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**Response to Canada's 19th and 20th Periodic Reports:
Alternative Report on Canada's Actions on the *Nagoya Protocol***

Joint Report by the Grand Council of the Crees (Eeyou Istchee); Assembly of First Nations; Nunavut Tunngavik Inc.; First Nations Child and Family Caring Society of Canada; Native Women's Association of Canada; National Association of Friendship Centres; Canadian Friends Service Committee (Quakers); First Nations Summit; Union of British Columbia Indian Chiefs; BC Assembly of First Nations; Federation of Saskatchewan Indian Nations; Chiefs of Ontario; Nishnawbe Aski Nation; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; International Indian Treaty Council; Innu Council of Nitassinan; Haudenosaunee of Kanehsatà:ke; Maritime Aboriginal Peoples Council; IKANAWTIKET; Indigenous World Association; First Peoples Human Rights Coalition

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EXECUTIVE SUMMARY

The *Nagoya Protocol* is a new international agreement focusing on access and benefit sharing arising from the use of genetic resources and related matters. This Alternative Report addresses Canada's discriminatory actions against Indigenous peoples, in the context of the negotiation and implementation of the *Protocol*.

Discriminatory acts by Canada described in this Report include the following:

- Refusing to use term "indigenous peoples" in the *Protocol*, as part of a broader strategy that undermines Indigenous rights
- Imposing an "established" rights approach to Indigenous peoples' genetic resources, opening the door to dispossessions worldwide
- Exploiting consensus to undermine human rights and exceed lawful authority
- Devaluing and opposing the *UN Declaration on the Rights of Indigenous Peoples*
- Failing to incorporate a human rights-based approach and respect Indigenous peoples' human rights in the *Protocol*
- Using domestic legislation to impair the inherent nature of Indigenous peoples' rights
- Undermining "free, prior and informed consent"
- Failing to consult and accommodate indigenous peoples
- Undermining the United Nations treaty and human rights system.

In the *Convention on Biological Diversity* and the *Protocol*, the central objective of "fair and equitable sharing" of benefits requires that "all rights" to genetic resources be taken into account. Yet in regard to both *access* to and *use* of genetic resources in the *Protocol*, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination.

In regard to possible domestic implementation of the *Protocol*, the draft "2010 Domestic Policy Guidance for Canada" and related government documents reflect the discriminatory approaches described in this Report.

The above actions by Canada are inconsistent with the *Charter of the United Nations*, *Convention on Biological Diversity* and other international law. Such acts undermine the human rights of Indigenous peoples in Canada and other regions of the world.

Response to Canada's 19th and 20th Periodic Reports: Alternative Report on Canada's Actions on the *Nagoya Protocol*

I. INTRODUCTION

1. Canada's 2011 Report to the Committee on the Elimination of Racial Discrimination (CERD) "outlines key measures adopted in Canada from June 2005 to May 2009, to enhance implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*".¹
2. The Report adds that it includes "occasional references to developments of special interest since May 2009". However, no reference is made to Canada's actions on the *Nagoya Protocol* – a new international agreement focusing on access and benefit sharing arising from the use of genetic resources and related matters.²
3. **This Alternative Report addresses Canada's discriminatory actions against Indigenous peoples, in the context of the negotiation and "implementation"³ of the *Protocol*.** While the focus is on Indigenous peoples, local communities⁴ are also adversely affected.
4. In assessing Canada's actions, it is important to highlight that in seeking election to the Human Rights Council, Canada accepted the commitment required by the UN General Assembly to "uphold the highest standards in the promotion and protection of human rights ... [and] fully cooperate with the Council".⁵ It is on this basis that Canada's actions should be assessed, during the three-year period - from June 2006 to June 2009 - that Canada was a Council member.⁶
5. Since it won the federal election in early 2006, the current government of Canada has repeatedly failed to respect and safeguard the rights of Indigenous peoples and fulfill related constitutional and international obligations.
6. On 22 September 2011, the government of Canada sent an email to selected⁷ Indigenous organizations and communities in Canada requesting their views by 21 October⁸ on whether Canada should sign the *Nagoya Protocol*. For such purposes, three documents were attached:
 - draft "2010 Domestic Policy Guidance for Canada"⁹ – developed jointly by the Federal – Provincial – Territorial Task Force since 2009¹⁰
 - "Discussion Document"¹¹ – produced by Environment Canada in consultation with the federal Interdepartmental Committee on Access and Benefit Sharing
 - "Comparison Chart"¹² – a comparison of the key provisions of the *Nagoya Protocol* and the "Domestic Policy Guidance"
7. The proposed "2010 Domestic Policy Guidance for Canada" perpetuates the discriminatory approach on genetic resource rights that the Canadian government insisted upon during the

negotiations of the *Protocol*. Indigenous organizations and nations across Canada concluded "it would not be beneficial or fair for the Canadian government to sign the *Protocol* at this time".¹³

Canada has prepared a draft domestic policy and approach that - if implemented in relation to Indigenous peoples - would defeat the object and purpose of the treaty prior to ratification in many crucial ways. Canada's approach to signing the *Protocol* is not consistent with international law and cannot be supported.¹⁴

8. The Grand Council of the Crees (Eeyou Istchee) prepared a number of detailed joint submissions, in collaboration with many Indigenous organizations in Canada and other regions of the world.¹⁵ The discrimination and other human rights concerns repeatedly raised to date have been virtually ignored by the Canadian government.

II. *NAGOYA PROTOCOL* - CANADA'S DISCRIMINATORY ACTIONS

9. In relation to the *Protocol*, actions by Canada criticized in this Alternative Report were often carried out in concert with other Parties. This in no way diminishes Canada's human rights responsibilities¹⁶ for its own conduct or positions.
10. In the event of conflict between Canada's obligations under the *Charter of the United Nations* and those under the *Protocol*, the *Charter* obligations would prevail.¹⁷ Since the prohibition against racial discrimination is a peremptory norm or *jus cogens*,¹⁸ Canada is especially bound to respect this norm.
11. Even where discriminatory provisions in the *Protocol* were adopted by consensus among the Parties, such texts lack validity.¹⁹ In regard to Indigenous peoples, interpretations would need to be adopted that do not discriminate against them or else the offending provisions would require amendment. Otherwise the superior human rights norms would prevail.

2.1 Refusal to Use Term "Indigenous Peoples"

12. Canada and other Parties continue to insist on the term used in the 1993 *Convention on Biological Diversity*, namely, "indigenous and local communities" (rather than "indigenous peoples and local communities").
13. With the historic adoption of UNDRIP in September 2007, the issue of "peoples" was resolved. Today, the term "indigenous peoples" is used consistently by the General Assembly, Office of the High Commissioner for Human Rights, Human Rights Council, treaty monitoring bodies, specialized agencies, special rapporteurs and other mechanisms within the international system.²⁰
14. For Canada to restrict or deny the status of Indigenous peoples as "peoples", so that the purpose or effect is to impair or deny them their human rights constitutes racial discrimination. This violates the *International Convention on the Elimination of All Forms of Racial Discrimination*²¹ and the *International Covenant on Civil and Political Rights*.²² Impairing or denying the status of Indigenous peoples is part of a broader strategy to undermine their rights in the *Protocol*.

In regard to the *Nagoya Protocol*, it is recommended that Canada:

- **Take steps to affirm the status of Indigenous peoples as "peoples", in accordance with article 1(1) of ICERD, UNDRIP and Canada's Constitution, so as not to impair or deny them their human rights.**

2.2 Discriminatory Approach to Genetic Resource Rights

15. In the *Convention on Biological Diversity* and the *Protocol*, the objective of "fair and equitable sharing" of benefits requires that "all rights" to genetic resources be taken into account.²³ Yet in regard to both access to and use of genetic resources, the *Protocol* only recognizes "established" rights of Indigenous peoples and local communities.
16. Canada played a lead role in advocating such a prejudicial approach. In regard to *use* of genetic resources, article 5(2) of the *Protocol* provides:

Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.²⁴
17. Under the *Protocol*, only "established" rights – and not other genetic resource rights based on customary use – appear to receive some protection under domestic legislation. Third parties may gain access to and use of genetic resources in the territories of Indigenous peoples and local communities, without their free, prior and informed consent.
18. The "established" rights approach runs counter to article 10(c) of the *Convention on Biological Diversity* that requires States, "as far as possible", to protect and encourage customary use of genetic resources "in accordance with traditional cultural practices". Article 10(c) does not include any reference to national legislation, domestic law. Nor is there any reference to "established" rights in the *Convention*.
19. The term "established" might only refer to situations where a particular Indigenous people can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling.²⁵ If such rights are not so proved, the *Nagoya Protocol* does not appear to provide any protection – regardless of how strong the evidence that such rights exist.²⁶
20. Should the term "established" be interpreted and applied in such a restrictive manner, **most Indigenous peoples worldwide could be denied their rights to genetic resources. If so, widespread dispossession and further impoverishment would result.** Traditional occupations may be impeded, contrary to the *Discrimination (Employment and Occupation) Convention, 1958*.²⁷

21. Such an approach is incompatible with States' obligations in the *Charter of the United Nations*,²⁸ *Convention on Biological Diversity*²⁹ and international human rights law.³⁰ It could deprive Indigenous peoples of their rights to self-determination, culture and resources contrary to principles of equality and non-discrimination.³¹
22. The restrictive "established" rights approach is incompatible with the jurisprudence of the Committee on the Elimination of Racial Discrimination. For example, in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the *discriminatory distinction between titled and untitled communities* from the 2006 Amerindian Act and from any other legislation."³²
23. In its September 2011 "Discussion Document" relating to Canada's possible domestic implementation of the *Protocol*, the government confirms that "established" rights may only be recognized in regard to Indigenous peoples with "comprehensive land-claim and self-government agreements which provide them authority to manage their lands".³³
24. Canada's draft Domestic Policy appears to unjustly exclude all other Indigenous peoples, unless they can demonstrate "established" or proven rights to genetic resources. Those peoples in Canada facing possible dispossession of their customary rights to genetic resources would include Indigenous peoples with historic treaties or specific claims agreements or uncompleted land-claim and self-government agreements.
25. At home, the Canadian government has been unsuccessful in its attempts to restrict its constitutional duty to Indigenous peoples to situations where their rights were already "established". In this regard, the Supreme Court of Canada discredited Canada's approach as dishonourable:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It must respect these potential, but yet unproven, interests. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.³⁴

In regard to Indigenous peoples' genetic resource rights, it is recommended that Canada:

- **Be advised that the distinction in the *Protocol* between "established" and other customary rights of Indigenous peoples is discriminatory and is incompatible with the central objective of "fair and equitable" sharing of benefits;**
- **Respect fully the ruling of the Supreme Court of Canada that engaging in such distinctions is "not honourable";**
- **Redress immediately this serious issue in a manner that eliminates all discrimination and fully respects their customary rights.**

2.3 Consensus Exploited to Undermine Human Rights

26. In the negotiations on the *Nagoya Protocol*, there was no legal obligation to require consensus³⁵ among the Parties. Even if such a duty existed, it could not prevail over the obligations of States to respect the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law.
27. Since the final text was intended to reflect a consensus among the Parties, it was often the lowest common denominator among their positions that was reflected in the *Protocol*. This resulted in approval of proposals that violated the rule of law and human rights.
28. Indigenous peoples were not part of any consensus on provisions relating to Indigenous rights and concerns. Indigenous peoples were not permitted to table any proposed amendments to the *Protocol*. In order to add Indigenous proposals to the text, they had to be supported by at least one Party. Otherwise, Indigenous concerns were dismissed.
29. Canada repeatedly exploited the practice of obtaining consensus in order to lower human rights standards relating to Indigenous peoples.³⁶ In its study on participation in decision-making, the UN Expert Mechanism on the Rights of Indigenous Peoples emphasized: "Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples."³⁷
30. Canada and other Parties paid little attention to their human rights obligations under the *Charter of the United Nations* and principles of international law. In regard to UNDRIP, they failed to uphold Indigenous rights and related State obligations affirmed in this human rights instrument.³⁸
31. Consensus was also used to approve discriminatory proposals that contradicted the *Convention* and sought to solely address "established rights" to genetic resources. This issue was agreed to in a meeting that expressly excluded representatives of Indigenous organizations in Nagoya.

In international processes, such as those relating to the *Convention on Biological Diversity* and the *Nagoya Protocol*, it is recommended that Canada:

- **Respect fully its human rights obligations under the *Charter of the United Nations* and other international law;**
- **End immediately the discriminatory practice of using consensus or other procedures to suppress Indigenous peoples' concerns and positions or undermine their rights;**
- **Apply procedures in a democratic manner that is consistent with international human rights law, including UNDRIP. Procedural injustices, such as excluding Indigenous peoples from key international meetings on their rights, often lead to substantive injustices that violate principles of democracy and human rights.**

2.4 Canada's Actions Against UNDRIP

32. The *UN Declaration on the Rights of Indigenous Peoples* has diverse legal effects and commands "utmost respect".³⁹ UN treaty bodies are increasingly using UNDRIP to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging its implementation.⁴⁰ In contrast to this global assessment, Canada's claims that UNDRIP is merely an "aspirational" instrument.
33. A month after the General Assembly's adoption of UNDRIP, Canada opposed the use of this human rights instrument "as an international standard" at the Convention on Biological Diversity.⁴¹ During the years of discussion and negotiation leading up to the adoption of the *Nagoya Protocol*, Canada repeatedly expressed its opposition to UNDRIP.
34. During the final negotiations in October 2010, the Co-Chairs proposed wording to be added to the preamble of the *Nagoya Protocol*: "Taking into account the significance of the United Nations Declaration on the Rights of Indigenous Peoples". Reneging on its previous commitment to similar wording,⁴² Canada was the only country in the world to object and insist there be no reference whatsoever to UNDRIP in the preamble.
35. After widespread international criticism by Indigenous and civil society organizations, Canada accepted to include in the preamble: "Noting the United Nations Declaration on the Rights of Indigenous Peoples". This minimal reference was discussed and agreed to in a meeting of the Parties that expressly excluded representatives of Indigenous organizations in Nagoya.
36. **In regard to UNDRIP, it took only one State – Canada – to exploit the practice of consensus in the negotiations so as to lower standards in the *Protocol*.** Such a process requires fundamental reform.⁴³ States that violate the rule of law at home and internationally should not be permitted to play such a determinative role.⁴⁴
37. According to the UN General Assembly, terms such as "noting" are *per se* "neutral terms that constitute neither approval nor disapproval."⁴⁵ Canada's insistence on simply "noting" UNDRIP in the preamble of the *Protocol* falls far short of the positive obligations agreed to by States.⁴⁶
38. Both internationally and domestically, Canada has relentlessly taken steps to undermine UNDRIP in a diverse range of forums. Such actions began in 2006. They have continued after the announcement in the Speech from the Throne⁴⁷ in March 2010 that Canada would take steps to endorse UNDRIP - and after Canada's endorsement in November 2010.
39. Many of these actions took place during the 3-year period that Canada was a member of the Human Rights Council. Canada was the only Council member to vote against UNDRIP at the UN General Assembly. Canada did not implement CERD's May 2007 recommendation that it "support the immediate adoption of the United Nations Declaration".⁴⁸
40. In 2006-2007, Canada actively joined with or lobbied other States with abusive human rights records or hard-line positions against UNDRIP. As emphasized by Amnesty International (Canada):

... Canada was at the forefront of urging the UN to undertake wholesale renegotiation of key provisions of the Declaration, a process that would have greatly delayed adoption and would likely have resulted in a greatly weakened text. In doing so, Canada aligned itself with states with poor records of supporting the UN human rights system and with histories of brutal repression of Indigenous rights advocates.⁴⁹

41. At the December 2008 world meeting on climate change in Posnań, Poland,⁵⁰ it is reported that Canada, Australia, New Zealand and the United States spearheaded the removal of any references to the term “rights” in relation to Indigenous peoples or to UNDRIP.⁵¹ In a press conference in Poland, Canada’s Environment Minister stated that the UNDRIP “has nothing whatsoever to do with climate change”.⁵²
42. In Canada's three documents⁵³ relating to possible domestic implementation of the *Protocol*, there is no mention whatsoever of UNDRIP.

In regard to UNDRIP, it is recommended that Canada:

- **End immediately its practice of devaluing and opposing this human rights instrument;**
- **Establish a process, in conjunction with Indigenous peoples in Canada, to ensure the effective implementation of UNDRIP domestically and internationally in such matters as environmental protection, diversity, climate change and intellectual property.**

2.5 Indigenous Peoples' Human Rights Not Respected

43. The *Convention on Biological Diversity* and the *Nagoya Protocol* are characterized as international environmental agreements. These instruments cannot be interpreted so as to undermine the human rights obligations of any Contracting Party in relation to Indigenous peoples.
44. As affirmed in the *Convention* and *Protocol*, nothing in these instruments shall affect the obligations of Parties deriving from “any existing international agreement”.⁵⁴ Such obligations would necessarily include respect and protection of human rights in a wide range of international agreements.
45. The central objective of “fair and equitable” benefit sharing in both the *Convention* and *Protocol* explicitly requires “taking into account all rights” over genetic resources.⁵⁵ Yet Canada and other Parties failed to take a rights-based approach in regard to Indigenous peoples and local communities.
46. **In the operative paragraphs of the *Protocol*, specific references are made to the “rights” of Indigenous peoples and local communities solely when the apparent intent is to severely limit or dispossess them of their rights to genetic resources.**⁵⁶ Natural resource rights are an integral part of Indigenous peoples’ *human right* to self-determination.⁵⁷

47. Canada's opposition to Indigenous peoples' rights goes well beyond the *Protocol*. Throughout Canada's history, in virtually every case relating to these rights, the government of Canada chooses to act as an adversary.⁵⁸ No other people in Canada are automatically subjected to such consistently adverse and discriminatory treatment. The government has an "impoverished view" of Aboriginal title.⁵⁹
48. Since 2006, Canada failed to acknowledge that Indigenous peoples' collective rights are human rights.⁶⁰ It also refuses to recognize that UNDRIP is a human rights instrument.⁶¹ Canada cannot deny the human rights quality of the rights of Indigenous peoples because such rights are predominantly held collectively. To seek to segregate or exclude collective rights from the international human rights system is inconsistent with international law and practice.⁶²
49. Canada's ongoing actions serve to diminish the importance of Indigenous collective rights and UNDRIP. Such actions violate principles of equality and non-discrimination,⁶³ including Indigenous peoples' right to be different.⁶⁴
50. The significance of the collective human rights of Indigenous peoples is far-reaching. Collective rights are essential for the integrity, survival and well-being of their distinct nations and communities. Such rights are inextricably linked to Indigenous cultures, spirituality and worldviews. Collective rights are critical to the effective exercise and enjoyment of the rights of Indigenous individuals.

In regard to Indigenous peoples, it is recommended that Canada:

- **Alter significantly its litigation and other strategies to minimize or oppose Indigenous peoples' rights, especially in relation to lands and resources, which strategies serve to impoverish the peoples concerned and are often discriminatory;**
- **Incorporate a human rights-based approach in international environmental processes, such as those relating to the *Convention on Biological Diversity* and the *Nagoya Protocol*, so as to ensure respect, protection and fulfillment of Indigenous peoples' rights.**

2.6 Use of Domestic Legislation to Impair Inherent Rights

51. Canada cannot use the *Convention on Biological Diversity* and *Nagoya Protocol* to convert Indigenous peoples' inherent rights to traditional knowledge or genetic resources into rights that only exist in accordance with national laws. Such an approach would run directly counter to international human rights law.⁶⁵

52. During the negotiations, Canada, among other Parties, insisted that the *Protocol* include ambiguous and questionable phrases such as “subject to national legislation” and “in accordance with national legislation”. Little or no regard was given that Indigenous peoples’ rights are inherent⁶⁶ or pre-existing rights, which urgently require protection. Their existence is not dependent on national laws.⁶⁷
53. The *Protocol* recognizes in its preamble “the importance of providing legal certainty with respect to access to genetic resources and the fair and equitable sharing of benefits arising from their utilization”. It is a double standard for the Parties to generate uncertainty, when addressing Indigenous peoples’ rights.
54. It would also be discriminatory to undermine the universal and inherent nature of Indigenous peoples’ human rights and make their existence contingent on each State “recognizing” these rights. Such rights must continue to be interpreted and safeguarded in a manner consistent with international human rights law.
55. The *International Covenant on Economic, Social and Cultural Rights* requires States Parties “to guarantee” that economic, social and cultural rights of Indigenous peoples “will be exercised without discrimination of any kind”.⁶⁸ This obligation is not subject to “progressive realization” and has “immediate effect”.⁶⁹
56. In the *Convention* and *Protocol*, national legislation is intended to have a *supportive* role consistent with international law. The preamble of the *Protocol* affirms that the Parties are: “*Determined* to further support the effective implementation of the access and benefit-sharing provisions of the *Convention*”. Thus, national laws should ensure that the rights of Indigenous peoples and local communities are respected and protected in realizing the objective of “fair and equitable” benefit-sharing.
57. In the *Convention*, such phrases as “subject to national legislation” are not used to enable States to determine whether Indigenous peoples’ rights exist or to what extent.⁷⁰ Rather, the phrase is used in the context where the Parties are obliged by the *Convention* to take maximum beneficial action. For example, in regard to Indigenous traditional knowledge, article 8(j) requires beneficial measures in support of Indigenous peoples in the broad context of conservation and biodiversity.⁷¹

Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices ...

58. The phrase “subject to national legislation” in article 8(j) must be interpreted in a manner compatible with the customary use of biological resources by Indigenous peoples and communities in article 10(c) of the *Convention*. This view is affirmed by the Executive Secretary of the *Convention*.⁷²
59. In Canada's three documents⁷³ relating to possible domestic implementation of the *Protocol*, each jurisdiction would generally be free to determine what measures it might take regarding genetic resources and traditional knowledge relating to Indigenous peoples. This could result in a "checkerboard" of different rights across Canada that undermines the universality and inherent nature of Indigenous peoples' human rights.
60. For example, Canada claims that whether or not there exists an obligation of Parties in article 12(1) of the *Protocol* to take into consideration customary laws, community protocols and procedures is dependent on domestic law and circumstances:

The obligation on a Party to take into consideration customary laws, community protocols and procedures is subject to domestic law and to what is applicable in the particular domestic circumstances of the Party. This provides considerable flexibility to each Party to determine whether and how to take customary laws, community protocols and procedures into account.⁷⁴

61. Article 12(1) does not use the phrase "subject to domestic law", but rather "in accordance with domestic law".⁷⁵ In any event, neither phrase can be reasonably interpreted in the whole context of the *Convention* and the *Protocol* so as to render illusory any State "obligation".

In regard to Indigenous peoples, it is recommended that Canada:

- **Use domestic legislation to *support* Indigenous peoples' rights under the *Convention* and *Protocol* and not to undermine the inherent nature of their human rights;**
- **Implement, in conjunction with Indigenous peoples in Canada, their rights and related State obligations in a binding manner that extends to all parts of the Canadian federation without exception.**

2.7 Undermining "Free, Prior and Informed Consent"

62. If ongoing dispossession and biopiracy of Indigenous peoples' resources are to be eliminated and fair and equitable benefit sharing is to be achieved, then the legal right and principle of "free, prior and informed consent" (FPIC) or PIC⁷⁶ must be respected, protected and fulfilled. Such consent is a key element in international and Canadian constitutional law.

63. FPIC is the standard required or supported by the UN General Assembly,⁷⁷ international treaty bodies,⁷⁸ regional human rights bodies,⁷⁹ UN special rapporteurs⁸⁰ and specialized agencies.⁸¹ FPIC is also the standard under UNDRIP and the *Indigenous and Tribal Peoples Convention, 1989*.⁸²
64. According to Canada's highest court, "full consent" is required on "very serious issues".⁸³ It is clearly a serious issue, when the human rights, cultures and well-being of Indigenous peoples are at stake in the context of biodiversity, environment and resource development.⁸⁴
65. Canada is clear about its own right to give or withhold prior and informed consent under the *Protocol*. However, in regard to FPIC or PIC of Indigenous peoples, Canada played a lead role in adding confusion and uncertainty in regard to this crucial right and principle.
66. In relation to genetic resources under the *Protocol*, Canada indicates: "Article 6 ... establishes that a Party can decide not to require PIC for access to some or all of its genetic resources".⁸⁵ In regard to Indigenous peoples, this conclusion is erroneous and inconsistent with "fair and equitable" benefit sharing and international human rights law.
67. The extent to which Canada has acted to impair FPIC and create confusion is illustrated by the convoluted drafting of article 6(3)(f) of the *Protocol*:

3. ... each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:

...

(f) Where applicable, and subject to national legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources ...⁸⁶

68. In the *Protocol*, the Parties retained the phrase "approval and involvement" used in article 8(j) of the *Convention* with an expanded formulation. In relation to Indigenous and local communities, the new phrase used repeatedly is "prior informed consent or approval and involvement".⁸⁷
69. In regard to the new phrase, the "or" between "prior informed consent" (PIC) and "approval" suggests that the two terms are synonymous. This interpretation is reinforced by article 6(3)(f) of the *Protocol*. Thus, the "involvement" of Indigenous peoples and local communities is required in addition to such consent or approval.
70. In its September 2011 "Discussion Document", the government added commas around the phrase "approval and involvement" so as to separate it from "prior informed consent":

Canada could also put in place ... measures to require evidence (documentation) that associated traditional knowledge utilized or used in research or

development has been accessed with the PIC, or approval and involvement, of the Aboriginal communities that hold the associated traditional knowledge.⁸⁸

71. The effect of the government's change is to imply that there are two different standards that could be applied. One standard is “prior and informed consent”; the other is “approval and involvement”. This could suggest that there would only be “involvement” in relation to situations of “approval” and not “PIC”. Such an interpretation would not be coherent and would be inconsistent with international and domestic law.⁸⁹

In regard to Indigenous peoples' rights to resources and traditional knowledge, it is recommended that Canada:

- **Respect the right of Indigenous peoples to free, prior and informed consent, as CERD has underlined in its General Recommendation No. 23 (1997), in implementing the *Convention on Biological Diversity and Protocol*;**
- **Revise its policy on consultation and accommodation so as to include free, prior and informed consent. Consistent with principles of non-discrimination and rule of law, Canada should respect this requirement in Supreme Court of Canada rulings.**

2.8 Failure to Consult and Accommodate Indigenous Peoples

72. Indigenous peoples' rights are increasingly addressed in international forums, such as those relating to the *Convention on Biological Diversity* and the *Protocol*. **Since 2006, the government of Canada has refused to even acknowledge or discuss its obligations to consult and accommodate Indigenous peoples under international and Canadian law.** Such ongoing violations of the rule of law by Canada are unacceptable.⁹⁰
73. For example, it took three and a half months for the Canadian government to provide a copy of its own public statement made at the first Intergovernmental Committee meeting (ICNP) to implement the *Protocol* in June 2011. No such information was shared in advance. By the time Indigenous organizations received a copy, the opportunity to address Canada's position was long passed.
74. The failure to provide "all necessary information in a timely way" on Canada's positions violates its duty to consult and accommodate Indigenous peoples.⁹¹ Such actions are incompatible with basic principles of democracy, accountability, transparency and good governance. They undermine the rights of Indigenous peoples to full and effective participation,⁹² as required by UNDRIP and other international human rights law.
75. As indicated by the Supreme Court of Canada, the duty to consult and accommodate Indigenous peoples is not met by having some kind of general public process. The same is

true at the international level.⁹³ The Crown must not only provide adequate information, but also indicate what might be the potential adverse impacts on Indigenous rights and interests.

76. At previous international meetings, federal officials repeatedly stated that they do not have any flexibility to alter government positions. Representatives of Indigenous organizations have expressed frustration that there is virtually no dialogue with the government in terms of genuine consultations.
77. The Canadian government has not provided funding to Indigenous peoples in Canada to effectively participate in the negotiations of the *Protocol* and in its ongoing implementation. A few Indigenous representatives from national Aboriginal organizations were allowed to be a part of the Canadian delegation in international meetings, but these organizations are not the rights holders. Indigenous members of the Canadian delegation must sign legal documents to ensure non-disclosure of information to other Indigenous people.
78. The democratic participation of Indigenous representatives has been rendered ineffective by ongoing government actions that ignore the rule of law, fail to consult and accommodate Indigenous peoples and resist providing timely information.

In regard to Indigenous peoples in Canada, it is recommended that Canada:

- **End its undemocratic practice of not consulting and accommodating Indigenous peoples, as rights holders, and refusing to discuss the nature of Canada's obligations in this regard;**
- **Adopt an effective policy on this matter, in conjunction with Indigenous peoples, so as to reinforce their full and effective participation in international processes.**

2.9 Undermining UN Treaty and Human Rights System

79. It is not a valid or legitimate practice to unilaterally derogate from the terms of the *Protocol* or *Convention on Biological Diversity*, so as to alter its scope and legal consequences. Yet this is the approach of Canada in regard to its domestic implementation of the *Protocol*.
80. If every Party did the same, such international agreements could conceivably lose all meaning and legal effect. Canada has an obligation to interpret such agreements in "good faith" and "in the light of their object and purpose".⁹⁴
81. The *Protocol's* central objective is "fair and equitable sharing of the benefits arising from the utilization of genetic resources, ... taking into account all rights over those resources".⁹⁵

Yet this key element is not included in Canada's draft domestic policy guidance as an "objective", but as a "main goal"⁹⁶ with some modifications.

82. Canada has unilaterally altered the central objective in the *Protocol* and *Convention on Biological Diversity*, by deleting any reference to "taking into account all rights" and replacing it with "arising from their use among Canadians". The former phrase reinforces the need for a rights-based approach.
83. The new domestic objective of "improving Canada's competitiveness in the bio-based economy"⁹⁷ gives rise to particular concern. It could serve to reinforce third party access to and benefits from genetic resources on lands and territories of Indigenous peoples, without their FPIC – especially since Canada's "established" rights approach facilitates dispossession.
84. For the above reasons, it is not accurate for Canada to conclude: "The objectives and goals of the draft Domestic Policy Guidance are consistent with the objective of the Protocol."⁹⁸
85. In key instances, the draft Domestic Policy Guidance would unilaterally alter the obligation ("shall") to a discretionary standard ("should").⁹⁹ The Policy Guidance also invalidly compares the *Protocol* to the draft Policy, instead of the reverse.¹⁰⁰ For example:

Article 4 of the Protocol does not contradict the draft Domestic Policy Guidance. However, the key difference between the draft Policy Guidance and the Protocol is that the latter is an obligation (i.e., should vs. shall).¹⁰¹

86. This Policy Guidance also limits safeguarding Canada's obligations in international agreements or arrangements to those "dealing with the subject matter that are relevant to Canada and in harmony with access and benefit sharing policy in Canada". Such qualifications are incompatible with the *Convention* and *Protocol*, which affirm that nothing in these instruments shall affect the obligations of Contracting Parties deriving from "any existing international agreement".¹⁰²
87. **The above unilateral changes serve to severely undermine both the international treaty system and international human rights system. Such invalid changes may be used to evade Canada's international human rights obligations in ICERD and other treaties.**¹⁰³
88. The explicit intention in the *Convention on Biological Diversity* is "to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components" (preamble). Such "international arrangements" include UNDRIP, which affirms Indigenous peoples' rights to genetic resources, traditional knowledge, cultural diversity and biological diversity,¹⁰⁴ as well as environmental,¹⁰⁵ food¹⁰⁶ and human security.¹⁰⁷ All of these aspects are relevant to the *Convention* and *Protocol* and entail human rights addressed by CERD.

89. Canada's discretionary approach is based on narrowly interpreting specific provisions of the *Convention* and *Protocol* in isolation, with a view to exercising virtually complete domestic control over Indigenous peoples, their rights and related State obligations. However, any related interpretations should be made in the overall context of these treaties, their objectives and international law as a whole. This would necessarily include Canada's international human rights obligations.

In regard to Indigenous peoples, it is recommended to Canada:

- **Ensure that its domestic strategies to implement the *Protocol* or *Convention on Biological Diversity* are fully consistent with Indigenous peoples' human rights and Canada's related obligations. In this context, there is ongoing concern that Canada is derogating from the terms of both instruments, in such a manner that the UN treaty system and human rights system are being undermined.**

CONCLUSIONS

The above actions by Canada discriminate against Indigenous peoples and their human rights – and are inconsistent with the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law. Such acts adversely impact Indigenous peoples in Canada and other regions of the world.

Canada cannot evade its international human rights obligations by acting through international organizations and related processes. In regard to genetic resources in the *Nagoya Protocol*, the "established" rights approach violates the peremptory norm prohibiting racial discrimination.

We respectfully urge the Committee on the Elimination of Racial Discrimination to adopt the recommendations in this Alternative Report, emphasizing the invalidity and illegitimacy of Canada's positions and conduct.

ENDNOTES

¹ Committee on the Elimination of Racial Discrimination, "Nineteenth and twentieth periodic reports of States parties due in 2009: Canada", UN Doc. CERD/C/CAN/19-20 (8 June 2011) ["Canada's 2011 Report"], para. 1.

² *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010, <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

³ Preparations to implement the *Protocol* are being made by the Parties in meetings of the Intergovernmental Committee on the Nagoya Protocol (ICNP). While many Parties have signed the *Protocol*, it is not yet in force. See *Protocol*, article 33(1): "This Protocol shall enter into force on the ninetieth day after the date of deposit of the

fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention."

⁴ There is no set definition of "local communities". See Convention on Biological Diversity, *Guidance for the Discussions Concerning Local Communities within the Context of the Convention on Biological Diversity*, Expert Group Meeting of Local Community Representatives within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, Montreal, 14–16 July 2011, UNEP/CBD/AHEG/LC/1/2 (7 July 2011), para. 5: " Many communities may be considered local and may also be described as traditional communities. Some local communities may include peoples of indigenous descent. They are culturally diverse and occur on all inhabited continents."

⁵ General Assembly, *Human Rights Council*, UN Doc. A/RES/60/251 (15 March 2006), para. 9.

⁶ These duties were repeatedly affirmed by Canada, at the time it was elected to the Council. See, e.g., Canada, "Statement to the Human Rights Council Wednesday, June 28, 2006 By Ambassador Paul Meyer, Permanent Mission of Canada, On behalf of Canada, Australia and New Zealand: Universal Periodic Review", Geneva: "The members of the Council have committed themselves to uphold the highest standards of human rights ... [and] cooperate with the Council".

⁷ See, e.g., Nishnawbe Aski Nation, Letter from Grand Chief Stan Beardy to Minister of the Environment Peter Kent, 28 October 2011, re "Nagoya Protocol and Canada's Draft Domestic Policy Documents", http://quakerservice.ca/wp-content/uploads/2011/12/Letter-re-Nagoya-Protocol-copy.pdf_at_2: "NAN, which represents 49 First Nations with traditional territories covering approximately two thirds of Ontario, was not directly notified by Canada".

⁸ The deadline for submitting views was later extended to 28 October 2011. Environment Canada hosted regional meetings for organizations to express views. Aside from an opening presentation on the *Nagoya Protocol* and closing remarks, only 75 minutes were allowed for plenary discussion.

⁹ Government of Canada, "Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada", Draft, 2010. As of January 2012, this and the other two documents were not available on Environment Canada's web site.

¹⁰ Only *after* the draft Domestic Policy Guidance was approved by the Deputy Ministers FPT Committee on Biodiversity was the Canadian government willing to canvass views of Indigenous organizations on whether Canada should sign the *Nagoya Protocol*. At a meeting convened by Environment Canada on 2 June 2010, Indigenous representatives repeatedly raised the lack of consultation by federal, provincial and territorial governments.

¹¹ Government of Canada, "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity: Discussion Document", September 2011, at 24 (Appendix 1: Overview of the Current Engagement Process). [emphasis added]

¹² Government of Canada, "Assessment of the draft 2010 Domestic Policy Guidance for Canada (Managing Genetic Resources in the 21st Century) vis-à-vis obligations of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity", no date.

¹³ Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol: Comments on Canada's Possible Signature and Draft Domestic Policy", Joint Submission to the government of Canada (October 2011), <http://quakerservice.ca/wp-content/uploads/2011/12/Nagoya-Protocol-GCCEI-Joint-Submission-on-Canadas-possible-signature-Oct-28-11.pdf>, para. 16.

¹⁴ *Ibid.* [emphasis in original] For a similar rejection of Canada's approach, see Nishnawbe Aski Nation, "Call for Canada to Not Sign the Nagoya Protocol by February 2012 and to Consult and Obtain the Free, Prior and Informed

Consent of Nishnawbe Aski Nation (NAN) First Nations", Resolution 11/51, 24 November 2011, <http://quakerservice.ca/wp-content/uploads/2011/12/NAN-Call-for-Canada-to-Not-Sign-the-Nagoya-Protocol.pdf>.

¹⁵ See, e.g., the following Joint Submissions:

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", Expert Mechanism on the Rights of Indigenous Peoples, 4th sess., Geneva (July 2011), <http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf>.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Draft Protocol: Indigenous Peoples' Objections to the Current Text – A Call for Justice and Solidarity", Joint Statement of Indigenous and civil society organizations, Montreal meeting 18-21 September 2010, in *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/22 (22 September 2010), <http://www.cbd.int/doc/?meeting=ABSWG-09-3RD>.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples' Human Rights", Joint Statement of Indigenous and civil society organizations, Montreal meeting 10-16 July 2010, in *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/21 (22 September 2010), <http://www.cbd.int/doc/?meeting=ABSWG-09-3RD>.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Indigenous Peoples' Right to Participate in Decision-Making: International and Regional Processes", Joint Statement of Indigenous and civil society organizations, Expert Mechanism on the Rights of Indigenous Peoples, 3rd sess., Geneva (13 July 2010), <http://quakerservice.ca/wp-content/uploads/2012/01/EMRIP-Study-re-IPs-Rt-to-Participate-Joint-Statement.pdf>.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Impacts of the CBD Revised Draft Protocol on the *UN Declaration on the Rights of Indigenous Peoples*: Human Rights Concerns", Joint Statement by Indigenous and human rights organizations from different regions of the world, Permanent Forum on Indigenous Issues, New York (20 April 2010), <http://quakerservice.ca/wp-content/uploads/2011/05/PFII2010-JointStatementonCBDdraftProtocolandUNDeclFINAL-Apr23101.pdf>.

¹⁶ *Charter of the United Nations*, arts. 55 c and 56. These articles reinforce the purposes of the *UN Charter*, which includes in art. 1(3): "To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

¹⁷ Article 103 of the *Charter of the United Nations* provides for the paramountcy of the *Charter*, in the event of a conflict relating to State obligations: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." [emphasis added]

Namibia Case (Legal Consequences for States of the Continued Presence of South Africa in Namibia) (Advisory Opinion), [1971] I.C.J. Rep. 16, at p. 57: "To establish ... and to enforce, distinctions, exclusions, restrictions and limitations, exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

¹⁸ *Report of the International Law Commission*, 53rd sess. (23 April-1 June and 2 July-10 August 2001) in UN GAOR, 56th sess., Supp. No. 10 (A/56/10), at 208, para. (5): "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."

¹⁹ *Report of the International Law Commission*, 58th sess. (1 May-9 June and 3 July-11 August 2006) in UN GAOR, 61st sess., Supp. No. 10 (A/61/10), at 423, para. 41: "(a) A rule conflicting with a norm of *jus cogens* becomes

thereby *ipso facto* void; (b) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict."

²⁰ Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 26: "Affirmation of the status of indigenous peoples as "peoples" is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43-E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago."

²¹ ICERD, art. 1(1): " In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." [emphasis added]

²² Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7: "... the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." [emphasis added]

²³ *Convention on Biological Diversity*, article 1; and *Protocol*, article 1.

²⁴ Similarly, article 6(2) of the *Protocol* refers solely to situations where Indigenous peoples and local communities have the "established" right to *grant access* to genetic resources: "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources." [emphasis added]

²⁵ In Canada, see for example *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, where the Supreme Court of Canada made the distinction between "established" rights and "unproven" rights. The Court indicated at para. 41 that, in the face of proposed government action, both types of "existing" rights require prior consultation to protect such rights from harm: "The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to *protect unproven or established rights from irreversible harm* as the settlement negotiations proceed". [emphasis added]

²⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 37: "The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims."

²⁷ *Discrimination (Employment and Occupation) Convention, 1958* (No. 111), International Labour Organization, adopted 25 June 1958 (entered into force 15 June 1960) (ratified by Canada 26 November 1964), article 1:

1. For the purpose of this Convention the term **discrimination** includes--

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

...

3. For the purpose of this Convention the terms **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

And at Article 2: "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." [emphasis added] See also *International Covenant on Economic, Social and Cultural Rights*, art. 6.

²⁸ *Charter of the United Nations*, arts. 1(3), 2(2), 55 c and 56.

²⁹ *Convention*, art. 1 (central objective of "fair and equitable benefit sharing) and art. 3: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources".

³⁰ See, e.g., *International Covenant on Civil and Political Rights*, arts. 1 and 27; *International Covenant on Economic, Social and Cultural Rights*, arts. 1, 2, 6, 11, 12 and 15(1)(a); ICERD, arts. 2(1), 2(2), and 5(d)(v) and (e); UNDRIP, preambular paras. 1, 6-8, 10, 11, 14, 15, 22 and 24 and arts. 1-4, 7, 8, 11-15, 18, 19, 26-34, 37-43 and 46.

Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life* (art. 15, para. 1 (a), of the *International Covenant on Economic, Social and Cultural Rights*), UN Doc. E/C.12/GC/21 (21 December 2009):

States parties should take measures to *guarantee* ... the exercise of th[at] right ... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ... (para. 36)

... the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant. (para. 48)

... in accordance with the Covenant and other international instruments dealing with human rights and the protection of cultural diversity, ... article 15, paragraph 1 (a) ... of the Covenant ... includes the following core obligations applicable with immediate effect”:

To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life ... (para. 55) [emphasis added]

See also Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), para. 9, where it is indicated that the right to “take part in cultural life” - as affirmed in the *International Covenant on Economic, Social and Cultural Rights* - includes “protecting access to cultural heritage and resources”.

Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38 (21 March 2011), para. 45: "The right of peoples to self-determination protects the right of peoples to freely pursue their cultural development, and dispose of their natural wealth and resources, which has a clear link with cultural heritage."

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 27: "The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."

³¹ Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37th sess., (1989), para. 1: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”

See, e.g., *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 93, where the Inter-American Court interpreted the Indigenous peoples’ right to property under Article 21 of the *American Convention on Human Rights* in a manner consistent with international human rights law: “... by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the two international Covenants], they may “freely pursue their economic, social and cultural development”, and may “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence”. Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.”

³² Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15. [emphasis added]

See also Permanent Forum on Indigenous Issues, *Report on the tenth session, supra* note 20, para. 27, where discrimination concerns are highlighted: “The Permanent Forum reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples’ rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the objective of “fair and equitable” benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only “established” rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.” [emphasis added]

³³ Government of Canada, “Discussion Document”, *supra* note 11, at 22: “Aboriginal communities in Canada that have completed comprehensive land-claim and self-government agreements which provide them authority to manage their lands would likely have responsibility for establishing mechanisms by which they can grant PIC for access to these genetic resources, and to establish MAT for benefit-sharing.” [emphasis added] “PIC” refers to “prior informed consent” and “MAT” refers to “mutually agreed terms”.

³⁴ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 27. [emphasis added] At para. 33, the Court added: “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of ... “meaningful content” ... It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.” [emphasis added]

³⁵ “Consensus”, as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

³⁶ For example, in regard to restricting Indigenous peoples’ genetic resource rights, see text accompanying notes 24 *et seq. supra*; UNDRIP, see text accompanying notes 41 to 45 *infra*; and “free, prior and informed consent”, see text accompanying notes 83 *et seq. infra*.

³⁷ Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 27. [emphasis added]

³⁸ See, e.g., UNDRIP, article 31: “1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions ...” 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

³⁹ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 63: "Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."

International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, para. 5: "UNDRIP is ... a declaration deserving of utmost respect. This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was '[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the *fulfilment of the obligations assumed by States in accordance with the Charter*'; this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." [underlining added]

⁴⁰ See, e.g., Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (29 January 2010), para.83; Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan*, UN Doc. CERD/C/JPN/CO/3-6 (6 April 2010), para. 20; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon*, UN Doc. CERD/C/CMR/CO/15-18 (30 March 2010), para. 15; Committee on the Elimination of Racial Discrimination (Chairperson), Letter to Lao People's Democratic Republic, 12 March 2010 (Early warning and urgent action procedure) at 1; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12 (13 March 2009), para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35; and Committee on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc. CEDAW/C/AUS/CO/7 (30 July 2010), para. 12.

⁴¹ Convention on Biological Diversity, *Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing on the Work of its Fifth Meeting*, UNEP/CBD/WG-ABS/5/8 (15 October 2007), para. 83: "The representative of Canada requested that it be reflected in the report that his delegation objected to the use of the United Nations Declaration on the Rights of Indigenous Peoples as an international standard. The Declaration was not a legally binding instrument, had no legal effect in Canada, and its provisions did not represent customary international law. ... Canada also believed that the issues of intellectual property and traditional knowledge fell within the mandate of WIPO."

See Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112, where it is concluded that Canada's position that UNDRIP does not include any customary international law is "manifestly untenable".

⁴² At an earlier meeting in Cali, Colombia in March 2010, Indigenous peoples had originally proposed: "Noting the significance of the United Nations Declaration on the Rights of Indigenous Peoples in this Protocol". At that time, the Canadian government confirmed to representatives of Indigenous organizations that it would not object to this wording.

⁴³ Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, supra note 37, Annex (Expert Mechanism advice No. 2 (2011)), para. 26: "Reform of international and regional processes involving indigenous peoples should be a major priority and concern. In particular, multilateral environmental processes and forums should ensure full respect for the rights of indigenous peoples and their effective participation including, for example, in relation to the negotiation of the Nagoya Protocol." [emphasis added]

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Implementation of the *UN Declaration on the Rights of Indigenous Peoples*: Positive Initiatives and Serious Concerns", Expert Mechanism on the Rights of Indigenous Peoples, 2nd sess., Geneva (joint global statement by Indigenous and human rights organizations delivered 12 August 2009), para. 36: "During its three-year term [on the Human Rights Council], Canada pursued the lowest standards of any Council member within the Western European group of States."

⁴⁴ See, e.g., Ed John, Matthew Coon Come *et al.*, "UN Security Council – Did Canada Merit a Seat?", *Windspeaker*, Vol. 28, Issue 9, December 2010 at 12, <http://www.ammsa.com/publications/windspeaker/un-security-council%E2%80%94did-canada-merit-seat>: "The Canadian government continues to opt for an ideological course that betrays core Canadian principles and values. This is especially evident in relation to the human rights of those most disadvantaged – the 370 million Indigenous people in over 70 countries. ... Canada's actions serve to undermine the international human rights system and the rule of law".

Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, online: <http://www.cfsc.quaker.ca/pages/un.html>: "[The Canadian government] has ... violated repeatedly the rule of law in Canada and internationally; misled Parliament and the Canadian public; and undermined the human rights of Indigenous peoples. Such conduct fails to uphold the honour of the Crown and is inconsistent with the constitutional objective of reconciliation with Indigenous peoples."

⁴⁵ Annex to General Assembly Decision 55/488 of 7 September 2001 provides: "The General Assembly ... reiterates that the terms 'takes note of' and 'notes' are neutral terms that constitute neither approval nor disapproval."

⁴⁶ UNDRIP, art. 38: "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration." Art. 42: "... States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

⁴⁷ Canada (Governor General), *A Stronger Canada. A Stronger Economy. Now and for the Future*. Speech from the Throne, 3 March 2010 at 19: "Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada's Constitution and laws."

⁴⁸ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 27.

⁴⁹ Amnesty International (Canada), "Canada and the International Protection of Human Rights: *An Erosion of Leadership?*", An Update to Amnesty International's Human Rights Agenda for Canada", December 2007, http://www.amnesty.ca/themes/resources/hr_agenda_update_2007.pdf at 7. [emphasis added]

⁵⁰ This meeting was the 14th Conference of Parties of the United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 4 June 1992, S. Treaty Doc. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force 21 March 1994).

⁵¹ Victoria Tauli-Corpuz (Executive Director, TEBTEBBA and then Chair, UN Permanent Forum on Indigenous Issues), "International Human Rights Day 2008: A Sad Day for Indigenous Peoples", Press Statement (10 December 2008). The references to Indigenous peoples and the *Declaration* were removed from United Nations Framework Convention on Climate Change (Subsidiary Body for Scientific and Technological Advice (SBSTA)), "Reducing emissions from deforestation in developing countries: approaches to stimulate action: Draft conclusions proposed by

the Chair”, FCCC/SBSTA/2008/L.23 (10 December 2008), online: FCCC <<http://unfccc.int/resource/docs/2008/sbsta/eng/l23.pdf>>.

⁵² Bill Curry and Martin Mittelstaedt, “Ottawa’s stand at talks hurting native rights, chiefs say”, *Globe and Mail* (12 December 2008) A10. Contrary to the Environment Minister’s claims, Indigenous rights affirmed in UNDRIP that are likely to be impacted by climate change include, *inter alia*: self-determination; treaty rights; lands, territories and resources; subsistence; health; culture; environment; development; peace and security.

See also Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (15 January 2009) at para. 53: “The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change.”

⁵³ See documents cited *supra* in notes 9, 11 and 12.

⁵⁴ In regard to interpreting the *Convention* and *Protocol*, see for example the following:

The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (*Convention*, art. 22(1))

The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (*Protocol*, art. 4(1))

⁵⁵ *Convention*, art. 1; *Nagoya Protocol*, art. 1. See also *Protocol*, preamble: “Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities”.

⁵⁶ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. CERD/C/51/Misc.13/Rev.4 (18 August 1997):

The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. (para. 3) [emphasis added]

5. The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ... (para. 5)

⁵⁷ In relation to Indigenous peoples, UN treaty-monitoring bodies have consistently applied the right of self-determination in identical article 1 of the two international human rights Covenants. See, e.g., Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the*

Committee on Economic, Social and Cultural Rights: Russian Federation, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41: “The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”

⁵⁸ Especially in lawsuits or negotiations that mainly involve Indigenous peoples and a provincial or territorial government, the Canadian government should be taking positions that support the full enjoyment of Aboriginal and treaty rights under Canada’s Constitution. Instead, the government generally crafts arguments that would minimize such rights and give greater control to the province or territory concerned.

⁵⁹ For a recent example, see *Tsilhqot’in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (B.C. Supreme Court) at para. 1376, where Vickers J. concludes: “What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a ‘postage stamp’ approach to title, cannot be allowed to pervade and inhibit genuine negotiations.”

⁶⁰ In its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the “rights of peoples” under Item 3 “Promotion and protection of all human rights ...”: see Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex (adopted without vote and subsequently approved in December 2007 by General Assembly).

Canada's position contradicts its own national human rights institution. See Canadian Human Rights Commission, “Still A Matter of Rights”, A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act, January 2008, http://www.chrc-ccdp.ca/pdf/report_still_matter_of_rights_en.pdf at 8: “... human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either.”

⁶¹ In its list of “universal human rights instruments” in international law, the Office of the UN High Commissioner for Human Rights includes UNDRIP: see <http://www2.ohchr.org/english/law/>.

⁶² See, e.g., Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), para. 10: “... the existence of collective cultural rights is a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples. In addition, the Committee on Economic, Social and Cultural Rights ... [has] underlined that cultural rights may be exercised alone, or in association with others or as a community.”

Mary and Carrie Dann v. United States, I/A Comm. H.R., Case N° 11.140, Report No. 75/02 (27 December 2002), para. 124: “... the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples ... encompass[ing] distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. Considerations of this nature in turn controvert the State’s contention that the Danns’ complaint concerns only land title and land use disputes and does not implicate issues of human rights.” [emphasis added]

⁶³ Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), at para. 26: “The notion of inadmissible ‘separate rights’ must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.” [emphasis added]

Case of Sawhoyamaya v. Paraguay, Inter-Am. Ct. H.R. Ser. C.No. 146 (Judgment) Mar. 29, 2006, para. 120: "... this Court considers that indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land "is not centered on an individual but rather on the group and its community." This notion of ownership and possession of land ... deserves equal protection under Article 21 of the American Convention [on Human Rights]." [emphasis added]

⁶⁴ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 94, *per* L'Heureux-Dubé, cited with approval by the Supreme Court in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, para. 87: "Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society."

UNDRIP, 2nd preambular para.: "... indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such".

⁶⁵ See also *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report, 1998-1999, Annex V, 52 at 58, para. 66: "To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law."

⁶⁶ UNDRIP, preambular para. 7: "*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (27-28 October 2005), para. 8: "The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights."

⁶⁷ *Calder v. A.G. British Columbia*, [1973] S.C.R. 313 (Supreme Court of Canada) at 390, *per* Hall J.: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment." United States, *Initial reports of States parties due in 1993: United States of America*, UN Doc. CCPR/C/81/Add.4 (24 August 1994) (State Party Report), para. 62: "Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title".

See also Permanent Forum on Indigenous Issues (Secretariat), "Presentation by Mattias Åhrén", International Expert Group Meeting, Indigenous Peoples and Forests, UN Doc. PFII/2011/EGM, New York, 12 - 14 January 2011 paras. 4.2 and 4.3, where it is described that, in the Norwegian cases of *Selbu*, Rt. 2001 side 769 and *Svartskogen*, Rt. 2001 side 1229, the Supreme Court has most recently confirmed that Saami property rights to land follows from traditional use and are not contingent upon formal recognition in national legislation. Similarly, the Swedish Supreme Court has determined in *Taxed Lapp Mountain Case*, NJA 1981 s 1, that the right to pursue reindeer husbandry follows from use since time immemorial and is not contingent on formal recognition in law.

⁶⁸ *International Covenant on Economic, Social and Cultural Rights*, article 2(2).

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of State parties obligations*, UN Doc. E/C.12/1990/8 (1990), para. 1.

⁷⁰ The phrase "subject to national legislation" is used, for example, in relation to "access to genetic resources" in article 15(1): "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." Article 15(2) requires States to adopt national legislation in a positive direction: "Each Contracting Party shall endeavour ... not to impose restrictions that run counter to the objectives of this Convention."

⁷¹ Johanna von Braun and Kabir Bavikatte (Natural Justice), “No narrowing of the definition of TK”, <http://www.naturaljustice.org/images/naturaljustice/eco%20-%20abs3%202009%20-%20tk%20definition.pdf>: “Art. 8j protects all TK of indigenous people and local communities within the mandate of the CBD. This includes TK associated with GR but much more, such as TK associated with biological resources relevant in the context of cosmetics or oils.” [emphasis added]

Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), Annex (Outcome of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing), at para. 18: “Article 8(j) as a stand alone provision protects all traditional knowledge of indigenous and local communities, within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources. Furthermore associated traditional knowledge does not necessarily have to be associated with genetic resources, as it can also include the use of traditional knowledge associated with biological resources.”

⁷² Convention on Biological Diversity, *Traditional knowledge and Biological Diversity: Note by the Executive Secretary*, UN Doc. UNEP/CBD/TKBD/1/2 (18 October 1997), para. 76: “Article 10(c) provides for the protection and encouragement of customary uses of biological resources in accordance with traditional cultural practices and thus forms a critical link with Article 8 ...” This background document was prepared by the Executive Secretary of the Convention on Biological Diversity, at the request of COP, in Decision III/14, para. 10.

⁷³ See documents cited *supra* in notes 9, 11 and 12.

⁷⁴ Government of Canada, “Comparison Chart”, *supra* note 12, at 5.

⁷⁵ *Protocol*, art. 12(1): “In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.” [emphasis added]

⁷⁶ It is assumed that free, prior and informed consent (FPIC) and prior informed consent (PIC) are synonymous, since no consent is genuine if it is not also freely given. FPIC has emerged as the international standard, but Canada and other States in the negotiations on the *Nagoya Protocol* refused to update the wording from the 1992 *Convention on Biological Diversity*.

⁷⁷ General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted without vote by General Assembly, 16 December 2005). At para. 9, one of the five objectives of the Decade is: “Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent ...”

⁷⁸ See, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11: “In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources”.

Comité des droits de l’homme, *Observations finales du Comité des droits de l’homme: Togo*, UN Doc. CCPR/C/TGO/CO/4 (28 March 2011), para. 21 (ensure Indigenous peoples can exercise their right to free, prior and informed consent); Human Rights Committee, *Poma v. Peru*, Case No. 1457/2006, *Report of the Human Rights Committee*, GAOR, 64th Sess., Supp. No. 40, Vol. I, UN Doc. A/64/40 (2008-09), para. 202: “Participation in the

decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.”

Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 5, indicating that a “core obligation applicable with immediate effect” includes the following: “States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.”

⁷⁹ See, e.g., *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 226: “In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also *requires that consent be accorded*. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property.” [emphasis added]

Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs), I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 134: “... the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”

⁸⁰ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur, *supra* note 39, para. 27: “... article 32 of the Declaration, with its call for the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, provides an important template for avoiding these problems in the development context.”

Human Rights Council, *Report of the Special Rapporteur on the right to food, Olivier De Schutter - Crisis into opportunity: reinforcing multilateralism*, UN Doc. A/HRC/12/31 (21 July 2009), para. 21: “These [core] principles are based on the right to food ... They also call for the respect of the right to self-determination of peoples and on the right to development. They may be summarized as follows: ... (j): States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

⁸¹ See, e.g., Food and Agriculture Organization, “FAO Policy on Indigenous and Tribal Peoples” (Rome: FAO, 2010), at 5: “The principle and right of ‘free, prior and informed consent’ demands that states and organizations of all kinds and at all levels obtain indigenous peoples’ authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them.”

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 13 (Principles of engagement): “When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent.”

Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children’s Fund*, UN Doc. E/C.19/2011/7 (25 February 2011), para. 52: “While the free, prior and informed consent approach is considered by UNICEF to be inherent in its human rights-based approach to programming, it is also used as a specific methodology to conduct projects and studies.”

International Finance Corporation (member of the World Bank Group), “IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency”, 12 May 2011, <http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48>

[525788E0071FAAA](#): “For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of ‘Free, Prior, and Informed Consent’ informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples.”

⁸² In regard to cultural and intellectual property, see UNDRIP, art. 11(2): “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

See also Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 4: "1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned."

⁸³ *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 26, para. 24. See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168: “Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”

The Canadian government deals selectively with the rule of law and its constitutional obligations, at the expense of Indigenous peoples' rights. See Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), where any reference to Aboriginal "consent" has been omitted.

Ensuring objectivity and non-selectivity are important principles in international law. See, *e.g.*, *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues."

⁸⁴ The far-reaching significance of Indigenous peoples' genetic resources and traditional knowledge is affirmed in the preamble of the *Protocol*: "Noting the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities ..."

⁸⁵ Government of Canada, "Discussion Document", *supra* note 11, at 10. [emphasis added]

⁸⁶ This provision was opposed by Indigenous representatives, because of the restrictive nature and possible State interference with Indigenous peoples' exercise of FPIC.

⁸⁷ Emphasis added. See articles 6(2), 3(f) (access to genetic resources); 7 (access to traditional knowledge associated with genetic resources); 13(1)(b) (National focal points and competent national authorities); and 16(1) (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources).

⁸⁸ Government of Canada, "Discussion Document", *supra* note 11, at 14.

⁸⁹ Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 20, para. 36, where in regard to FPIC, “the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of ‘consultation’.”

⁹⁰ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 72: "The rule of law principle requires that all government action must comply with the law, including the Constitution. ... The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source." [emphasis added]

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, para. 44: "... government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights ..." [emphasis added]

⁹¹ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C. Court of Appeal), at para. 160: "The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." [This paragraph was cited with approval in *Mikisew Cree First Nation, supra*, para. 64, emphasis added by Supreme Court of Canada]

See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 25: "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation." [emphasis added].

⁹² There are over 60 references to "full and effective participation" of Indigenous and local communities in related decisions of the Conference of the Parties (COP), many of which address implementation of the *Protocol*.

However, such participation has not been achieved to date. This is largely the result of the failure of Parties to ensure their proposals are consistent with international human rights law and do not exceed their authority under the *UN Charter*, *Convention on Biological Diversity* and other international law. Democratic participation is also adversely affected by the lack of financial and other resources.

⁹³ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 42: "Procedures for notice to and comment by the general public often appropriately reinforce representative democratic processes for State decisions. However, special, differentiated consultation procedures are called for when State decisions affect indigenous peoples' particular interests." [emphasis added]

⁹⁴ *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, para. 31(1): "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

⁹⁵ This is also one of the key objectives in the *Convention on Biological Diversity*, article 1.

⁹⁶ Government of Canada, "Comparison Chart", *supra* note 12, at 1:

The objectives of ABS policy in Canada are:

- 1) promoting the conservation and sustainable use of Canada's biodiversity;
- 2) improving Canada's competitiveness in the bio-based economy;
- 3) support ethical scientific research and development;
- 4) support Canada's foreign policy objectives;
- 5) Contribute to the improvement of the health of Canadians.

The main goals of the draft Policy Guidance are to facilitate the *sustainable access* to genetic resources and to provide for the fair and equitable *sharing of benefits arising from their use among Canadians.* [underline added]

⁹⁷ See *supra* note 96.

⁹⁸ *Ibid.*

⁹⁹ For examples where the obligation ("shall) would be unilaterally changed by Canada to a recommendation ("should"), see Government of Canada, "Comparison Chart", *supra* note 12, at 2 (relationship with other international agreements); at 3 ("prior informed consent"); at 4 ("mutually agreed terms"); and at 5 (traditional knowledge).

¹⁰⁰ For examples where the *Protocol* is assessed as to whether it is consistent with Canada's draft 2010 Domestic Policy Guidance (rather than the reverse), see Government of Canada, "Comparison Chart", *supra* note 12, at 2 (relationship with other international agreements); at 3 ("prior informed consent"); at 4 ("mutually agreed terms"); at 5 (traditional knowledge); and 8 (administrative measures).

¹⁰¹ [Emphasis added] *Ibid.* at 2.

¹⁰² [Emphasis added] See *Convention*, art. 22(1); and *Protocol*, art. 4(1), which provisions are quoted *supra* in note 54.

¹⁰³ See references to human rights instruments *supra* note 30.

¹⁰⁴ In regard to Indigenous peoples' right to cultural diversity, see UNDRIP, preambular para. 2 (right to be different) and the many provisions relating to culture, including arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance.

In relation to Indigenous peoples' right to biological diversity, see UNDRIP, arts. 29(1) (right to conservation and protection of the environment and the productive capacity of their lands or territories and resources) and 31(1) (right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, etc.).

¹⁰⁵ UNDRIP, art. 7(2) (right to live in peace and security, as distinct peoples), read together with arts. 29(1) (right to conservation and protection of environment and the productive capacity of their lands, territories and resources); 32(1) (right to determine and develop priorities and strategies for development or use of their lands, territories and resources); 32(2) (State duty to consult and cooperate in good faith, in order to obtain free and informed consent); and 32(3) (State duty to mitigate adverse environmental, economic, social, cultural or spiritual impacts).

See also *African Charter of Human and Peoples' Rights*, art. 23(1): "All peoples shall have the right to national and international peace and security"; and art. 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

¹⁰⁶ UNDRIP, art. 7(2) (peace and security), read together with arts. 3 (right to self-determination); 20 (right to own means of subsistence and development); 24 (right to health and conservation of vital medicinal plants and animals); 26 (right to lands, territories and resources); 29 (right to conservation and protection of environment); 31 (right to cultural heritage, traditional knowledge and cultural expressions including genetic resources, seeds and medicines); and 32 (right to determine priorities and strategies for development). See also identical art. 1(2) in the two international human rights Covenants: "All peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence."

See also *Convention on Biological Diversity*, preamble: "Aware that conservation and sustainable use of biological diversity is of *critical importance for meeting the food, health and other needs* of the growing world population, for which purpose *access to and sharing of both genetic resources and technologies* are essential". [emphasis added]

¹⁰⁷ See generally UNDRIP. John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Seroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: "indigenous peoples human security' . . . encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects."