights over their lands or resources to which they may lay claim under

⁴⁵ OP 4.10, para. 17; PS-7, para. 13.

international and national rules, indigenous peoples have maintained, and continue to maintain, ties to their traditional territories by participating in their control and management. These ties are, moreover, collective, and therefore go far beyond the individual rights of the members of these groups.

3. The State's duty to consult, and related corporate responsibilities

60. In his previous report to the Human Rights Council, the Special Rapporteur stressed that the failure of States to comply with the duty to consult with indigenous peoples before carrying out activities that affected them, and in particular in relation to corporate projects likely to have an impact on indigenous peoples, had regularly given rise to "conflictive situations, with indigenous expressions of anger and mistrust, which, in some cases, have spiralled into violence".⁴⁶

61. According to well-established principles of international law, the duty to consult indigenous peoples, like other human rights obligations, is a responsibility that falls mainly to States.⁴⁷ However, in practice, States often delegate companies, formally or informally, to carry out such consultations. Delegation, besides not absolving the State of its ultimate responsibility to consult, "may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be in complete alignment with the public interest or the best interests of the indigenous peoples concerned".⁴⁸ Moreover, in most cases, companies, even while acting in good faith, do not always have an adequate understanding of the relevant international standards and do not have internal codes of conduct reflecting them.⁴⁹

62. What is the relationship between the State's duty to consult and consultations carried out by private companies? First, in accordance with international rules, States must consult indigenous peoples prior to the authorization of any measure that may have a direct impact on their rights, particularly in relation to activities carried out in indigenous traditional territories (Declaration, arts. 19, 32 (2); ILO Convention No. 169, arts. 6 and 15). Consultations must be conducted in accordance with the criteria laid down in international standards, which were analysed by the Special Rapporteur in his previous report and which, in some cases, require the consent of the indigenous peoples concerned.⁵⁰

63. Where private companies are to be granted the legal right to carry out activities (either through an actual concession, a production sharing contract or a service delivery agreement), the State must carry out consultations in the initial phases of the project, ideally during the inventory phase and certainly before the invitation to tender and the awarding of the concession. The need for prior consultations is even more evident in the case of public corporation activities.

64. Consultation is a process of dialogue or negotiation and, depending on the specific circumstances of the case, should not be viewed as a single event. In many cases, especially corporate projects such as dam and infrastructure construction, or exploitation of mining resources or hydrocarbons, various administrative decisions may need to be taken, for example approval of environmental licences. Where such decisions involve State institutions and entail modifications to the initial plan on which the indigenous peoples concerned have already been consulted, the State must so inform them and conduct further consultations.

⁴⁶ A/HRC/12/34, para. 36.

⁴⁷ *Ibid.*, para. 55.

⁴⁸ *Ibid.*, para. 55.

⁴⁹ *Ibid.*, paras. 55 to 57.

⁵⁰ *Ibid.*, para. 47.

65. Among the due diligence measures that they must exercise to respect indigenous rights, companies must ensure that they, through their own acts, do not contribute to any act or omission on the part of the State that could lead to violations of those rights. Thus, companies must not accept any award or commence any activity if the State has failed to hold prior and adequate consultations with the indigenous communities concerned,⁵¹ and companies, in exercising due diligence, may not simply assume that such consultations have taken place prior to the award being granted. Likewise, companies must not hold consultations that endeavour to or actually replace the State's obligation to consult with indigenous peoples in relation to activities affecting them.

66. Businesses, in the exercise of due diligence with respect to basic human rights principles, should therefore abstain from operating in countries in which consultation with indigenous peoples has not been duly established in general terms or in relation to the specific activity for which the award is made, in conformity with international rules.

67. Independent of States' basic responsibility to consult with indigenous peoples prior to the implementation of measures affecting them, and the assumption that States alone should perform that task, companies also bear a responsibility to respect indigenous peoples' right to participate in decisions with regard to such measures, including through the holding of consultations to keep them informed. Such consultations are particularly important in connection with impact studies, compensation measures and benefit sharing (see paragraphs 71 to 80 below). Because they involve one of the State's primary responsibilities, consultations carried out by companies should be supervised by the State.⁵²

68. Ongoing consultation and dialogue with the communities concerned can also foster transparency through the dissemination of information, and establish the confidence necessary to gain support for the project and avoid potential conflicts. Likewise, consultations with indigenous peoples can serve as an early warning system with regard to possible negative impacts or problems arising from the project, so that measures can be taken to avoid similar problems in the future.

69. One excellent way to ensure that companies respect indigenous peoples' right to participate in decisions concerning the measures affecting them is to establish permanent institutional fora for consultation and dialogue, in which the peoples and communities concerned, companies and local authorities are appropriately represented, as recommended by the Special Rapporteur in cases of conflict arising from corporate projects in indigenous territories.⁵³ Such fora may also be associated with informal complaint mechanisms which provide a way to satisfy the demands of the communities concerned.

70. The responsibility to consult indigenous peoples must be fully assumed by companies as part of their duty to respect human rights. This implies a change in perspective that goes beyond traditional approaches to local participation which are aimed at obtaining support for project operations. Companies must therefore make every possible effort to carry out responsible, transparent and effective consultations, which genuinely correspond to the goal of reaching agreement or consensus with indigenous peoples, in accordance with the relevant international instruments. In conducting such consultations, companies should endeavour to incorporate in them the minimum criteria laid down in those international instruments, especially in cases where domestic law provides either limited regulations or none at all.

⁵¹ Ibid., para. 57.

⁵² Ibid.

⁵³ See, for example, preliminary note by the Special Rapporteur on the application of the principle of consultation to the indigenous peoples of Guatemala, and the case of the Marlin mine (A/HRC/15/37/Add.8), para. 38.

4. Impact studies and compensation measures

71. Impact studies and the definition of appropriate measures to compensate for any negative impact identified are, by definition, related to the consultation process. In recognition of the special ties that indigenous peoples maintain with the natural habitats of the territories in which they live, international standards widely acknowledge indigenous peoples' "right to the conservation and protection of the environment" and of the "productive capacity of their lands or territories and resources" (Declaration, art. 29.1), and at the same time call for the adoption of "special measures ... for safeguarding" their environment (ILO Convention No. 169, art. 4.1). Such rights are in addition to the social and cultural rights that may be affected by corporate activities.

72. In recognition of indigenous peoples' reinforced right to the conservation and protection of the environment, international standards and practice now require that social and environmental impact studies be conducted as a specific guarantee for the protection of indigenous rights, and in particular with regard to projects involving investment in or the development, exploration or extraction of natural resources likely to affect those rights. Under article 7.3 of ILO Convention No. 169, States are required to conduct "studies ... in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities", the outcome of which must serve as "fundamental criteria" for the implementation of those activities. In its judgement *Pueblo Saramaka v. Suriname*, the Inter-American Court of Human Rights stated that conducting social and environmental impact studies guaranteed the right of indigenous communal ownership in relation to the projects carried out on their territories and that such studies must be conducted by independent technical experts under the supervision of the State.⁵⁴ Such studies are also expressly required by the policy of various international financial institutions.

73. As the Special Representative of the Director-General has noted with respect to multinational corporations, the traditional impact study paradigm must be modified to incorporate fully a human rights based approach. Under that new approach, in drawing up the terms of reference for impact studies relating to indigenous rights, companies must identify "the relevant human rights standards, including those set out in international conventions to which the home and host countries are signatories (perhaps also noting human rights conventions those countries have *not* ratified)" and other standards such as "indigenous customary laws and traditions (for example those that govern the distribution and ownership of land)".⁵⁵ That was the approach used, for example, in the Akwé Kon Guidelines, adopted by the Conference of Parties of the Convention on Biological Diversity and intended to facilitate the conduct of cultural, environmental and social impact assessments regarding activities planned to take place on indigenous territories or which might affect those territories.

74. The ultimate goal of impact studies is to ensure that all necessary steps are taken to avoid any negative impact that the planned activities might have on the environment and on the social, economic, cultural and spiritual life of indigenous peoples. As part of their duty to respect indigenous rights, companies must therefore do everything possible to seek technically feasible solutions to mitigate or limit such impact (Declaration, art. 32.3). When, for fundamental reasons, adverse impact cannot be avoided, indigenous peoples are entitled to "just and fair redress" for any damage arising from corporate activities, as clearly

⁵⁴ *Pueblo Saramaka v. Suriname*, Inter-American Court of Human Rights, Series C, No. 172 (2008), para. 129.

⁵⁵ A/HRC/4/74, para. 23.

set out in the relevant international instruments (Declaration, arts. 20.2, 32.3; ILO Convention No. 169, art. 15.2).

75. As may be clearly deduced from international standards, compensation must be aimed at repairing all possible adverse impacts of corporate activity on the daily life of indigenous peoples, including not only the impact on their environment or productive capacity, but also the impact on the social, cultural and spiritual aspects of their life. The practice of the Inter-American Court of Human Rights offers in that regard a series of highly pertinent examples of compensation and reparation in cases of damage to indigenous peoples' social and cultural practices.⁵⁶

5. Benefit sharing

76. Aside from their entitlement to compensation for damages, indigenous peoples have the right to share in the benefits arising from activities taking place on their traditional territories, especially in relation to natural resource exploitation. The duty to establish benefit sharing mechanisms for peoples affected by such activities is set out explicitly in article 15.2 of ILO Convention No. 169 and has been reiterated by, inter alia, the jurisprudence of the Inter-American Court of Human Rights⁵⁷ and the Committee on the Elimination of Racial Discrimination (CERD).⁵⁸

77. Indigenous peoples' right to share in the benefits arising from activities affecting their traditional territories reflects the broad international recognition of the right to indigenous communal ownership, which includes recognition of rights relating to the use, administration and conservation of the natural resources existing in indigenous territories, independent of private or State ownership of those resources⁵⁹ In that regard, the previous Special Rapporteur has observed that "mutually acceptable benefit sharing" is a means of guaranteeing the human rights of indigenous peoples "in relation to major development projects".⁶⁰ Likewise, the Inter-American Court of Human Rights has ruled that benefit sharing is one of the guarantees required in any case involving limitations on the rights of indigenous communal ownership; benefit sharing must be understood as equivalent to the right to fair compensation for limitation or deprivation of property, as recognized in various international instruments.

78. There is no specific international rule that guarantees benefit sharing for indigenous peoples, aside from the consideration that such sharing must be "fair and equitable".⁶¹ Domestic law still presents serious limitations in this sphere. States rarely guarantee a share in the benefits arising from natural resource exploitation, and when such benefit sharing is established by law, a distinction is usually not made between the local population and indigenous communities per se. Moreover, the share in project-generated benefits is often trivial in comparison with the company's share, and there are often no clear and transparent criteria for apportioning such benefits.

79. When domestic law offers limited responses to this question, or no responses at all, due diligence with respect to indigenous rights may require companies to set up specific benefit-sharing mechanisms, based on international standards. It should be kept in mind

⁵⁶ See, in particular, *Masacre de Paz de Sánchez v. Guatemala*, Inter-American Court of Human Rights, Series C, No. 116 (2004).

⁵⁷ Loc. cit. (footnote 54 above).

⁵⁸ CERD/C/EQU/CO/19, para. 16.

⁵⁹ See United Nations Declaration on the Rights of Indigenous Peoples, arts. 25 and 26 (1); and ILO Convention No. 169, art. 15 (1).

⁶⁰ E/CN.4/2003/90, para. 66.

⁶¹ Loc. cit. (footnote 54 above), paras. 133, 134 and 140.

that under a corporate approach based on respect for indigenous rights, benefit sharing must be regarded as a means of complying with a right, and not as a charitable award or favour granted by the company in order to secure social support for the project or minimize potential conflicts.⁶²

80. From the standpoint of indigenous rights, benefit sharing must go beyond restrictive approaches based solely on financial payments which, depending on the specific circumstances, may not be adequate for the communities receiving them.⁶³ As pointed out by the participants in the international seminar held by the Permanent Forum in Manila in 2009, “payments to indigenous communities often had negative impacts on the community and were divisive” and could easily lead to the exercise of “undue influence and even bribery”.⁶⁴ Consideration should be given to the development of benefit-sharing mechanisms which genuinely strengthen the capacity of indigenous peoples to establish and follow up their development priorities and which help to make their own decision-making mechanisms and institutions more effective.

IV. Conclusions and recommendations

81. **The absence of clarity with respect to corporate responsibility, especially transnational corporate responsibility, in relation to indigenous rights is the source of numerous abuses worldwide. The implementation of corporate activities without taking account of those rights, as they are recognized under international rules, has given rise to highly negative impacts on the environment and the economic, social, cultural and spiritual life of indigenous peoples. Such irresponsible corporate activity, sometimes abetted or simply ignored by the Governments concerned, continues to engender serious social conflicts in areas where indigenous peoples live.**

82. **These conflicts, which are worsening as new regions of the world get involved in natural resource exploitation or infrastructure building, have given rise to situations of genuine ungovernability, which limit the capacity of States and the companies themselves to carry out projects that fail to take into account indigenous rights.**

83. **As a result, the international community now holds the expectation, increasingly shared by all the stakeholders directly involved, including business itself, that companies bear certain responsibilities with respect to indigenous rights. Within the conceptual framework drawn up by the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises — protect, respect and remedy — companies have, at the very least, the duty to comply with international standards relating to the human rights of indigenous peoples.**

84. **As part of their responsibility to respect indigenous rights, companies must exercise due diligence by identifying legal, institutional or other factors that have an impact on the effective enjoyment of the rights of indigenous peoples in the countries in which such companies operate; evaluating effectively the possible negative impact their activities may have on indigenous rights; and ensuring that such activities do not contribute to acts or omissions by States and other stakeholders that might give rise to abuses of those rights.**

⁶² A/HRC/12/34/Add.5, para. 40.

⁶³ E/C.19/2009/CRP.8, para. 16.

⁶⁴ *Ibid.*, para. 17 (non-official translation).

85. Due diligence exercised by companies in relation to indigenous rights include, first, the identification of the indigenous peoples that might be affected by their activities, including in States that do not recognize, or recognize solely in a limited fashion, the indigenous peoples living within their borders. For the purposes of such identification, companies must apply the international criteria which define the category of indigenous peoples and provide the grounds for a series of specific rights.

86. In addition, within the framework of due diligence, companies must take account of the criteria, as laid down in international rules, for recognition of the rights of indigenous peoples, in particular their right to lands, territories and natural resources, including in cases where domestic law differs substantially from such criteria. Companies must therefore grant, in all respects, full recognition of the indigenous territorial rights arising from customary land tenure, independent of official State recognition.

87. The principle of due diligence also requires that companies recognize the duty of States to consult indigenous peoples (and, in some case, to obtain their consent) prior to the adoption of measures that may affect them directly, and in particular in relation to projects that affect their traditional territories. Companies must not attempt to replace Governments in situations where international standards require Governments to bear direct responsibility for holding consultations; indeed, they must promote the full assumption by Governments of such responsibility.

88. Lastly, companies would be negligent in their due diligence with respect to human rights if they agreed to work on specific projects or with countries in which Governments fail to guarantee adequate consultation with indigenous peoples.

89. Without prejudice to the principle that States bear the main responsibility to consult, companies must respect the strengthened right of indigenous peoples to participate in decisions affecting them by ensuring adequate mechanisms for consultation and dialogue with them. Here, the purpose of consultations with indigenous peoples should be to seek consensus on key aspects such as identification of the potential negative impact of the activities, measures to mitigate and compensate for such impact, and mechanisms for sharing the benefits derived from the activities. Once again, if companies wish to exercise due diligence, they must ensure that the consultations they hold are based on the criteria laid down in international rules, especially when the States in which they operate provide inadequate legal regulations, or none at all.

90. An adequate consulting process requires full information on the planned corporate activity, which means, first of all, that impact studies must be conducted prior to the implementation of the project. From a human rights standpoint, such studies, conducted by independent technical experts under State supervision, must consider all possible negative impacts on the rights, of whatever kind, of the indigenous communities concerned. Impact studies must also identify possible ways of mitigating those impacts. In the event that such solutions do not exist or are not technically feasible, companies must compensate for all types of damage sustained by the indigenous peoples concerned.

91. Independent of compensation measures, companies are bound by their duty to respect indigenous rights to establish mechanisms ensuring that indigenous peoples share the benefits generated by the activities in question. Benefit sharing responds in part to the concept of fair compensation for deprivation or limitation of the rights of the communities concerned, in particular their right of communal ownership of lands, territories and natural resources. Companies must ensure that benefit-sharing

mechanisms genuinely fulfil that purpose, and that they are appropriate to the specific context of indigenous peoples.
