



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND HUMAN RIGHTS

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND HUMAN RIGHTS

Abstract

The present study examines the human rights impacts of the extractive industries on indigenous peoples worldwide. It finds that there continue to be significant human rights risks associated with mining, oil and gas extraction falling disproportionately on indigenous peoples. It argues that the growing demand for non-renewable resources and the need to explore and exploit resources in ever more invasive ways suggest that such activities are likely to impinge even more on the lands of indigenous communities living in countries with important resource reserves. The paper acknowledges the major efforts being made by industry associations to address these issues through voluntary guidelines but finds that, notwithstanding, conflicts and violence persist and that further measures are required to protect the rights and interests of indigenous peoples. The universal acceptance of the 2007 Declaration on the Rights of Indigenous Peoples provides impetus to renewed efforts to ensure implementation of the provisions in practice. The paper concludes by recommending, among other things, that the European Union as one of the regions championing the Declaration at the United Nations take the initiative to develop a region-wide framework for extractive industries that sanction companies and provide legal redress in cases where the human rights of indigenous peoples are violated.

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LIST OF ACRONYMS

ACPHR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
DCI	Development and Cooperation Instrument of the European Union
EBRD	European Bank for Reconstruction and Development
EIB	European Investment Bank
EIDHR	European Instrument for Democracy and Human Rights
EIR	Extractive Industry Review of The World Bank
EITI	Extractive Industries Transparency Initiative
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EP	European Parliament
EU	European Union
EUTR	European Union Timber Regulation
FLEGT	Forest Law Enforcement Governance and Trade
FPIC	Free, prior and informed consent
GDP	Gross Domestic Product
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IADB	Inter-American Development Bank
ICMM	International Council on Mining and Metals
ICSID	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
IPIECA	International Petroleum Industry Environmental Conservation Association
IPRA	Indigenous Peoples Rights Act of the Philippines
ILO	International Labour Organization
MDG	Millennium Development Goals
NCP	National Contact Point for Guidelines on Multinational Enterprises
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PFII	Permanent Forum on Indigenous Issues
UN	United Nations
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNDESA	United Nations Department for Economic and Social Affairs
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Committee
UNSR	United Nations Special Rapporteur on the rights of indigenous peoples
WCIP	World Conference on Indigenous Peoples
WIPO	World Intellectual Property Organization

EXECUTIVE SUMMARY

The activities of extractive industries on the lands of indigenous peoples have significant human rights impacts. This is not to say that all extractive industries are unwelcome to indigenous peoples or that they all necessarily have negative consequences. There are cases of fruitful negotiations, sometimes after bitter confrontations, and eventually acceptable agreements and outcomes. Some oil, gas and mining companies, especially the largest enterprises, have policies and guidelines on operating on indigenous peoples' lands and provide training to their staff to make them aware of indigenous cultures and sensibilities. However, despite some positive examples of industry initiatives, the overwhelming picture of indigenous – extractive industry relations is one of misunderstandings, mistrust, conflict and often violence.

Human rights abuses associated with the exploration and exploitation of non-renewable resources include, among others, violation of the right to life, forced displacement and destruction of the environment on which indigenous peoples depend. Extractive industries have had impacts on the health and well-being of indigenous peoples and destroyed sacred sites thereby affecting the right to religion of the peoples concerned. The consequences of such projects have violated the right to an adequate standard of living and the right to food, water and subsistence.

Indigenous peoples enjoy all the rights that are recognized in international law without discrimination and which protect them against such abuses. Additionally, they are specifically protected in International Labour Organization (ILO) Convention 169 on indigenous and tribal peoples (1989) which is binding on states that have ratified it – the case of most countries in Latin America. Specific rights are also recognized in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly and opposed by no member states¹. These rights include the right of indigenous peoples to self-determination, to their lands and resources, and to consultation in good faith in order to obtain their free and informed consent prior to any large-scale economic activities that might affect their communities.

Concurrent with this general strengthening of the rights of indigenous peoples in international law, there has been a marked increase in voluntary guidelines for the private sector and in particular companies involved in the extraction of non-renewable resources to comply with human rights norms. Such voluntary arrangements include the Guidelines for Multinational Enterprises elaborated by the Organization on Economic Cooperation and Development (OECD) and the UN Human Rights Council's Guiding Principles on Business and Human Rights. Industry associations such as the International Council on Mining and Metals (ICMM) and the International Petroleum Industry Environmental Conservation Association (IPIECA) have also issued guidance for their members on how to conduct business with indigenous peoples including by recognizing that indigenous peoples may need to give their consent before a project moves forward.

The multi-lateral banks such as the World Bank Group have directives and safeguards in cases where loans may be for projects impacting indigenous peoples and which require states and industry to respect indigenous peoples' rights. The legal and regulatory framework in which extractive industries operate has greatly developed over the last two decades and has been given further impetus since the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

¹ Australia, Canada, New Zealand and the United States were the only states voting against the Declaration at the General Assembly in 2007. Since then all four countries have endorsed the Declaration.

Failure to comply with the international legal framework that protects the rights of indigenous peoples constitutes a risk that is now recognized by many companies in the same way as financial, technical and other factors. Resource extraction is highly capital intensive and requires a long lead-in time before resources come on stream and yield profits. Hence, according to industry specialists, there is a need to ensure that there is full compliance with national laws and that local interests, including those of indigenous peoples, are accommodated.

From the perspective of governments, the extraction of non-renewable resources is an area that falls under their authority and is fundamental to longer-term strategies for national development and their responsibilities to the population as a whole. Many of the countries in which indigenous peoples live are highly dependent on investment in the mining, oil and gas sectors as a source of foreign exchange, income, and technology transfer. National laws have been adapted to facilitate such investment and ministries such as those for mining, energy or finance are charged with developing these areas. In such cases, governments pursue apparently contradictory policies, granting concessions to extractive industries that may impinge upon the legally-recognized lands of indigenous peoples.

Indigenous peoples, who are the victims of these often unwanted extractive industry projects, argue that the rights set out in UNDRIP, in particular article 32 which requires that states undertake good faith consultations in order to obtain their free and informed consent prior to a large-scale project, should be respected. In practice, this and other rights of indigenous peoples are very often violated when extractive industries move onto indigenous peoples' territories following authorisation from governments. This leads the paper to conclude that further efforts need to be made to improve implementation of the rights of indigenous peoples in this respect.

The paper recommends that the European Parliament re-affirm its commitment to protecting and promoting the rights of indigenous peoples as contained in the Declaration on the Rights of Indigenous Peoples. It calls for a specific recognition of free, prior and informed consent as an obligation for extractive industries engaging in activities that may impact indigenous peoples. It notes that serious and unacceptable human rights violations continue to be associated with the extractive industries in their dealings with indigenous peoples and considers that such abuses are likely to continue given the more invasive methods of extraction required to respond to global demand for commodities.

The paper welcomes the advances made by parts of the extractive industry sector to address the human rights, social and environmental issues arising from their contacts with indigenous peoples. It also considers that a goal at the European level should be a legally binding regime including sanctions where appropriate. This would ensure a level playing field among all extractive industry companies and prevent companies with serious commitments to indigenous peoples' rights being put at a disadvantage with companies that do not have those commitments.

The paper also notes that the European Union (EU) in its trade and investment policies with outside partner countries may inadvertently set standards or impose restrictions that result in undermining the human rights of indigenous peoples. In this respect, further research on these contradictions would be helpful so that they can be brought to the attention of policy-makers with a view to making the necessary changes. The paper notes that the EU includes indigenous peoples as a cross-cutting part of its development, human rights and democracy programmes, and recommends that this area be strengthened and that further specific attention be given to challenges arising from the presence of extractive industries on indigenous peoples' lands.

1. INTRODUCTION

Just over 50 years ago, in 1963, the Yolngu people of Yirrkala in the Northern Territory of Australia sent a petition written on bark to Parliament calling on the Government to halt the granting of mining rights to the company Nabalco. The petition told Parliament that the land designated for bauxite mining had been used for hunting and food gathering since time immemorial and contained places sacred to the indigenous people. The petition complained that no consultation with the indigenous owners had been held and concluded by calling on the Government to halt concessions to the mining consortium which would destroy the livelihood and independence of the indigenous people.

A Select Committee established by Parliament recommended compensation and a land grant for the loss of the traditional territory of the Yolngu people but did not call a halt to the mine. In the Northern Territory the recommendations for compensation and alternative lands were not endorsed and the company was given unrestrained access to indigenous territory. Following an appeal by the indigenous community to the Supreme Court of Northern Territory, the Court found in favour of the company declaring that communal native title did not form part of the law of Australia². The petition and the subsequent assertion of the doctrine of "terra nullius" by the Court led to a wide-ranging debate on indigenous peoples' land rights, the eventual rejection of "terra nullius" as a grounds for denying land rights to Aboriginal people and the introduction of the Native Title Act which to some extent addresses Aboriginal and Torres Strait Islander rights over their traditional lands. The bark petition written in the Yolngu language with an English translation is preserved in Parliament House in Australia as a first and historic document asserting land rights. The last word though can be left to the indigenous elder Galarrwuy Yunupingu who, at the 50 year commemoration of the bark petition in July 2013, stated: *"This land rights is empty. It's full of everything, but it's full of nothing ... when you have a look at it, closely, there's nothing that gives to individuals... land rights is for Aboriginal people but the land ownership and use of land ownership is not for Aboriginal people, it's for mining companies. For white fellas"* (The Guardian, 10 July 2013).

The story of Yolngu peoples can be found in different forms in other countries. Peoples with long-standing, spiritual ties with the land and subsistence needs satisfied by local resources are removed with little consultation and compensation. It is an age-old phenomenon. It is also a confrontation of two laws: one oral and traditional and related in songs, stories or even paintings as was the assertion of land ownership in the iconography presented by the Yolngu people in their bark petitions; the other written, negotiated and recorded far away from the lands themselves in cities and government offices and at lawyers' desks. It is a confrontation between two philosophies, one that considers lands and resources as a collective responsibility intimately linked to the cultural identity of a people; the other that sees land as a commodity like any other, to be bought and sold, explored and exploited, and made to give up its wealth.

Since 2007 and the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples, there is global consensus on the rights of indigenous peoples to their lands and resources and to self-determination and a recognition that governments be required to hold good faith consultations with indigenous communities that might be affected by large scale developments on their territories in order to obtain their consent (UNDRIP art. 32). Despite universally accepted human rights standards protecting indigenous peoples, national laws that recognize their lands and rights to be consulted as well as a growing body of jurisprudence endorsing these norms, indigenous peoples

² See *Milurpump vs. Nabalco Pty Co* (1971) 17 FLR 141

continue to face unprecedented pressures on their lands and resources most often resulting in conflicts and a negation of their rights. The present paper seeks to understand why such conflicts persist and consider ways and means by which the European institutions can contribute to the better protection of indigenous peoples' rights and improved relations between their communities and the companies interested or already engaged in resource extraction on their lands.

Now that the international community has reached agreement on the rights of indigenous peoples, after lengthy debates and negotiations, it is the responsibility of governments to ensure that these rights are implemented. This so that the progress that has been made in terms of indigenous peoples' rights on paper – “full of everything”, as our Aboriginal elder commented – does not turn out in practice to be “full of nothing”.

2. HUMAN RIGHTS IMPACTS OF EXTRACTIVE INDUSTRIES

Indigenous peoples the world over are affected by the economic activities of governments, private companies and others when they take place on their ancestral lands. Indigenous peoples' territories contain significant deposits of minerals, oil and gas and this has made them attractive to the extractive industries and to governments which see them as areas suitable for foreign investment and income generating exports. A 2013 report reviewing the operations of 40 US oil and gas companies, found that nearly one-third of production was taking place on or near indigenous peoples' lands and more than half of potential new reserves were likely to impact indigenous peoples. In the case of mining, the report found that 40 percent of current projects and nearly 80 percent of future projects already impacted or would impact indigenous peoples in the future (First Peoples Worldwide, 2013).

In the last decades, fuelled by demand from the emerging economies and facilitated by the liberal investment regimes established in most countries, mining, oil and gas companies have increasingly looked for non-renewable resources in areas where indigenous peoples live giving rise to protests and resistance, conflict and human rights violations and claims that processes of consultation have been ignored³. In Latin America, the mining boom has meant that projects increasingly affect indigenous peoples' lands (Latin American Mining Monitoring Programme).

The environmental, social and human rights impacts of the extractive industries on indigenous peoples are well documented. The former United Nations Special Rapporteur on the rights of indigenous peoples, Rodolfo Stavenhagen, has noted that “[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence”(United Nations, 2003, p.2).

The Special Rapporteur, James Anaya, appointed by the Human Rights Council in 2008 made the issue of extractive industries his primary focus because of the multiplicity of complaints from indigenous peoples on the impacts of these activities on their communities. In his 2012 report he comments: “The

³ The present report focuses its attention on oil, gas and mining. However, other extractive industries operate on indigenous peoples' lands such as forestry companies, large-scale agriculture or ranching and have proven to be equally destructive to indigenous peoples' lands and often engender conflict and human rights abuses.

Special Rapporteur regrets that he has found, across the globe, deficient regulatory frameworks such that in many respects indigenous peoples' rights remain inadequately protected, and in all too many cases entirely unprotected, in the face of extractive industries. Major legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live to adequately define and protect their rights over lands and resources and other rights that may be affected by extractive industries. Yet at the same time and in the same countries in which this need persists, extractive industries are permitted to encroach upon indigenous habitats, a situation that the Special Rapporteur finds alarming and in need of urgent attention" (United Nations 2012b, para. 58) The last report of his mandate to the Council in 2013 recognizes the continuing challenge presented by extractive industries and provides recommendations aimed at improving processes of consultation and implementation (United Nations, 2013).

In numerous recommendations by the UN's human rights treaty bodies and by regional inter-governmental human rights organizations such as the Inter-American Court (IACtHR) and Commission on Human Rights (IACtHR) and the African Commission on Human and Peoples' Rights (ACPHR), governments have been reminded of their human rights obligations in relation to indigenous peoples when major and disruptive resource extraction affect the livelihoods and well-being of indigenous communities. The subject of the extractive industries, indigenous peoples and human rights has also been the focus of attention of two other UN bodies - the Permanent Forum on Indigenous Issues (PFII) and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). At an expert meeting on the extractive industries organized by the Permanent Forum, it was noted for example that: *"Extractive industries corporations generally fail to comply with national laws that protect the rights of Indigenous Peoples...[and] that this was occurring on a global basis, regardless of a State's developed or developing status and regardless of a State's industrialized, political or economic status"* (United Nations 2012a, para. 20). The Expert Mechanism notes that: *"The human rights risks associated with extractive activities in or near indigenous peoples' territories are aggravated by the ongoing marginalization of indigenous peoples in many States"* (United Nations 2012, para, 29).

The Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises observed that the most and the worst human rights abuses are associated with the extractive sector. He writes: *"the extractive sector – oil, gas and mining – utterly dominates this sample of reported abuse with two thirds of the total... [and] accounts for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially indigenous people"* (United Nations, 2006, para.25).

Furthermore, in the World Bank Extractive Industries Review (EIR), it was noted that the vast majority of human rights abuses reported to international human rights organisations by indigenous groups stem from the exploitation of natural resources on their lands (World Bank, 2004). The European Union (EU) and the European Parliament (EP) have also made recommendations on extractive industries and their effects on indigenous peoples and local communities even to the extent of outlawing activities in countries with poor human rights records and where such activities would affect the human rights of indigenous peoples and local communities.

2.1. Right to life

Indigenous peoples have taken action locally to prevent mining and other economic activities on their lands where there has been no good faith process of consultation and where their concerns have not been met. In certain cases this has led to confrontation, violence and loss of life. In 2009, indigenous peoples in Peru undertaking peaceful protests against oil, gas and gold exploration on their lands near the town of Bagua ended in violent confrontations in which more than 30 individuals were killed

(United Nations, 2009). The case drew international attention and criticism of the government. Confrontations between indigenous peoples and mining companies have plagued the Indonesian province of West Papua for many years. The security forces for the Freeport mine have been accused of targeting local indigenous communities which have been protesting against the mine since its inception in the 1960s. One report has suggested that the company is effectively operating a counter-insurgency policy against the indigenous population living near the mine (Whitmore, p.20). Violence against community leaders opposing extractive industry activities on their ancestral lands in Mindanao in the Philippines are alleged in the reports of human rights organizations (Mines and communities). In Africa, violent confrontations have been well-documented in the case of the Ogoni of Nigeria and their resistance to the social and environmental impacts of oil extraction on their traditional territory over many years. More recently the African Commission on Human and Peoples' Rights has pointed to the dangers to the lives and way of life of the Batwa/Bumbuti in the Democratic Republic of Congo due to the unmonitored and uncontrolled exploitation of resources by multinational and local companies (African Commission, 2006, p.26).

The Inter-American Commission on Human Rights has strongly condemned the killings of indigenous community leaders defending their lands by paramilitary and guerrilla groups in Colombia. In that country, it has been estimated that 89 percent of crimes committed against indigenous peoples occur in mining and energy-producing areas (Global Witness, 2013). In Latin America more than 180 conflicts in relation to mining have been identified, many affecting indigenous peoples and local communities (Observatorio de conflictos mineros). Furthermore, social protest in many of the countries in the region have been harshly repressed and criminalised, including by applying anti-terrorism laws. A recent visit by the Special Rapporteur on counter-terrorism and human rights, Ben Emmersen, noted that an anti-terrorism law dating from the Pinochet dictatorship was used *"in a manner that discriminates against the Mapuche,"* and is *"applied in a confused and arbitrary fashion that has resulted in real injustice, has undermined the right to a fair trial, and has been perceived as stigmatising and de-legitimising the Mapuche land claims and protests"* (United Nations, 2013 (a)).

It is important for the purposes of this report to note that in certain countries, indigenous peoples' opposition to the activities of extractive industries on their lands can result and has resulted in killings, beatings and torture of those carrying out peaceful and legitimate protests. In such cases, the right to life, the right to be free from torture, degrading or inhumane treatment and security of the person are violated as a result of the activities by extractive industries. While such violations of the fundamental rights of indigenous peoples are not widespread, and when they occur are usually the subject of international condemnation, indigenous leaders know that when they confront governments and private companies to defend their lands they may be taking personal risks.

2.2. Forced displacement

Mining, oil and gas projects cover extensive areas of land, often well beyond the actual site of extraction and include access roads, accommodation and offices and areas for tailings, water run offs and other detritus caused by extractive processes. In certain cases, this has meant that large numbers of indigenous people are removed or are threatened by removal, against their will, from their lands to make way for extractive industries and the infrastructure they inevitably entail. For example, in Bangladesh, between 50,000 and 130,000 people including entire villages of tribal Munda, Santal, Mahili and Pahan are threatened with forcible removal from the Phulbari coal mine project area. Although the footprint of the mine will cover about 2,000 hectares, a further 4,000 hectares are required for related infrastructure. In the case of the Phulbari mine, the potential human rights violations, including against indigenous peoples, have led to a call to the government to desist by seven UN Special Rapporteurs (OHCHR Press Release, 28 February 2012).

In Colombia, a coal mine operated by the Brazilian company EBX and due to be one of the largest coal-mining projects in Latin America has led to the forced displacement of Wiwa people and impacts Kogi indigenous people, who claim that there has been no process of consultation⁴. More than half of the extractive industry projects reviewed by the UN Special Rapporteur on indigenous peoples involve or threaten the removal of the indigenous peoples from their traditional territories. In certain cases, major investments in extractive industries are coupled to the development of nearby hydro-electric schemes whose energy output is necessary for the successful implementation of the project thus compounding the effects on local indigenous communities. In Brazil, for example, the Belo Monte dam, justified economically as a source of energy for the nearby aluminium smelting plant, will ultimately flood 6,000 sq. km, produce significant greenhouse gases and has forcibly displaced indigenous Juruna and Arara from their homelands as a result (Fearnside). Following criticisms the Electronorte Company eventually committed to ensuring electricity is made available locally.

2.3. Consultation and participation in decision-making

The Declaration on the Rights of Indigenous Peoples makes extensive reference to the importance of consultation, participation and the principle of free, prior and informed consent as underlying rights that should be the framework for discussions on proposed activities by governments or companies on indigenous peoples' lands. In practice, the commonest complaint made by indigenous peoples in relation to extractive industries is that consultation was inadequate, manipulative or did not take place at all and that the project proceeded without their giving consent. If the absence of any clearly defined rights in relation to indigenous peoples' lands and resources and their rights to be consulted may have been a viewpoint in the past, it can certainly not be acceptable today when such rights are recognized at the highest level of the UN. Furthermore, a large number of states have also introduced national laws that affirm indigenous peoples' rights over their traditional lands and their rights to be consulted in good faith and for their consent to be obtained prior to any development that might cause their relocation. For example, the Philippines Indigenous Peoples Rights Act of 1997 requires that the free, prior and informed consent of indigenous peoples is obtained prior to projects on their lands in particular in cases that may cause relocation.

In certain cases, the first inkling of a major development activity on the lands of indigenous peoples may well be when the trucks roll up and temporary housing is set up for the workforce. But even where consultation is ostensibly practised, indigenous peoples are often claiming manipulation or coercion. This may take the form of a company only engaging with a small unrepresentative group and not addressing traditional elders and representatives, or threatening communities with sanctions, or bribing spokespersons with money and other favours. The purpose of establishing the principle of free, prior and informed consent is to set out rules of procedure *"free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community"* as it is expressed in the Indigenous Peoples Rights Act of the Philippines (IPRA, Sec.1 (g)).

The formulation reflects the experiences that indigenous peoples have had in the past and which persist today. Even in countries aspiring to the highest standards in human rights, indigenous peoples criticise the means by which the government has carried out its negotiations with communities, working with state-endorsed structures of leadership rather than traditional indigenous decision-making bodies and not making available and in a form that can be understood in the community complex, technical draft agreements that will effectively lead to the ceding of vast areas of land for

⁴ UNSR website extractives database <http://unsr.jamesanaya.info/study-extractives/map/reports/view/62>

mining and other economic activities (Samson and Cassell). Finally, consultation and consent is required at all phases of the project not only at the planning stage but also in regards to implementation, benefit-sharing and post-operation rehabilitation. Very often these aspects of consultation are omitted.

2.4. Rights to lands and resources and the right to property

The rights of indigenous peoples to own, use, develop and control the lands, territories and resources they have traditionally owned or used is established in international law but is not in practice always recognized or guaranteed by states. Examples of governments giving concessions to extractive industries for exploration and exploitation of resources and subsequently finding themselves embroiled in conflicts or even litigation are plentiful. Botswana is a case in point. In the mid-1990s, the Basarwa were relocated from their traditional territory on the Central Kalahari Game Reserve because their presence was considered by the government harmful to the preservation of wildlife and their way of life unsustainable and obsolete. In 2006, however, the High Court of Botswana found that the government had acted unconstitutionally in removing the Basarwa from their ancestral lands and in a further decision of 2011 judged that the indigenous people could not be denied water from bore holes on the reserve (Sapignoli). The government has not implemented the court's decision in full and in the meantime, land formerly owned, used and occupied by the Basarwa forms part of a concession for diamond prospecting whose activities, as pointed out by the UN Special Rapporteur will certainly have far greater impact on the environment than its original peoples⁵. The government has recently declared it has approved coal bed methane prospecting within the Reserve where it once accused the San of being dangers to the environment. It has been suggested that more than half the 52,000 sq. km. has now been allocated as concessions to multinationals, a fact initially denied and later confirmed by the President's Office (*The Guardian*, 18 November 2013).

The non-recognition of indigenous peoples' right to land is a denial of an established right recognized internationally. It gives rise to misunderstandings, conflicts and even violence. In cases taken before the Inter-American Court of Human Rights, the property right of indigenous peoples to lands they have traditionally used, notwithstanding the absence of formal written titles, has been recognized and concessions to extractive industries have been declared illegal. The collective nature of indigenous peoples land and property is recognized internationally and in the aforementioned judgements as a property right. While it is certainly the responsibility of states to identify, demarcate and protect indigenous peoples' rights over their traditional lands, it is also the responsibility of companies to exercise due diligence and ascertain that there are no prior claims to lands and resources by indigenous peoples. Not to do so, is to risk complicity with human rights violations that may arise where indigenous peoples assert their rights over lands they have traditionally occupied since time immemorial. Indeed, the source of human rights violations in many countries is the absence of properly regulated and guaranteed land rights. In this connection, there are certainly further tensions arising in countries where sub-soil rights belong to the state even if indigenous peoples' rights to lands and natural resources such as forest produce may be recognized in law.

2.5. Rights to a clean environment, clean water, health, food and subsistence

Indigenous peoples claim that the extractive industries have damaged the environments on which they depend. Their activities have contaminated rivers, lakes and other ground water, left toxic wastes that damage soils, driven away animals on which they depend for subsistence and devastated local ecosystems. As a consequence, indigenous peoples' right to food and subsistence have been affected as well as their rights to a healthy environment and clean water. There are sufficient cases of health

⁵ See UNSR database at <http://unsr.jamesanaya.info/study-extractives/map/reports/view/17>.

crises occurring on or around the extractive industries to underline the very grave risk such activities entail (UNDESA, p.168).

In Ecuador, the long-term environmental impact of oil extraction on the lands of the Kichwa, Siona, Secoya, Huarani and Cofan indigenous peoples has been the subject of litigation for some years and resulted in 2011 in a decision by the Ecuadorian court to fine Chevron, one of the companies it claimed to be involved, \$19 billion – later reduced \$9.5 billion - to help clean up the 440,000 hectares concession⁶. According to one report, 32,000 barrels of oil were spilt yearly into Ecuador's Amazon River system, equivalent to a spill the size of Exxon Valdez every two to three years (Martinez, pp. 189 - 204).

In Chile, where mining is a pillar of the export-led economy, there are an estimated 20 conflicts associated with the extractive industries and related to their impacts on the environment. In the case of the Pascua-Lama project, the mining company Barrick Gold was ordered to halt production by a Chilean court in 2013 after complaints by indigenous peoples and others affected by the environmental damage around the site and especially contamination of water. A 2008 study on mining in Chile, notes that one of the principal environmental impacts is the extensive use of ground and sub-surface water as well as its contamination with direct and irreversible impacts on indigenous peoples such as the Atacamenos, Aymara, Quechuas and Collas whose highland animal husbandry and agriculture has been undermined causing forced migration to urban centres and the abandonment of their way of life (Yanez and Molina, p.12, 232 and passim). In Peru, the Public Defender found that in 2013 more than 100 conflicts related to mining had been registered representing nearly one half of the social conflicts in the country (Defensoria Publico de Peru, 2014) A 2011 United Nations Environment Programme (UNEP) report on the oil spills on the land of Ogoni and other communities in the Niger Delta of Nigeria estimates that any clean-up would take over 25 years (UNEP).

The traditional territories of indigenous peoples are recognized as spaces of rich biodiversity. Marked and invasive forms of economic activity can upset the careful balance of humans and nature and result in dramatic loss of biodiversity. In the sense that states are committed by being party to the Convention on Biological Diversity (CBD) to establish a system of protected areas to preserve biodiversity, there is an interest in ensuring protection of indigenous peoples' lands as places that historically and culturally safeguard nature. The impact of extractive industry, unless carefully managed, potentially reduces biodiversity and inevitably threatens the maintenance and transmission of the traditional knowledge of indigenous peoples of that biodiversity⁷.

2.6. Cultural rights

The Declaration on the Rights of Indigenous Peoples states that indigenous peoples have the right not to be subjected to forced assimilation or destruction of their culture and requires states to prevent any action which has the effect of depriving them of their cultural values or ethnic identity. Any number of factors can contribute to the erosion or disappearance of indigenous culture, most importantly the forcible removal of members of the community from the ancestral lands with which they identify. When a community is driven from their lands, losing all cultural reference points, and moves to an urban centre where its members are marginalized, impoverished, discriminated against and dispersed, there is

⁶ A US federal judge has, however, found that the decision by the Ecuadorean court was obtained by corruption. No conclusion, however, is offered on whether the company has responsibility for the environmental damage. See *The Economist*, 8 – 14 March 2014.

⁷ The World Intellectual Property Organization (WIPO) is at present engaged in the drafting of a legally binding instrument designed to protect the traditional knowledge of indigenous peoples and local communities. For further information on the Intergovernmental Committee on intellectual property and genetic resources, traditional knowledge and folklore see <http://www.wipo.int/tk/en/igc/>

inevitably and with time a forced assimilation into mainstream society. Languages disappear, values and customs specific to the community are lost, and social and political structures are debilitated. Historically, the process of assimilation following the forcible removal of indigenous peoples from their lands has led to the disappearance of distinct peoples in what some have characterised as ethnocide or cultural genocide⁸.

For most indigenous peoples, the lands they traditionally occupy embody features critical to their cultural identity, the spirits of ancestors and sacred sites indispensable to their religious practices. Since indigenous belief systems make sense of the natural world, removal from that familiar landscape effectively denies them their religion and the specificity of their culture. It is for this reason that many indigenous peoples react strongly to certain forms of development that disrupt these spiritual spaces.

The case of Dongria Kondh living in the Nyamgiri hills in the state of Odisha in India gained international visibility when their sacred mountain was threatened by a bauxite mine owned by the company Vedanta. The people worship the mountain god Niyam Raja and depend on it for their well-being. To interfere with the mountain is to defy the fundamental laws of the people. In this instance, the government of India after holding a referendum of the 12 tribal villages (panchayats) took a decision in January 2014 to deny mining rights to the company. Ironically, the Petroleum Minister, Veerappa Moily, was made Environment Minister as well a few weeks later and has since authorised 100 stalled commercial projects worth \$40 billion to the delight of corporations. He did however say he would respect the decision of Panchayats in the case of the Nyamgiri hills (*Times of India*, 13 and 15 January 2014).

2.7. Discrimination against women

The human rights abuses and negative effects resulting from the activities of extractive industries referred to above are not gender neutral. Women are disproportionately affected by mining and oil extraction. Loss of land and displacement can lead to increased burdens for women when they are responsible for the subsistence needs of the family. A degraded environment places additional demands on women especially when obtaining clean water is more difficult or if children have health problems arising from pollution. A large transient non-indigenous male workforce in proximity to an indigenous community can affect social cohesion, increase levels of sexually-transmitted diseases, alcoholism and violence against women and bring prostitution. Furthermore, women are often kept peripheral in consultations with mining companies and have few job opportunities in the event of a mine or oil project going ahead. According to a network of indigenous women in Bolivia, mining has greatly increased their work because soils and water are contaminated, there is a permanent concern about the health of and access to food for their families and women are subjected to violence from outside workers (Red Latinoamericano de Mujeres; Oxfam; LAMMP).

In a statement to the International Expert Group Meeting on *sexual health and reproductive rights held in New York on 14 and 15 January 2014*, the UN Special Rapporteur on indigenous peoples, James Anaya noted that *"in many cases indigenous women living in communities near oil, gas and mining operations are vulnerable to sexually transmitted diseases, including HIV/AIDS, which are often introduced with a rapid increase of extractive workers in indigenous areas. In addition, indigenous women have reported that the influx of workers into indigenous communities as a result of extractive projects also led to increased incidents of sexual harassment and violence, including rape and assault."*

⁸ The term of ethnocide was used in the draft declaration adopted by experts of the UN but later dropped in the final version.

3. THE INTERNATIONAL RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES

The rights of indigenous peoples are specifically set out in two international documents: the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples. The former was adopted by the General Assembly in 2007 and is accepted by all member states; the latter adopted in 1989 has been ratified by 22 states, principally in Latin America. While indigenous peoples enjoy all rights contained in international human rights instruments which themselves have been progressively interpreted to protect indigenous peoples' rights including rights to their lands, to meaningful consultation and free prior and informed consent, the 2007 Declaration constitutes the only universally accepted document exclusively focused on indigenous peoples. There is also a growing body of jurisprudence, interpretations and recommendations from the UN human rights treaty bodies, the Human Rights Council, the regional human rights systems as well as from domestic sources such as national or constitutional courts that are relevant to the manner in which indigenous peoples' rights should be understood and implemented.

There is often on-going tension between indigenous peoples and others on how universally recognized rights should be understood and implemented. This is particularly the case with regard to the provisions on consultation and consent. This is illustrated by the discussions now taking place at the World Bank which has, in its 2005 Operational Directive 4.10 recognized the rights of indigenous peoples to be consulted, but has not recognized the principal of free, prior and informed consent which indigenous peoples argue is the norm that should be applied since the adoption of the Declaration in 2007.

Since the purpose of the present paper is to be forward-looking and solutions-oriented, it focuses on the questions of consultation and free, prior and informed consent since it is only by building consensus around these key principles that the human rights of indigenous peoples can be protected in the event of extractive industries seeking to carry out activities on their lands. Necessarily though, both these principles arise out of the right of self-determination of indigenous peoples and the right of indigenous peoples to their lands, territories and resources as recognized in the 2007 Declaration. In this respect the UN Special Rapporteur refers to the principle of free, prior and informed consent as a safeguard right that contributes to the realisation of substantive rights such as to property or culture (United Nations, 2012b, paras. 47 – 53).

3.1. Right of self-determination

The right of self-determination of all peoples is recognized in common article 1 of the two international covenants on human rights. The right of indigenous peoples to self-determination is acknowledged in article 3 of the Declaration but is an underlying right present in almost all other provisions and is designed to ensure that distinct indigenous peoples can maintain their political, social, economic and cultural characteristics and determine their own future development. To recognize the right to self-determination is to accept that indigenous peoples can and should decide the appropriate development that can take place on their ancestral lands. When and if there is no consultation by outside parties in line with the procedures set out in the Declaration then this is to deny indigenous peoples their right to determine for themselves their own development.

3.2. Right to lands, territories and resources

One-third of the provisions of the Declaration on the Rights of Indigenous Peoples relate to the rights of indigenous peoples to their lands, territories and resources. Together with the right of self-determinations and the rights that run throughout the Declaration to guarantee non-discrimination

against indigenous peoples, they constitute the core of the legal instrument. When indigenous peoples resist the activities of the extractive industries it is on the basis of these rights. The Declaration guarantees them a right to decide on the nature of development they want for their peoples and recognizes their right of ownership and use of their traditional lands. If indigenous peoples' lands are demarcated, recognized and protected, governments and companies are obliged to enter into negotiations with the legal owners to determine the conditions under which economic activities can take place. When there are conflicts they are often generated by the decision of states to grant mining or other exploration and exploitation concessions to companies on lands that are traditionally owned and occupied by indigenous peoples. Or else, ambiguities arise when states that in many countries have constitutionally recognized rights to sub-soil resources give concessions where indigenous peoples have legal rights over the land and renewable resources. In light of these continuing ambiguities and conflicts, much effort is being made to establish and elaborate on what is often termed a procedural right, namely the right to be consulted and for the free, prior and informed consent of the community to be recognized.

3.3. Consultation and free, prior and informed consent

The 2007 Declaration refers extensively to participation in decision-making, consultation and free, prior and informed consent. They are formulated as procedural rights as well as duties and are also essential principles enabling indigenous peoples to exercise the right of self-determination. There is general agreement on the obligation of States to undertake consultations with indigenous peoples that might be affected by a state-endorsed activity but a degree of ambiguity envelops the principle of free, prior and informed consent. The principle, however, is found in several articles of the Declaration, notably articles 10, 11(2), 19, 28(1), 29(2), 30(1) and 32(2). Article 32 (2) of the Declaration is particularly relevant to the extractive industries and stipulates: *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

Articles 32 and 10 set out rights that go to the core of the discussions relating to indigenous peoples, extractive industries and human rights and offer nuanced solutions. While article 10 affirms an absolute prohibition of the relocation of indigenous peoples without their consent, article 32 requires consultation with the object of obtaining the free, prior and informed consent of the indigenous peoples concerned.

The principle of free prior and informed consent is also referred to in articles 6 and 15 of ILO Convention 169. Article 6 states that *"consultations carried out in application of this convention shall be undertaken [...] with the objective of achieving agreement or consent to the proposed measures."* The article can be read alongside article 15 which is of relevance to the situation of indigenous peoples and extractive industries. The article reads: *"In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples [...] before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."*

While some states have argued that the principle of consent is absent from the Convention, the ILO's Committee of Experts on the Application of Conventions and Recommendations has on several

occasions recalled that, in accordance with Article 6, governments shall consult the peoples concerned with the objective of "*achieving agreement or consent to the proposed measures*"⁹.

There is also an argument that the principle of free, prior and informed consent as it is elaborated in the 2007 Declaration is not an automatic and enforceable right because the Declaration is not binding on states. An alternative position holds that the requirement to obtain the free, prior and informed consent of indigenous peoples is necessary for the realization of their fundamental rights including their right of self-determination (Doyle). For this reason, reference needs to be made to the growing body of human rights jurisprudence and recommendations that have interpreted the right and the obligations of states to respect it. It is not the purpose of the present paper to examine the legal underpinnings of the principle since this has been done in several scholarly works. It is relevant though to point to the understanding that is increasingly being accepted by judicial and quasi-judicial bodies of the principle of free, prior and informed consent as the framework for any future political action that might be taken in relation to extractive industries, indigenous peoples and human rights. The Special Rapporteur notes, for example, that the "*Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent*" (United Nations 2013, para. 27). Furthermore, consultation and FPIC are understood not as a one-off event but as a continuous process that takes into account changes in conditions of both companies and the community through the length of the project. In this respect, successful negotiations with indigenous peoples require their free, prior, informed and continuing consent.

3.4. Jurisprudence of the United Nations treaty bodies

The bodies established to monitor legally-binding conventions and covenants of the United Nations have explicitly recommended that states undertake good faith consultations with indigenous peoples and have invoked free, prior and informed consent as a fundamental objective. The Committee on Economic, Social and Cultural Rights has called on states to respect the principle in its recommendations to a number of states parties to the Convention including Argentina, Brazil, Colombia, Ecuador, Mexico, New Zealand, Nicaragua, Peru, Philippines, the Russian Federation and Tanzania (UNCESCR).

The Human Rights Committee monitoring the International Covenant on Civil and Political Rights has also referred to the principle of free, prior and informed consent in cases where the lands of indigenous peoples are impacted in a number of countries including Canada, Colombia, El Salvador, Guatemala, Kenya, Nicaragua, Panama and Peru (UNHRC).

The Committee on the Elimination of Racial Discrimination (CERD) in its General Comment 23 of 1997 calls upon states parties to "*ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.*" The Committee has called for implementation of the principle of free prior and informed consent when adopting measure affecting the rights of indigenous peoples as a means of preventing the disappearance of their cultures and as necessary for their survival. Such concluding observations have been made in the cases of Argentina, Australia, Bolivia, Botswana, Cambodia, Cameroon, Canada, Chile, Colombia, Ecuador, Ethiopia, Fiji, Finland, Guatemala, Guyana, India, Indonesia, Mexico, Panama, Peru, Philippines, Russian Federation, Suriname, Thailand, United State of America and Vietnam (CERD).

⁹ Follow-up to the recommendations of the tripartite committee, *Observation (CEACR) - adopted 2011*, published 101st ILC session (2012), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2700476

3.5. Jurisprudence of regional human rights bodies

Consultation for the purpose of obtaining the free, prior and informed consent of indigenous peoples has been examined and commented upon by both the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights.

In the case of the Maya of Belize, the Inter-American Commission has noted that, although countries may assign ownership of sub-surface mineral and water rights to the state, it does not imply that indigenous peoples do not have rights in relation to the process of mineral exploration and exploitation, nor does it imply that the authorities have freedom to dispose of such resources at their discretion (IACHR, 2004, para.180). In the case of the Inter-American Court on the Saramaka people v Suriname, it was the conclusion of the Court that the state had *"a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format"* (IACHR, 2007, para 17). While the Court recognizes that the form of consultation may depend on the nature of the project, it recognizes that large-scale developments require the state to obtain the affected people's consent. The Court stated that: *"in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramaka, in accordance with their traditions and customs"* (IACHR 2007, para. 137).

The African Commission has also expressed an opinion regarding the requirement for states to obtain the free, prior and informed consent of indigenous peoples prior to undertaking any developments that may affect them. In the case of the Endorois of Kenya, the Commission concluded: *"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. [...] In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois ... Additionally, the African Commission is of the view that in any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions"* (ACHPR, 2010, para. 226, 290 and 292).

3.6. State practice

A number of states make explicit reference to consultation based on the principle of free, prior and informed consent. The Indigenous Peoples Rights Act of 1997 of the Philippines incorporates the principle of free, prior and informed consent, which the act defines as *"the consensus of all members of the ICCs/IPs (indigenous cultural communities/indigenous peoples) to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community"* (IPRA, Sec. 3 g). Projects of exploitation of natural resource affecting the rights of indigenous peoples are prohibited in the absence of their free, prior and informed consent (IPRA, Sec 7c, Sec. 33a and Sec. 46a).

India recognizes "Scheduled Tribes" as protected by the Constitution from social injustice and all forms of exploitation (Constitution of India, art. 46). Schedule V of the Constitution identifies "Scheduled

Areas” and these are protected by the Panchayats (Extension to Scheduled Areas) Act (PESA) against the acquisition of land for any development projects without a consultation process (Constitution of India, Schedule V and PESA, 1996).

The Bolivian Constitution of 2009 recognizes that exploitation of non-renewable natural resources must be conducted in consultation with the affected community “*in good faith and upon agreement*” (Constitution of Bolivia, arts 30 (15), 352, 403). There are also specific decrees that incorporate the right of indigenous peoples to prior consultation. Among them is the law on hydrocarbons. The law states that communities, peasant, indigenous and native peoples should be consulted in a prior, mandatory and appropriate manner when any hydrocarbon activity under the act is to be developed (Ley de hidrocarburo, articles 114 – 118). In conformity with principles recognized in the ILO Convention No. 169, the consultation must be conducted in good faith, with principles of truthfulness, transparency, information and opportunity. The Supreme Decree No. 29033 establishes four phases of a consultation process; coordination and information; organization and planning of the consultation; execution of the consultation; and agreement (Decreto Supremo No. 29033, 16 February 2007).

Colombia has recognized the right of indigenous peoples to consultation in various laws. Law 21 of 1991 approved the ILO Convention 169 and incorporated all of its provisions into the national law thus enshrining the necessity to reach final agreement and consultation as contained in article 6 of the Convention. Law 99 of 1993 (the Environment Act) regulates environmental licenses and obliges governmental authorities to “*conduct prior consultation with indigenous and black communities as a prerequisite for making decisions about natural resource exploitation*” (Ley 99, 1993, art. 9).

A law in Peru has been established in 2011 with regard to the principle of free, prior and informed consultation. The law affirms that the purpose of the consultation process is to reach an agreement or consent between the state and the indigenous peoples who are directly affected by the legislative or administrative measure in hand. The corresponding regulation of 2012 of the 2011 law, while stating for example in art 5 (d) that the end result of consultations should be the consent of the community concerned, notes also that the process of consultation would still be deemed valid in the absence of consent (Peru, Ley de Consulta, 2011 and Reglamento, 2012).

In New Zealand, the State has a duty to consult and reach agreement with Maori people in accordance with the Treaty of Waitangi. The principle of prior consultation with indigenous peoples is recognized in other laws and policies in New Zealand. The Local Government Act, states that local authorities have the obligation to “*establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority*” (New Zealand, Local Government Act 2002, Section 81(1)(a)). The Resource Management Act guarantees the right of iwi (Maori) authorities to be consulted at various stages under the Act, for instance during the development of resource management plans including by obtaining their consent (EMRIP Study on participation, information from New Zealand). In 2005, Norway and the Norwegian Sami Parliament signed a consultation agreement which sets out consultation procedures that “*apply in matters that may affect Sami interests directly.*” The agreement states in Section 6 that the consultation procedures “*shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures*” (EMRIP, Study on participation, information from Norway). The Arctic Council also offers a unique example of indigenous participation allowing six indigenous organizations to be “*permanent participants*” in the intergovernmental body giving them extensive consultative rights although no decision-making role.

4. BUSINESS AND HUMAN RIGHTS

4.1. United Nations action

There has been growing international preoccupation about the impacts of business on the enjoyment of human rights. In 2000, the United Nations launched its Global Compact initiative to encourage business to align itself voluntarily with a series of key labour, environmental and human rights principles including with respect to avoiding complicity in human rights violations. The Compact is an entirely voluntary arrangement for companies but does give visibility to “*enlightened global business*”. In 2013, it produced a business reference guide to the Declaration on the Rights of Indigenous Peoples. The Guide describes the consultation process as one that has the objective of reaching a mutually satisfactory agreement. Free, prior and informed consent, the Guide states, “*implies a decision-making right to either permit, agree to a modified version or to withhold consent to a project or activity.*” States, it is noted in the Guide, are still working on how to implement the nascent FPIC right but companies that commit to obtaining the consent of the community “*are better positioned to avoid significant legal costs and reputational risk*” (Global Compact, 2013, pp. 22 and 25).

In 2011, the Human Rights Council adopted new measures on business and human rights by endorsing the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework. The Guiding Principles affirm the responsibilities of states to protect human rights; companies to respect human rights and; in cases where there are breaches of human rights compliance, recognize the need for redress (UN Guiding Principles). Companies that do not exercise due diligence in preventing human rights violations may be breaking domestic laws. In this sense, the Guiding Principles identify much more explicitly the responsibilities of companies and set out proposals for compliance. The commentary on Principle 12 specifically refers to indigenous peoples who may be particularly affected by business and who enjoy additional rights. A UN Working Group of experts has also been established to promote implementation of the Guiding Principles and make recommendations to the Forum on Business and Human Rights, among other matters, and which has the opportunity of further elaborating the responsibilities of business towards indigenous peoples when they envisage activities that might affect them. Indigenous peoples are active in this forum as in others established by the United Nations system. The UN Forum on Business and Human Rights, created to discuss challenges arising from implementation of the Guiding Principles, has been invited by Ecuador together with a number of other states to consider a possible treaty to provide protection, justice and remedy to the victims of human rights abuses resulting from the activities of transnational corporations and other business enterprises.

4.2. Other intergovernmental guidelines

The Organization for Economic Cooperation and Development (OECD) developed Guidelines on Multinational Enterprises, a set of voluntary principles and standards for responsible business, as early as 1976. The Guidelines have been amended on several occasions, most recently in 2011 enhancing reference to human rights. Paragraph 40 of the revised Guidelines makes mention of indigenous peoples noting that the activities of companies may have adverse impacts and that the UN has elaborated specific rights for them. The formulations relating to indigenous peoples are in line with the UN Guiding Principles. The OECD Guidelines are recommendations addressed by governments to multinational enterprises and are described as non-binding. However, the OECD has in place an implementation mechanism of National Contact Points (NCPs) established by the 42 governments adhering to the Guidelines which assist companies to implement the Guidelines and provide mediation. There have been cases relating to extractive industries and indigenous peoples brought to the

attention of NCPs but the full potential of this complaint mechanism to safeguard indigenous peoples' rights has still to be realized¹⁰.

International Financial Institutions have also drawn up specific recommendations related to indigenous peoples' rights. The World Bank has had a policy on indigenous peoples since the 1980s most recently revised as Operational Policy 4.10 in 2013. The revised policy requires that the Bank, before financing development that may affect indigenous peoples, ensure that the project includes "*a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project*" (World Bank, OP 4.10). The International Finance Corporation (IFC), part of the World Bank Group providing loans to the private sector, adopted Performance Standard 7 on indigenous peoples which requires that a client receiving financial support for a project on lands traditionally owned by or under customary use of indigenous peoples, obtain the free, prior and informed consent if there is a risk of relocation from their community lands (IFC, PS paras 14 and 15).

The regional intergovernmental banks have adopted policy guides on indigenous peoples. The Asian Development Bank published its policy on indigenous peoples in 1998 which was superseded by a Safeguard Policy Statement in 2009. The Policy requires that clients obtain the free, prior and informed consent of indigenous peoples although it has qualified this position by defining it as broad community support, a standard that indigenous peoples do not accept (ADB, Policy Principle 4). The Inter-American Development Bank approved an Operational Policy on Indigenous Peoples and Strategy for Indigenous Development in 2006 which sets out a framework around the concept of development and identity and an "*intercultural economy*" that combines traditional and market elements (IADB). The European Bank for Reconstruction and Development has adopted a Performance Requirement on indigenous peoples and a Guidance Note which endorse free, prior and informed consent as a requirement for projects affecting indigenous peoples supported by the Bank (EBRD).

4.3. Industry policies

The extractive industries have also elaborated guidance for companies with activities likely to affect indigenous peoples. The International Council on Mining and Metals (ICMM), an association of the world's major mining companies, published the Indigenous Peoples Review in 2005 and has endorsed an Indigenous Peoples and Mining Policy Statement. The policy makes commitments on indigenous peoples' rights including to engage in culturally-appropriate consultations with indigenous peoples own decision-making bodies and to work to obtain the consent of the affected community. ICMM has also produced an Indigenous Peoples and Mining Good Practice Guide which has received the cautious endorsement of some indigenous experts (ICMM). In May 2013, the ICMM adopted a Position Statement on Indigenous Peoples and Mining which makes a commitment to work to obtain the consent of indigenous peoples for new projects that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on them. Research on the evolving practices of the mining sector with regard to FPIC points to positive developments but also highlights the need for a greater understanding by the sector of indigenous peoples own understanding of consent (Doyle and Carino).

¹⁰ The UK NCP took up the case of Vedanta in India and recommended that the company commit to a consultative process and respect the results. See Final statement of UK NCP, 25 September 2009. In the case of the Norwegian NCP, Intex was asked to respect FPIC for all indigenous peoples in the project area. For further information see OECD Watch http://oecdwatch.org/cases/Case_164.

Another sector-specific initiative, the International Petroleum Industry Environmental Conservation Association (IPIECA) has committed to upholding human rights and has provided information on indigenous peoples in the form of a guide for its oil and gas members (IPIECA). FPIC is recognized as a key component of mutually acceptable negotiations but the guide also notes that the right of indigenous peoples to withhold their consent is not accepted by all states. The Equator Principles which set out social and environmental policies for lending and investment institutions were revised in 2013 in line with IFC Performance Standard 7 to include reference to free, prior and informed consent in certain circumstances (Equator Principles, Principle 2). Mention can also be made of the 2000 Voluntary Principles for Security and Human Rights which invite companies to respect human rights when setting up security for their operations – relevant for indigenous peoples who have sometimes been the victims of company security – and the Extractive Industries Transparency Initiative (EITI) addressed to countries and requiring extractive industries to disclose revenues and payments, again relevant for indigenous peoples negotiating benefit-sharing arrangements in negotiations with companies.

4.4. Challenges

The extractive industries are in full ascension and have been growing exponentially for more than 50 years in terms of output, investment, profits and size and extent of projects. There is no mystery about this. Everything we make requires resources drawn from the earth. Evidently, the more our populations grow, the more we consume, the more non-renewable resources we require. The dramatic expansion of the Chinese economy and its demand for resources to fuel growth together with high growth rates in Asia and Latin America in particular have only stimulated expansion of this sector. Although the financial crisis of 2008 and the reduction of demand from the emerging economies and overcapacity within the industry have slowed down commodity production (Price Waterhouse Cooper, 2014), oil, gas and minerals remain the indispensable ingredients of the global economy as it is today.

The scale of demand for mined commodities is predicted to grow significantly in the near future (ICMM, Trends in the mining and metal industry). According to one author, *"in order to meet the demand over the next 40 years mining companies will need to mine five times more than they have ever mined before. Achieving this growth in mining is far from straightforward. Discovery costs have effectively trebled over the past 30 years, the average size of mineral discoveries has diminished, and discovery rates have roughly halved"* (Standing, p. 1). A report by Chatham House estimates more conservatively that energy demands will increase by 17 percent and demands for metals increases by 20 percent between 2010 and 2020 and that such growing demands will continue to 2030 (Chatham House, p.24).

New technology, more aggressive exploitation methods and the paring back of environmental safeguards have opened up new spaces for exploitation of which hydrological fracturing or fracking is the best known but not the only example. While apparently providing a response to the demands of the global economy and its undiminished need for commodities, such methods have given rise to a growing number of concerns, protests and conflicts. Extractive industries need extensive areas of land which are often to be found on lands traditionally owned by indigenous peoples. Sometimes these are in fragile eco-systems and companies are increasingly criticised for contaminating the environment where they are located and drawing upon precious fresh water needed for human consumption. As noted in the Chatham House report *"...the overall shift to more marginal and unconventional production will bring common challenges. These include ecological impacts associated with land-use change; increasing production in climate-sensitive areas; risks of technological failure; more resource-intensive production; and accelerating innovation"* (Chatham House, p. xi). As elaborated in the present paper, the activities of extractive industries may also cause human suffering most notably among indigenous peoples and local communities.

If the global economy stimulates ever more invasive forms of resource extraction, most national economies are also driven to adopt strategies that exploit the oil, gas and mineral resources within their jurisdictions. The rising price of commodities since 2000 has stimulated the interest of governments which have the resources to exploit. For example, the price of copper rose fourfold between 2000 and 2011 contributing 19% to Chile's GDP (Monaldi, p.6). With windfalls such as these, governments see the extractive industries as a means of paying back international debts, attracting foreign investment, earning income to reinvest in improved standards of living, addressing poverty and improving infrastructure.

But governments have also signed up to trade agreements and investment treaties and made other commercial commitments that, while offering markets in developed countries and attracting foreign investment, guarantee unrestricted access to outside investors, provide incentives often in the form of tax breaks and provide redress for loss of profits due to governmental policies even where they may be for social or environmental protection. Today there are more than 3,000 international investment agreements and where they involve extractive industry may ultimately have impacts on indigenous peoples (Anderson and Perez-Rocha, p.4).

Much of the conflict over the extractive industries between indigenous peoples and states takes place within an environment of contradictory laws, regulations and development and environmental commitments. The present paper has sought to demonstrate that indigenous peoples enjoy full protection of their rights to self-determination and to their lands and resources internationally and domestically. Yet in practice indigenous peoples do not determine their own development priorities, participate meaningfully in decision-making in matters affecting them and are rarely able to exercise their right to say no to a project on their lands.

The investment and trade agreements that all countries now subscribe to, set rigid structures that governments even with good will cannot easily remove themselves from. While it is reasonable that governments look to establish trade opportunities and foreign investors to protect their investments from unreasonable risks, there is an increasing sense that often this turns out to be to the detriment of certain less favoured groups such as indigenous peoples or even against the national interest. In the growing area of international arbitration, the extractive industries are the most active. According to a recent report, more than a third of cases brought to the International Centre for the Settlement of Investment Disputes (ICSID) came from mining, oil and gas companies (Anderson and Perez-Rocha). The same report notes that one of the highest awards was made in October 2012 when Ecuador was ordered to pay \$1.7 billion to Occidental Petroleum Corporation for cancelling its operating contract. It had earlier lost another case against Chevron and was ordered to pay \$700m.

Ecuador can remain as an example of the dilemmas confronting a government pledged to improve social conditions in the country – a pledge it has to some extent addressed – and committed constitutionally to protecting the environment¹¹. When indigenous peoples pursued Chevron in the courts for pollution it claims the company was responsible for in the Amazon, it resulted in a massive clean-up bill. As the US magazine observed at the time, it was a wakeup call for the company which apart from getting criticism from conscientious shareholders also lobbied Congress to halt trade preferences with Ecuador if the Government did not annul the court's decision (Newsweek, 26 July

¹¹ The 2008 Constitution of Ecuador gives nature the "right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution" and mandates that the government take "precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles."

2008). No compensation has yet been made for the environmental destruction caused by oil extraction, while the same companies have made use of the US-Ecuador Bilateral Investment Treaty and won compensation that is estimated to be equivalent to more than 3 percent of the country's GDP (Anderson and Perez-Rocha, p.1 and 12).

When the interesting proposal was made by Ecuador to hold off oil extraction from the Yasuni Reserve – an area of rich biodiversity and home to indigenous peoples including several uncontacted groups – in exchange for a fund equivalent to the resources estimated to be lying under the Reserve, there were few takers and less than 1 percent of the sum required was raised. In late 2013, at the instigation of the President, the National Assembly voted in favour of opening up the reserve for oil extraction and the promise of \$18 billion of revenue and the unlikely promise that only a minuscule part of this unique UNESCO World Heritage will be affected. In taking this decision, the government has evoked the development needs of the country as a whole as his reason for approving the project. Although, it is legitimate to ask whether the wealth that has been extracted in the form of oil over nearly 50 years, has done much to help the majority of the people in this, one of the region's poorest countries.

The decision taken by the President of Ecuador has rekindled conflict between the government which is seen as sacrificing an environment of rich biodiversity and the livelihoods of indigenous communities to open up the country for further exploitation by outside interests. Investment treaties may well offer protection to companies but increasingly governments and courts are ready to intervene if national interests are at stake. Bolivia, for example, has amended its constitution to deny jurisdiction of international tribunals to hear disputes over investments in the hydrocarbons sector. When courts intervene to close down a mining operation it can be costly to the companies concerned. For example, when a Chilean court ordered a halt to construction work at the \$48.5 billion Pascua-Lama project, shares of Barrick Gold plunged. The court went on to impose a \$16m fine for environmental irregularities (Associated Press, 24 May 2013). A recent report by First Peoples Worldwide concludes that of the 370 oil, gas and mining sites that they analysed, 92 percent posed a medium to high risk for shareholders because there were potential legal, indigenous or other non-technical claims (First Peoples Worldwide, p.3).

In practice and despite the worthy and forward-looking policies of the industry associations such as ICMM, companies do not always abide by their tenets. The report of First Peoples Worldwide claims that most companies are not prepared with effective policies and practices for their dealings with indigenous peoples. Two studies by Oxfam seem to confirm this finding. For example, a study by Oxfam USA in 2012 found that only 5 of the 28 extractive industries it studied had explicit commitments to FPIC in the event their activities brought them in contact with indigenous peoples and in certain cases these were formulated in a way that weakened their impact (Oxfam America). Similar conclusions are reached in a report by Oxfam Australia which notes that only two of the 53 extractive companies on the Australian stock market had a public commitment to indigenous peoples' rights and only one had a policy specifically recognizing FPIC (Hill et al).

Furthermore, companies are criticised for not responding effectively in areas of interest to the indigenous communities in particular rehabilitation of lands affected by extractive industries, redress and compensation for loss of livelihood and other impacts brought about by a project, and benefit-sharing. As noted earlier, Indigenous peoples are not systematically opposed to mining or oil and gas extraction and in some countries – Australia, Canada and Greenland, to name a few - have entered into different kinds of agreements with companies when there are deemed to be benefits. In a study of 12 extractive industries in Latin America, companies are shown to adopt a range of policies with indigenous peoples, in some instances reaching out to communities and entering direct agreements with them. The report claims that Cerrejon company mining coal in Colombia, which has been fiercely

criticised for ignoring indigenous peoples for many years, has signed agreements with more than 100 Wayuu communities (Americas Society/Council of the Americas). In other instances, indigenous peoples have organized their own community referendums – this is the case in, for example, Guatemala and Colombia – as a means of strengthening their negotiations both with governments and the companies concerned.

In light of the increased capacity of indigenous peoples to resist unwanted extractive industry projects on their lands, some companies are certainly more willing to look for ways of obtaining community support. There may even be a case for arguing that investors would benefit from a clear and binding commitment to the provisions of the Declaration on the Rights of Indigenous Peoples. One author, for example, suggests that an obligation to comply with the Declaration may give a competitive advantage to companies and tend to *“build positive relations with local communities and avoid the insecurity and bad publicity that can result from conflict”* (Foster, 2012).

5. ACTION BY THE EUROPEAN UNION

5.1. The European Union and indigenous peoples

The European Union has been active on indigenous peoples’ issues since the late 1990s. Its representatives have participated in international meetings on indigenous peoples for more than a decade and the EU took a positive position during negotiations on the draft declaration on the rights of indigenous peoples, supporting its adoption by the Human Rights Council in 2006 and at the General Assembly in 2007. As one of the key regions together with the Latin American and Caribbean group behind the adoption of the Declaration, it can be argued that it has strong motivation to see that it is applied in spirit and in fact. The EU also participates in the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Human Rights Council as well as other international fora where its representatives contribute on indigenous peoples’ issues. The EU is also providing support to the World Conference on Indigenous Peoples which will be held in New York on 22 and 23 September 2014.

Through the European Instrument for Democracy and Human Rights (EIDHR) launched in 2006, the EU has supported projects designed to increase indigenous peoples’ capacity and rights as part of its larger objective to strengthen the role of civil society. The EU Regulation on the Development and Cooperation Instrument (DCI) for the period 2007 to 2013 identified thematic areas for funding support that are inclusive of indigenous peoples’ concerns including through emphasis on the preservation of cultural diversity, biodiversity and enhancement of the sustainable use of natural resources. The new Regulation on the DCI for the period 2014 to 2020 has two new programmes entitled *“Global public goods and challenges”* and *“Support for civil society organizations and local authorities”* prioritizing the fight against poverty – an objective that ought to maintain indigenous peoples as a focus of attention given their disadvantage in all societies. The EU Strategic Framework and Action Plan for Human Rights and Democracy adopted in June 2012 include commitments that potentially may benefit indigenous peoples such as the agreement to have corporate social responsibility provisions in free trade agreements negotiated by the EU and committing to advocate for the rights of indigenous peoples.

Indigenous peoples are also a cross-cutting issue in development cooperation under the 2005 European Consensus on Development supported by the Council, Member States, the European Parliament and the European Commission. The Consensus commits the EU to applying a strengthened approach to mainstreaming indigenous peoples including by ensuring their full participation and free prior and informed consent. In its human rights dialogues with other states, indigenous peoples’ issues can be raised although are not specifically referred to in the Guidelines. Under its development

cooperation programmes, country strategies also include activities for indigenous peoples. For example, the EU Annual Report on Human Rights and Democracy in the World in 2012 refers to the inclusion of specific projects in the EU country development strategies in Colombia and Peru and to activities in the Asia region aimed at supporting indigenous human rights defenders with financing of 1.1 million Euros. Support was also given to a thematic paper on indigenous peoples for the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises and is to be available for activities related to the World Conference on Human Rights. While there is nominal coordination of these activities, this is less evident from the outside. The post Millennium Development Goals (MDG) framework, however, may offer an opportunity to enhance coordination on indigenous issues among EU organizations and programmes and ensure that indigenous peoples, who were largely omitted from MDG targets, are a specific focus of attention in any new global development goals.

In addition, the European Parliament has adopted a number of resolutions on the human rights of indigenous peoples in specific countries. These include resolutions relating to the human rights of indigenous peoples in, for example, Colombia, Guatemala, Peru and West Papua (Indonesia) or on thematic issues such as the impacts of climate change in the Arctic or timber export partnerships in Cameroon and the Republic of Congo. These resolutions are necessarily reactive, responding to human rights crises as they occur. Mention can also be made of the role the European Parliament can play in proposing, amending and otherwise influencing legal texts of the EU. For example, the EP has suggested strengthening the protection of indigenous peoples' rights in the Regulation on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.

5.2. European Union and corporate social responsibility

In October 2011 the European Commission published a new policy on corporate social responsibility. The policy is focused on integrating the UN Guiding Principles on Business and Human Rights into the national programmes of member states. As part of the policy, companies are also invited to include the Guiding Principles into their activities and respect human rights. In 2013, an oil and gas sector guide on implementing the UN Guiding Principles on Business and Human Rights was published by the European Commission. The sector guide includes reference to the principle of free, prior and informed consent and its relevance in particular to indigenous peoples noting that the right "*applies to indigenous peoples with regard to activities involving land, territory or other resources that they traditionally own, use or occupy*" (Oil and gas sector guide, p.38). Further guidance to companies, including oil and gas companies is due in April 2014.

In considering ways of strengthening corporate social responsibility in relation to indigenous peoples, other EU initiatives may be borne in mind. For example, lessons for addressing human rights violations associated with other extractive industries can be drawn from the EU's efforts to curb illegal logging through the EU Forest Law Enforcement Governance and Trade (FLEGT) Action Plan (2003). This includes the EU Timber Regulation (EUTR) which places due diligence requirements (with sanctions for failure) on those importing timber and wood products onto the EU market, and the FLEGT Voluntary Partnership Agreements (VPA) mechanism, which involves EU support to timber exporting countries so that they can guarantee adequate monitoring, enforcement and compliance with national and international law. The EC's Raw Materials Initiative can also be a mechanism for furthering recognition of indigenous peoples' rights. The proposed EU Regulation on conflict minerals that fuel irregular military groups (such as the Fuerzas Armadas Revolucionarias de Colombia) that might have required

companies to be legally obliged to check their sources has, by some accounts, been weakened by turning the regulation into a voluntary self-certification scheme (*The Guardian*, 4 March 2014).

6. CONCLUSION AND RECOMMENDATIONS FOR CONSIDERATION BY THE EUROPEAN PARLIAMENT

6.1. Conclusion

There are, since 2007, universally accepted rights for indigenous peoples. There are numerous states that have incorporated indigenous peoples' rights into their constitutions and laws. There is an increasing corpus of judgements and recommendations from judicial and expert bodies to uphold these rights. In practice, however, and despite the well-established nature of these rights, indigenous peoples worldwide are victims of human rights violations when confronted by extractive industry projects on their lands.

There are reasons that go some way to explaining why this is so. Governments may genuinely seek to develop mining and oil extraction because they see this as the only immediate means of bringing in income and thereby addressing development challenges. Or else it may be that there are vested interests within or close to the government that expect personal benefits from these outside investments. The question of high levels of corruption in many governments cannot be ignored. It may also be that governments are committed to trade and investment agreements that require them to privilege foreign investment including by extractive industry.

The contradictory policies that exist within countries and that appear to be the source of many of the conflicts affecting indigenous peoples are equally present in Europe. Extractive industries include companies that are European or European-based. Their economic success benefits the region. European banks, investors and manufacturing companies benefit from the non-renewable resources of the extractive industries. Europe is also faced with the strategic challenge of ensuring access at affordable prices to resources at a time when other regions are substantially increasing their demands. Europe is faced with balancing protection of its own companies and interests with the rights and interests of the peoples where such resources are extracted.

Although the present paper has focused on the human rights impacts of extractive industries on indigenous peoples, it is important to note that indigenous peoples themselves have widely diverse views regarding the extractive industries. Some may adamantly resist because of what they fear, often with reason, will happen to their lands and cultures; others see opportunities. How these diverse views can be accommodated, the paper argues, is by fully respecting indigenous peoples' rights to be consulted. This may mean lengthy negotiations; it may also mean some projects get rejected but in the end governments and companies may in return get a well-functioning, relatively harmonious project and one that does the least permanent damage to the environment, biodiversity and indigenous traditions.

So much of what has been recorded regarding indigenous peoples relations with extractive industries is negative and this means that there is a credibility gap. Indigenous peoples do not believe companies and governments respect their rights. Furthermore, when extractive industries commit crimes against indigenous peoples – destroying their livelihoods, polluting their living spaces, driving them from their homes – they are not sanctioned. For this reason, many advocating indigenous peoples' rights believe, that while voluntary arrangements by companies have done much to build confidence and improve relations, a goal ultimately has to be a legal recourse for victims of these human rights abuses.

The EU has to find the means to protect its strategic interests but insist that in so doing it implements in practice the rights it has helped to establish and this means ensuring that companies that fall within its jurisdiction do so also. A longer-term aim, although this falls outside the scope of this paper, has to be to contribute to the creation of a less destructive economic model which ensures equitable prosperity and is not based on the ever-increasing use of non-renewable resources and climate-changing fossil fuels.

6.2. Recommendations

In the light of the comments and conclusions, the European Parliament has an opportunity to (a) note in general the continuing deleterious impact of extractive industries on indigenous communities; (b) welcome the significant steps taken by mining and oil and gas associations as well as certain individual companies to respect indigenous peoples' rights and incorporate these rights into policies and practices; (c) reaffirm the EU's commitments to promoting the rights of indigenous peoples as contained in the Declaration on the Rights of Indigenous Peoples through its diplomatic, developmental and democracy activities; (d) address existing contradictions within the region by identifying those agreements, treaties and other legal arrangements that may work against the rights of indigenous peoples to self-determination and to their lands and resources and proposing appropriate solutions; (e) clarifying and strengthening the legal and regulatory framework for companies within the EU jurisdiction engaged in extractive activities affecting indigenous peoples as a means of ensuring a level playing field for all oil, gas and mining operations.

The following constitute proposals for consideration by the European Parliament:

Possible action at the European Union level

1. Recommend EU member states ratify International Labour Organization Convention 169 on indigenous and tribal peoples.
2. Recommend that EU member states include reference to indigenous peoples and the rights contained in the Declaration on the Rights of Indigenous Peoples in their Business and Human Rights National Action Plans.
3. Recommend that a European Regional Action Plan on Business and Human Rights be developed on indigenous peoples and extractive industries.
4. Ensure that all investment and trade agreements both by the EU and by member states comply with international human rights standards, including those addressing the rights of indigenous peoples.
5. Ensure that EU development policies comply with human rights, including those set out in the Declaration on the Rights of Indigenous Peoples.
6. Establish a regulatory framework to ensure that future investment and trade include mandatory human rights impact assessment and due diligence requirements.
7. Explore ways in which EU bodies and personnel concerned with trade (notably those at the European Commission) and their respective policies, procedures and practices, can be better trained and coordinated so as to ensure that all trade-related activities are fully compliant with the human rights obligations of the EU and its Member States, and the EU's international development agenda.
8. Propose the establishment of an effective, affordable, and accessible grievance mechanism where indigenous peoples can address allegations of European corporate violations of their rights, including their decision-making rights over developmental activities in their territories or impacting on their rights.

9. Recommend that EU member states harmonize their OECD National Contact Points processes to facilitate access by indigenous communities and improve mediation and public determinations of the allegations raised. The European Parliament should consider a possible follow up procedure to NCP complaints in order to increase their effectiveness as a remedy for rights violations.
10. In line with the recommendations of the Committee on the Elimination of Racial Discrimination to a number of EU member states ensure that companies based, registered or otherwise having a significant market or administrative presence in the EU are held to account for violations of indigenous peoples rights.
11. To this end the Parliament should examine the potential for strengthening or extending EU legislation so that corporations involved in extractive industries can be held to account for corporate violations of (or complicity in violations) of, indigenous peoples' rights that take place overseas, in the domestic courts of Member States.
12. Consider ways and means of strengthening reporting of European Export Credit Agencies and improved oversight by the European Parliament, Commission and civil society. The safeguards and standards against which European Export Credit Agencies should be measured and held accountable should be mandatory and enforceable and reflect the current state of international human rights law and other standards legislated and endorsed by the EU including the UNDRIP.
13. Explore demand-side initiatives at the EU level that guarantee human rights monitoring and due diligence, with an associated enforcement and sanctions regime, to ensure that products and commodities entering the EU market are not sourced from areas in which customary land tenure regimes are not recognized or respected in practice, or where land conflicts are associated with natural resource extraction.

Possible action at the international level to promote the development of a governance framework for the extractive sector

14. Support further discussion under the auspices of the UN Forum on Business and Human Rights of ways and means of strengthening protection of indigenous peoples' rights. This should include further elaboration of how the Guiding Principles can be implemented in practice especially through affirmation of the principle of free, prior and informed consent as a sector-wide norm for oil, gas and mining enterprises.
15. Engage in the discussions of the UN Forum regarding a proposed treaty on business and human rights as a means of preventing the most egregious violations of human rights of indigenous peoples arising from certain practices by governments and extractive industries.
16. Propose an EU-initiated multi-stakeholder dialogue on indigenous peoples, extractive industries and human rights focused on regulation of extractive industry in accordance with the Declaration on the Rights of Indigenous Peoples and as a means of ensuring a level playing field for all companies operating on indigenous peoples' lands.
17. Recommend to EU member states that they request the World Bank and other international financial institutions as well as the European Investment Bank where they are shareholders to ensure that the lending policies of the banks reflect and respect the Declaration on the Rights of Indigenous Peoples, including the principle of free, prior and informed consent which should be a requirement in the event of large-scale projects likely to affect indigenous peoples.
18. Continue to give support to UN mechanisms and the World Conference on Indigenous Peoples to be held at UN Headquarters in September 2014 and in particular consider ways and means of

following up the Special Rapporteur's recommendations contained in his 2013 report to the Human Rights Council.

19. Give support to the eventual elaboration of a UN convention on the rights of indigenous peoples.

Support for indigenous peoples, academic and civil society organizations

20. Invite and support civil society organizations and academic institutions, in cooperation with indigenous peoples, to continue research on the impacts of extractive industries on indigenous communities.
21. Build on the research work undertaken by the UN Special Representative in relation to human rights and investment treaties by reviewing investment treaties with potential impact on indigenous peoples' pre-existing rights, where appropriate in consultation with indigenous peoples, in order to determine how to render them consistent with those rights.
22. Continue to support capacity-building of indigenous communities in particular in relation to business and human rights including in human rights strategies drafted by EU delegations in relevant countries.
23. Provide technical and financial assistance to indigenous peoples to strengthen their technical capacity to engage in consultations with extractive industries as well as to hold their own referendums through EIDHR country-based support schemes.
24. Establish a forum for dialogue with indigenous peoples' representatives to consider measures that might be proposed improve relations between their communities and extractive industries that are within EU jurisdiction.
25. Include a panel on indigenous peoples in the EU Human Rights Forum that will provide opportunities to draw on a wide range of civil society organizations, academic institutions and others working on indigenous issues.
26. Review overall EU policies, programmes and financing with a view to harmonizing activities, ensuring coherence and making them more accessible to outsiders.

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