

**To: Keith Slack, Oxfam**

**From: Lowenstein Clinic**

**Date: August 21, 2003**

**Re: Revised Draft of Summary Memo on Requirement of Free, Prior and Informed Consent of Indigenous Communities for Sub-Surface Resource Extraction**

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Does international law require that mining and other extractive industries obtain the free, prior and informed consent of local indigenous peoples before commencing sub-soil resource exploration and development? Fifty years ago, or even twenty-five years ago, the answer would probably have been no. Indigenous communities' rights to lands they had occupied for centuries were routinely disregarded by national governments. Legal doctrines such as *terra nullis* ("empty land") justified colonial possession and control over all supposedly "unowned" land. For many indigenous peoples, their experience included invasion and murder, environmental degradation, cultural and legal discrimination, and, in extreme cases, extinction of entire communities.<sup>1</sup>

The days of *terra nullis* as international law are over,<sup>2</sup> though many indigenous peoples remain economically disadvantaged and politically isolated. Indeed, the past twenty years have witnessed a sea change in international legal and political recognition of the rights of indigenous peoples.<sup>3</sup> In place of *terra nullis*, new international legal

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<sup>1</sup> International Working Group for Indigenous Affairs, at <http://www.iwgia.org/> (last visited Mar. 10, 2003). See generally Jose Martinez Cobo, U.N. Special Rapporteur for Indigenous Peoples, Study of the Problems of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1-4 (1986) [hereinafter Cobo Report].

<sup>2</sup> See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (repudiating the historical legal doctrine of *terra nullis*, and recommending self-determination for former territorial residents).

<sup>3</sup> There is no well-settled definition of what constitutes an "indigenous" community under international law. At this point in time, the chief determinant of whether a group is formally indigenous is the nature of that community's relationship to its land. Jose Martinez Cobo, the former Special Rapporteur of the U.N.

standards have been created that favor recognition of indigenous peoples' human rights and require indigenous consent to development of their land.

So far, no single, binding standard in customary international law explicitly addresses the development of subsurface oil and minerals. States and corporations that wish to develop subsurface resources in ways that affect the lands of indigenous peoples do, however, face multiple legal constraints designed to protect the human rights of affected communities. This memo surveys those constraints, which vary depending on geography, the relevant legal instruments, the property rights involved, and the effect that proposed extractive activities would have on protected rights and interests.

Although international law requires certain behavioral minima, the degree and form of consent may in certain geographic areas be established and augmented by national law. While domestic laws play an important role in the emergence of customary international legal norms, this memo does not purport to include all country-specific requirements. Where appropriate to demonstrating the impact and interpretation of

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Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined indigenous populations as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. At present, they represent non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems.

UN Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add 4, para. 39 (1986). This criterion, by its own terms, tends to favor groups that have occupied their lands over long periods of time. This measure may unfairly treat groups that have been forced to relocate over time, casting their credibility as "indigenous" groups into question. Although this memo focuses on indigenous communities, this definitional question is ultimately not of critical importance. Development may threaten community interests that, as protected in human rights, are shared both by indigenous and non-native communities. Of course, the salience of these interests, and the converse risk of damage, is particularly acute with indigenous communities living on native lands. *See generally* Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 169 I.L.O. 1989 [hereinafter Convention No. 169].

certain human rights norms, this paper does make reference to several national examples – these do not, however, comprise an exhaustive study.

Some jurisdictions have adopted expansive rules that conceive of consent as a right in itself, but most have not. Instead, consent has emerged as a secondary procedural right, implicit in and instrumental to a host of well-established international protections. The first Part of this memo sketches out the fundamental human rights at stake: The right to self-determination; the right to property; the right to culture; the right to non-discrimination; the right against forced relocation; and the right to a healthy environment. In many extractive projects, the preservation of this set of rights necessitates that governments and companies obtain the consent of local communities. In this regard, the right to consent flows syllogistically from an array of well-established human rights.

Part II describes a bold and recent shift within extractive industries to embrace the human rights outlined in Part I. These efforts are still young and, in many cases, not fully developed. As companies begin to flesh out their commitments to international law, some have underestimated the procedural steps necessary to ensure the preservation of indigenous communities' rights.

These steps are drawn into relief in Part III, which focuses on legal rules that have evolved to protect the rights listed in Part I. To this end, the section evaluates several different consent rules, which vary in stringency and derive from different legal concepts. It also examines other measures, short of consent, that have arisen to protect the same rights. These include: a right to be compensated for past harms; a right to be consulted about future development projects; and an entitlement to a share of the benefits from such

projects. In practice, these lesser standards often operate in combination, and this memo analyzes them together.

This memo concludes that consent, while independently gaining momentum in practice around the world, is implicit in other rights that have already achieved full global acceptance. Indigenous communities cannot meaningfully realize many well-established protections unless they enjoy a right of consent to development projects that threaten these rights. This memo argues that all development should be screened through a context-sensitive approach in which standards of compensation, consultation or consent may apply, depending on the nature and degree of the rights affected by the proposed development. However, international law explicitly requires that projects targeting the native lands of indigenous communities entail a minimum of robust meaningful consultation with affected groups. This means that developments impacting such groups, which are the focus of this memo, may be subjected to one of only two legal standards – a rigorous practice of consultation, or a process of free, prior and informed consent. Whenever a project implicates the human rights, identified in Part One, that trigger consent, that standard should prevail over one of consultation.

### **Part I. Fundamental Human Rights at Stake**

Oil exploration, mining and similar development projects implicate fundamental human rights of communities that would be affected by extractive projects. Indeed, the U.N. Special Rapporteur on Indigenous Peoples found that countries in the Amazon and elsewhere have in the past been “looted by transnationals with the co-operation of governments” with “total disregard” for the human rights of indigenous residents.<sup>4</sup> Many of these rights are codified in the major instruments known collectively as the

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<sup>4</sup> Final Cobo Report, *supra* note 1, at 141.

International Bill of Human Rights<sup>5</sup>: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>6</sup> While the rights contained in these documents are not absolute,<sup>7</sup> they do impose legal obligations upon parties (and in the case of the Declaration, which is widely viewed as embodying international law, upon all states) to respect human rights.

#### *A. Right to Self-Determination*

The ICCPR and the ICESCR both begin by affirming the right of all peoples to “self-determination” and proclaim that all peoples have the right to freely dispose of their natural resources and that “in no way may a people be deprived of its own means of subsistence.”<sup>8</sup> While the principle of self-determination does not necessarily extend to a right to separate statehood, it does mean that indigenous peoples have the right to control

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<sup>5</sup> See generally Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1 (R. Bernhardt & J.A. Jolowicz, eds.) (1987).

<sup>6</sup> Regional instruments such as the American Convention on Human Rights and American Declaration on the Rights and Duties of Man also guarantee the rights to life, non-discrimination and property. See American Declaration of the Rights and Duties of Man, adopted 1948, Ninth International Conference of American States, Art. XXIII, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, at 17, OEA/Ser.L./V.II.82, doc. 6 rev. 1 (1992) [hereinafter American Declaration], (Art. 1, right to life, liberty and personal security; Art. 2, equal protection; Art. 9, right to inviolability of the home; Art. 11, right to preservation of health and to well-being; Art. 13, right to “take part in the cultural life of the community”); available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>; American Convention on Human Rights, adopted Nov. 22, 1969, Art. 21, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention] (Art. 1(1), nondiscrimination; Art. 4, right to life; Art. 21, right to property; Art. 24, equal protection), available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>. According to the OAS website, the following countries have ratified the American Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad & Tobago, Uruguay, and Venezuela.

<sup>7</sup> Art. 29(2) of the Universal Declaration permits a state to enact laws limiting rights provided the sole purpose of those laws is to secure “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” A government’s ability to limit rights is further constrained by Art. 30, which provides that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms” in the Declaration.

<sup>8</sup> ICCPR Art. 1(1) and (2); ICESCR Art. 1(1) and (2). The U.N. Charter also provides for the right to self-determination in Article 1, para. 2.

their own lands and natural resources and to be genuinely involved in all decision-making processes that affect them.<sup>9</sup> The Human Rights Committee – the body charged with monitoring compliance with the ICCPR – recently called upon Mexico and Norway to faithfully implement the right of self-determination in relation to indigenous peoples and their traditional lands.<sup>10</sup> Although it has not yet yielded an independently justiciable cause of action in international forums,<sup>11</sup> the right to self-determination is central to conceptions of liberty and human dignity and, of course, to any standard of “consent.”

### *B. Right to Property*

A corollary to the right to self-determination is the right to property, which has proved more amenable to international adjudication. Art. 7 of the Universal Declaration of Human Rights states that “everyone has a right to own property” and that “no one shall be arbitrarily deprived of his property.” Indigenous property regimes may be very different from those of national governments, but nevertheless legitimate.<sup>12</sup> As Anaya and Williams explain,

[W]ith their source in indigenous peoples' own customs and usages, and with characteristics that may diverge widely from property regimes that derive from

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<sup>9</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 85-88 (1996).

<sup>10</sup> See Concluding Observations of the Human Rights Committee: Mexico, U.N. GAOR, Hum. Rts. Comm., 66<sup>th</sup> Sess., para. 19; U.N. Doc. CCPR/C/79/Add.109 (1999); Concluding Observations of the Human Rights Committee: Norway, U.N. GAOR, Hum. Rts. Comm., 67<sup>th</sup> Sess., paras. 10 & 17, U.N. Doc. CCPR/C/79/Add.112 (1999).

<sup>11</sup> For instance, when Chief Bernard Ominayak of the Lubicon Lake Cree people alleged in a communication to the Human Rights Committee that Canada had violated Art. 1 of the ICCPR, in addition to other human rights principles, that portion of the claim was dismissed by the HRC, which observed that Chief Ominayak “as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination . . . which deals with rights conferred upon peoples, as such,” and that “the question whether the Lubicon Lake Band constitutes a ‘people’ is not an issue for the Committee to address under the Optional Protocol” to the ICCPR. Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984, Report of the Human Rights Committee, U.N. GAOR, 45<sup>th</sup> Sess., No. 40, vol. 2, UN Doc. A/45/40, Annex IX(A) (1990), at 9-10, 27. Critics charge that this leaves indigenous peoples without a forum in which to adjudicate claims of self-determination; see Andrew Huff, *Resource Development and Human Rights: A Look at the Case of Lubicon Cree Indian Nation of Canada*, 10 *COLO. J. INT’L ENVRL. L. & POL’Y* 161, 187 (1999).

<sup>12</sup> See Anaya & Williams, 42-48, for examples of native property regimes in the Americas.

state enactments, indigenous traditional and resource tenure regimes nonetheless constitute forms of property. The existence of indigenous property regimes does not depend on prior identification by the state, but rather may be discerned by objective evidence that includes indigenous peoples' own accounts of traditional land and resource tenure.<sup>13</sup>

Because of the history of discrimination against indigenous ownership, property rights that have not yet been recognized in governmental title records may nonetheless exist under law. Governments that continue to fail to recognize such ownership are subject to international litigation. The government of Paraguay has agreed to repurchase land improperly transferred to private industrial interests.<sup>14</sup> The World Bank, the Inter-American Development Bank, and the United Nations Development Program have all adopted policy directives requiring recognition of indigenous land rights.<sup>15</sup>

In the case of the Awas Tingni people in Nicaragua, both the Inter-American Commission and the Inter-American Court found that a failure to recognize indigenous ownership of land, as well as subsequent grants of logging concessions without the consent of the Awas Tingni community, violated the right to property.<sup>16</sup> The Awas Tingni, an indigenous community in Nicaragua, sought to bar the Nicaraguan government from granting a logging concession to a Korean timber company. Nicaraguan courts rejected this request, instead allowing the company to log 153,000

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<sup>13</sup> Anaya & Williams at 46.

<sup>14</sup> See *Enxet-Lamenxay and Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay*, case 11.713, Report No. 90/99, Inter-Am. C.H.R. 1999 I.A.C.H.R. 350. In this friendly settlement supervised by the Inter-American Commission, Paraguay agreed that the Exnet-Sanapana people, whose entire territory was sold without their consent to foreigners between 1885 and 1950, had a right to the land "at both the domestic and international levels" (para 12). Paraguay agreed to repurchase land and return it to the Exnet, and to provide assistance in the resettlement process.

<sup>15</sup> The World Bank directive is currently undergoing revision. *See generally* Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 (2002).

<sup>16</sup> *Judgement on the Preliminary Objections of February 1, 2000*, Inter-Am. C.H.R., report no. 27/98, Ser. C. no. 66 (2000).

acres of tropical rainforest for 30 years on land the Awas Tingni argued was theirs.<sup>17</sup> The Inter-American Court of Human Rights, in its first major decision on indigenous rights, found that the community did indeed have a collective right of ownership to its traditional lands and resources.<sup>18</sup>

Whether property rights extend to sub-surface resources, however, depends on domestic law. ILO Convention No. 169 specifically refers to the fact that some states retain “ownership of mineral or sub-surface resources.”<sup>19</sup> Many national laws requiring consent apply only to ground-level resources, and the “traditional use” arguments used to establish land or forest ownership apply less well when the indigenous peoples did not historically exploit sub-soil resources. Some governments, however, explicitly recognize indigenous property interests in sub-surface resources.<sup>20</sup>

### *C. Right of Non-Discrimination*

Though indigenous peoples’ understanding of property ownership might differ from that of the dominant society (for instance, ownership may be communal rather than individual), non-discrimination and equal protection norms require that their property rights be respected equally.<sup>21</sup> The ICCPR and the ICESCR both bar discrimination based on race, color, sex, language, religion, national or social origin, property or birth.<sup>22</sup> Furthermore, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) expressly protects collective group property rights and allows state parties to take special affirmative measures to ensure that particular racial groups are given equal

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<sup>17</sup> Court Affirms Indigenous Rights, OAS News, at [http://www.oas.org/OASNews/2001/English/Nov\\_Dec2001/art8.html](http://www.oas.org/OASNews/2001/English/Nov_Dec2001/art8.html) (Nov.-Dev. 2001).

<sup>18</sup> The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua, Judgment Summary and Order of the Inter-American Court of Human Rights, issued Aug. 31, 2001.

<sup>19</sup> Convention No. 169, *supra* note 3.

<sup>20</sup> Australia and the Phillipines have both recognized such interests. *See* Section B(1), *infra*.

<sup>21</sup> Anaya & Williams at 43.

<sup>22</sup> ICCPR Art. 2(1), ICESCR Art. 2(2).

protection.<sup>23</sup> In many cases, the only means of ensuring that indigenous peoples' land is not unfairly exploited is to require their participation in and consent to decisions about the use of their lands. A 1997 General Recommendation by the CERD Committee calls upon states parties to "ensure that members of indigenous peoples have equal rights in respect to effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>24</sup> Furthermore, if indigenous peoples' land was in the past taken without their free and informed consent, states should "take steps to return those lands and territories."<sup>25</sup>

#### *D. Right to Cultural Enjoyment*

Signatories to the ICCPR or ICESCR undertake not to deny members of ethnic, religious or linguistic minorities the right, "in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>26</sup> Although this right to cultural enjoyment pertains to minority groups generally, it has special significance for indigenous peoples. The right to cultural integrity has been interpreted to include indigenous peoples' right to their land as an essential prerequisite to the preservation of their culture.<sup>27</sup> In a series of decisions about

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<sup>23</sup> Art. 1(4).

<sup>24</sup> Gen. Rec. XXIII Concerning Indigenous Peoples, 51<sup>st</sup> Sess., 1235 mtg, para. 4(d), UN Doc. CERD/C/51/Misc.13/Rev.4 (1997). MacKay argues that the comments of the CERD should be given special weight given the strength and importance of the non-discrimination norm. *See* MacKay, *supra* note 15 at 610.

<sup>25</sup> Gen. Rec. XXIII Concerning Indigenous Peoples, 51<sup>st</sup> Sess., 1235 mtg, para. 5, UN Doc. CERD/C/51/Misc.13/Rev.4 (1997) (continuing that where this is "for factual reasons not possible, the right to restitution should be substituted by the right to just, fair, and prompt compensation . . . [in] the form of lands and territories").

<sup>26</sup> Art. 27 of the ICCPR and Art. 27 of the ICESCR. Art. 30 of the Convention on the Rights of the Child provides for similar cultural protections.

<sup>27</sup> For instance, in the *Lubicon Lake* case, *supra* note 11, the UN Human Rights Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band. The Committee found that the natural resource development activity compounded historical inequities to

the Sami indigenous group in Scandinavia, the Human Rights Committee confirmed that Article 27 protections of culture extend to traditional economic activities—in the Sami’s case, reindeer herding—“where that activity is an essential element in the culture of an ethnic community.”<sup>28</sup> International bodies and instruments have also noted the centrality of the right to culture to a broader right to self-determination.<sup>29</sup> Respecting cultural rights, in a fashion that parallels the protection of property rights, may demand “effective participation” of indigenous peoples and other members of minorities in decisions affecting traditional land and resources.<sup>30</sup>

#### *E. Right Against Forced Relocation*

International law standards also prohibit involuntary relocation, a phenomenon closely linked to violations of the rights to culture, property and self-determination. This doctrine has its roots in the Geneva Convention, which bars forced relocation of civilian

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“threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.”

The Inter-American Commission has also interpreted ICCPR Art. 27, in conjunction with ACHR Art. 26 to include land, economic and participation rights for indigenous peoples. *See, e.g.*, Report on Ecuador, at 103-04; Inter-Amer. C.H.R., Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 26 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984), 76-78, 81 (stating that Art. 27 when applied to indigenous peoples covers “the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands”); Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10, rev. 1, at 24, 31 (concerning the Yanomami of Brazil).

<sup>28</sup> *Kitok v. Sweden*, Communication No. 197/1985, U.N. Hum. Rts. Comm., A/43/40, annex VII.G (1988); also *Lansmann v. Finland*, Human Rights Committee, UN Doc. CCPR/52/D/511/1992.

<sup>29</sup> Article 3 of the UN Draft Declaration on the Rights of Indigenous Peoples states, “Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development.” Article 27 of the ICCPR and the ICESCR state that “in no way may a people be deprived of their own means of subsistence.” The U.N. Human Rights Committee has interpreted ICCPR Art. 27 to include the “rights of persons, in community with others.”

<sup>30</sup> *See* U.N. Hum. Rts. Comm., General Comment No. 23 (50) (Art. 27), HRI/GEN/1/Rev.1 at para. 7, adopted Apr. 6, 1994. Elsewhere, the UN Human Rights Committee states that “[f]or indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture.” Report on the Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997).

populations without legal justification.<sup>31</sup> Forcible relocation in peacetime is also proscribed by international legal instruments and condemned by academics and has arguably reached the status of customary international law.<sup>32</sup> For indigenous peoples with strong connections to their land, forced relocation may be tantamount to destruction of culture, or “ethnocide.”<sup>33</sup>

Mining and other development operations may implicate the right against forced relocation by degrading a community’s lands to the point of causing a diaspora. The tragic plight of Brazil’s Yanomami people illustrates how development projects may wreak such havoc. A development plan organized by the government of Brazil to exploit Amazonian resources led to the construction of a highway that cut through the territory of the Yanomami Indians. The resulting influx of outsiders resulted in the destruction of the Yanomami traditional economic and cultural life and, in some cases, forced displacement as well as hundreds of deaths. The Inter-American Commission held that the government of Brazil was responsible for violations of the rights to life, liberty and personal security, the rights to residence and travel, and the right to the preservation of health and well-being.<sup>34</sup>

Short of spurring such a “constructive relocation,” extractive ventures may still undermine the purpose of the right against forced relocation if they damage a community’s cultural ties to its lands. Insofar as the international mandate of indigenous consent to relocation rests on cultural concerns, the law should require commensurate

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<sup>31</sup> Geneva Convention, Art. 2.

<sup>32</sup> See generally, Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95 (2002).

<sup>33</sup> Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT’L L. REV. 527, 613-14 (2002).

<sup>34</sup> Commission on Human Rights, Case No. 7615 (Brazil), Annual Report, 1984-1985, 33.

levels of consent for development operations that wreak the same type and degree of damage. When an extractive project threatens to degrade a native community's territory to the point of severing the group's relationship to its land, that project has for all meaningful intents and purposes "relocated" them. In situations such as these, international law must require a strong standard of consent.

#### *F. Right to a Healthy Environment*

Extractive operations may also interfere with the emergent international right to a healthy environment.<sup>35</sup> Several regional human rights instruments<sup>36</sup> and the constitutions of a few nations recognize this entitlement.<sup>37</sup> A wide variety of other legal sources deploy different language to elaborate similar principles. At least 44 countries have constitutions that provide for protection of the environment,<sup>38</sup> several U.N. declarations have emphasized the importance of environmental well-being,<sup>39</sup> and the Convention on the Rights of the Child calls upon nations to take "into consideration the dangers and risks of environmental pollution" to food and water supplies.<sup>40</sup>

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<sup>35</sup> See, e.g., the Toledo Maya Cultural Center of Belize's petition to the Inter-American Commission claiming that logging and oil exploration concessions granted by the government of Belize without Mayan consent "are causing, and are threatening to cause further environmental harm to the Maya communities." *Maya Indigenous Communities and their Members against Belize*, Case No. 12.053, Inter-Am. C.H.R. 78, para. 3 (2000) available at [www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm](http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm) (Belize admissibility decision).

<sup>36</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 14, 1988, art. 11, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989); African Charter of Human and Peoples Rights, entered into force Nov. 16, 1999, art. 24, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982).

<sup>37</sup> Article 35 of the Czech Republic's Charter of Fundamental Rights and Freedoms, attached to its constitution in 1991, provides for the individual's right "to live in a favorable environment." Chapter VI of Title VIII of the 1988 Brazilian Constitution provides for the right of all persons to an "ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life."

<sup>38</sup> See EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 297-327 (1989).

<sup>39</sup> See, e.g. Declaration of the United Nations Conference on the Human Environment, principle 2, U.N. Doc. A/Conf.48/14/Rev.1 (1972) (the "Stockholm Declaration"); Rio Declaration on Environment and Development, June 13, 1992, Principle 1, U.N. Doc. A/CONF.151/26 (vol. I) (1992), reprinted in 31 I.L.M. 874, 876.

<sup>40</sup> United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 24, U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1448 (1989).

As a universal entitlement, the right to a healthy environment protects all people equally, not just members of indigenous communities. Moreover, the right to a healthy environment is not anchored in a right to property. Whether a community “owns” subsurface minerals is irrelevant if extraction of those minerals would create adverse effects on the health of its environment. But the reach of this right has traditionally been limited by a literal interpretation of the word “healthy.” Thus far, most scholars have defined the right to a healthy environment around the better-established rights to life and to adequate health.<sup>41</sup> According to current literature, the right to a healthy environment usually protects communities from developmental operations only insofar as those ventures threaten their physical well-being. There are, however, more expansive interpretations,<sup>42</sup> and many of the regional and national sources described above actually call, more broadly, for a “satisfactory,” “decent,” or “favorable” environment instead of a narrowly “healthy” one.

## **Part II. Industry Practices**

The human rights just described have become increasingly relevant to mining companies. A number of “diverse contemporary trends are making human rights a responsibility incumbent on corporations.”<sup>43</sup> These include “the impact of globalization and trade, increased public sensitivity to labor and environmental conditions, shareholder

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<sup>41</sup> See, e.g. Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VIRG. J. INT’L L. 545, 581 (2000); Carl Bruch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENV’T L. 131, 151 (2001) (“[T]he application of these principles has traditionally been interwoven with the separate right-to-life provision.”).

<sup>42</sup> See Bruch, *supra* note 6, at 151. Discussing the Indian Supreme Court’s decision in *Kendra v. Uttar Pradesh*, the authors note, “Without establishing harm to human health, the Supreme Court upheld the right to live in a healthy environment and issued an order to cease mining operations, notwithstanding the significant investments of money and time by the mining company. According to this thread of interpretation, protection of this right may be sought when ongoing behavior is damaging or is likely to damage the environment, regardless of an effect on human health.”

<sup>43</sup> Simon D. Handlesman, “Human Rights in the Mining Industry,” 11, at [www.iiied.org/mmsd](http://www.iiied.org/mmsd) (last checked April 26, 2003) (report commissioned by the MMSD project of the IIED).

and other stakeholder demands for greater openness and public accountability, and an increased reliance on voluntary compliance with international standards.”<sup>44</sup> The rise of nationalistic and economic reform-focused approaches in developing countries from the 1950s through the 1980s and the pressure exerted by the environmental movement in the 1970s have also shaped the climates in which modern companies operate.<sup>45</sup>

At the same time, many concerns have historically made mining companies reluctant to align with the human rights movement, particularly where the property rights of indigenous people are concerned. By recognizing the rights of indigenous people, mining companies invite difficulty when acquiring mining permits. Corporations have traditionally exerted pressure on national governments to amend, repeal, or mitigate the effects of laws protecting the property rights of indigenous people.<sup>46</sup> Mining companies also see human rights issues as being in the socio-political realm and therefore outside their technical expertise, often limiting their discussions to environmental issues.<sup>47</sup> Finally, mining companies express uncertainty as to how to adapt their strategies for dealing with indigenous people and national governments in a system that requires the prior and informed consent of indigenous people.<sup>48</sup>

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<sup>44</sup> *Id.* See also “The Social Responsibility of Transnational Corporations”, UNCTAD/ITE/IIT/ Misc, 1999.

<sup>45</sup> M. Cecilia Gonzales Guerra, “Community Relations in Mineral Development Projects,” 3-4, *at* <http://www.dundee.ac.uk/cepmlp/journal/html/vol11-6.html> (last checked March 13, 2003).

<sup>46</sup> Thompson, *supra* note 72 at 179. Under the 1995 Mining Act, “the Philippines Mines and Geosciences Bureau (MGB) was permitted to grant, on behalf of the state, 100 percent ownership of a mining claim to a foreign mining company. Under the IPRA (Indigenous Peoples Rights Act), however, indigenous lands can be owned by indigenous communities instead of the state, preventing the MGB from awarding the high ownership stake in mining claims to foreign mining companies that those companies have come to expect under the Mining Act.” According to Thompson, the passage of the IPRA generated a “‘conservative backlash,’ organized in large part by multinational mining corporations.”

<sup>47</sup> Handlesman, *supra*, note 91 at 9.

<sup>48</sup> Report of the Workshop on Indigenous Peoples and Mining Minerals Sustainable Development, Perth, 4-6 Feb. 2002 and Report of the MMSD Preparatory Work on Indigenous People and Relationships with the Mining Sector, Quito, 17-28 September 2001. (Reports commissioned by the MMSD project of the IIED) available at [www.iied.org/mmsd](http://www.iied.org/mmsd) [last checked April 26, 2003].

As recently as five years ago, these attitudes dominated the policies of the extractive industry. A 1998 survey of the social policies of 69 companies, including the top 50 mining companies, found that “strategies and tactics for dealing with indigenous people rank low on corporate agendas.”<sup>49</sup> Of 38 companies that responded, only 5 percent undertook social impact assessments related to indigenous people, and only 3 percent integrated these into their operations.<sup>50</sup> Only two companies, Zambia Consolidated Copper Mines and Normandy Mining, Ltd., of Australia, had a “specific indigenous people’s policy.”<sup>51</sup> Only WMC, Ltd., employed anthropologists or social scientists. Less than 8 percent had offices dedicated to indigenous issues. Only 13 percent were willing to set up compensation mechanisms or negotiate land titles with indigenous populations.<sup>52</sup>

With the recent advent of industry-oriented codes of conduct, however, “greater responsibility and consistency in corporate responsibilities for actions to protect human rights” have started to emerge.<sup>53</sup> NGOs, IGOs and companies have all had a hand in producing these codes.<sup>54</sup> While not conclusive, the codes provide a good starting point for mining companies interested in drafting policies that respect the rights of indigenous people and human rights in general. The emergence of voluntary principles in the year

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<sup>49</sup> Theodore E. Downing, Jerry Moles, Ian McIntosh, Carmen Garcia-Downing, “Indigenous Peoples and Mining Encounters: Strategies and Tactics,” p. 20. ( Report commissioned by the MMSD project of the IIED) available at [www.iied.org/mmsd](http://www.iied.org/mmsd) [last checked April 26, 2003]

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Handlesman, *supra*, note 91 at 15.

<sup>54</sup> *Id.* Codes of conduct have been drafted by organizations like the OECD, the World Commission on Dams and the Australia Asia-Pacific Mining Network. For a list corporate responsibility statements, see <http://csrforum.com>.

2000,<sup>55</sup> though aspirational and non-binding, indicates a recognition by corporations and governments of the imperatives of human rights. Major mining companies are considering conforming to these principles on security and human rights in their overseas operations.<sup>56</sup>

Corporate policies on respecting human rights and the rights of indigenous people have also in the last five years become more thorough and specific. It is difficult to tell whether recent advances by leading mining companies like Rio Tinto reflect widespread change or the possible beginnings of a domino-effect in the industry. Nevertheless, a number of prominent mining companies have developed corporate policies on human rights, including the rights of indigenous communities.

At one extreme, Ivanhoe Mines has “adopted a statement of values and responsibilities,” pledging support for the UDHR, on the caveat that it does not hold any political beliefs or wish to be a tool of political causes.<sup>57</sup>

Freeport-McMoran’s corporate policy, passed in 1999, commits the company to “sustainable development.” Its policy states, “The company and its affiliates will adhere to the principles of the Universal Declaration of Human Rights and other applicable international standards of human rights and all laws of the host country wherever the company operates.”<sup>58</sup> This policy is limited, however, to the provision of employment, education, and health benefits.<sup>59</sup>

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<sup>55</sup> Handlesman, *supra*, note 91 at 47. Those who worked together to produce the principles were NGOs, US/UK governments, Texaco, Chevron, Conoco, BP-Amoco, Shell, Freeport McMoran, Rio Tinto.

<sup>56</sup> *Id.* at 33.

<sup>57</sup> Handlesman, *supra*, note 91, Attachment E at E(1).

<sup>58</sup> <http://www.fcx.com/esp/socpolicy.html>

<sup>59</sup> *Id.*

BP, an Australian Mining subsidiary, has also formally embraced human rights imperatives in its company policy, “stating support for the UDHR and recognizing the importance of political, civil, cultural, social and economic rights. BP is drafting and testing an audit protocol and developing guidelines to clarify its standards.”<sup>60</sup>

Rio Tinto has adopted the most progressive company policy toward indigenous people. In the company’s guidelines for implementing its human rights policy, Rio Tinto states not only that it will “work as closely as possible with its hosts, respecting laws and customs, minimizing adverse impacts, and ensuring transfer of benefits and enhancement of opportunities,” but also that it “recognizes that in some parts of the world there exist, in addition to land rights enshrined in national law, other claims to land such as those based on ancestral or indigenous title.” According to Rio Tinto, its policy exists to “ensure that the economic, technical, environmental, and social factors are co-ordinated in an integrated process. In all cases, this involves free consultation with local people, public authorities and other interested parties, with the intention of securing the widest possible agreement and support for any activities proposed.” Rio Tinto goes further, stating that it “recognizes that the outcome of this process may result in authority not being given” or the decision by the group itself to pull out. It promises to adhere to a nation’s “well-developed consultative process” if that process exists, to support the development of such a process in a country if that process does not exist, and to adhere to that well-developed consultative process as it accords with world standards.<sup>61</sup>

The values expressed in these codes of conduct may mark an awakening within extractive industries to the significance of human rights. While the codes signal a welcome

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<sup>60</sup> Handlesman, *supra*, note 91 at 99.

<sup>61</sup> Handlesman, *supra*, note 91, Attachment C, at C(1)-C(6).

departure from the historic indifference of mining companies toward indigenous populations, it would be premature to say that they accord fully with the broad mandates of international law. Many of these codes emphasize the value of consultation, a practice that may be appropriate in many scenarios involving indigenous communities. But only the Rio Tinto policy acknowledges and weighs the merits of a consent standard as applicable in certain cases. In this regard, industry standards do not yet fully respond to international human rights requirements, which – as shown in the following section – domestic and international authorities have often construed to require the consent of affected indigenous communities.

### **Part III. Consent and Related Procedural Rights**

The rights and principles described in Part I are generally well established elements of international law and, as such, are essential elements of state obligation. When it comes to indigenous peoples, however, human rights obligations have been recognized in the breach for much of the 20<sup>th</sup> century. Since the 1970s, the international community has recognized this gap and begun to develop appropriate responses to this long tradition of exploitation; indigenous peoples have been moving “from object to subject in international law.”<sup>62</sup>

In an attempt to identify these evolving protections, this section surveys a range of approaches that domestic and national authorities have taken in response to proposed extractive projects. An overview of the relevant national and international instruments and decisions reveals an emergent emphasis on two basic practices – consultation and

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<sup>62</sup> Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237, 261 (2001/2002) (quoting Russell Lawrence Barsh, *Indigenous Peoples in the 1990's: From Object to Subject in International Law?*, 7 HARV. HUM. RTS. J. 33, 35 (1994)).

consent. Sections A and B(1) inspect meaningful consultation and consent in instances where international instruments or national laws require these standards as free-standing principles of law. Sections B(2) through B(5) illustrate how the more powerful consent rule has manifested itself in other cases as an instrument to protect the fundamental rights described in Part I. Section B(5) looks to a widely accepted Western regime of consent, as it has been established through nuisance law. Nuisance doctrine provides an interesting analogue, because it implicitly recognizes the importance of many of the rights discussed in Part I and addresses them using a “sliding scale” test that sometimes gives affected communities a veto power over proposed developments.

**A. Rights to Meaningful Consultation, Compensation and Participation in Development Benefits**

International legal instruments, national laws and precedents, and leading scholars agree that international law constrains the ability of state governments to assign exploration rights without the meaningful consultation of affected indigenous communities. International Labor Convention No. 169, however, is the only international instrument to specifically describe the elements of indigenous peoples’ rights to consent to extraction where states retain ownership of subsurface resources.<sup>63</sup> The Convention, which entered into force in 1991, protects indigenous land and resource rights and requires states parties to safeguard the right of indigenous people to participate in the “use, management, and conservation” of resources.<sup>64</sup>

The Convention sets out three specific requirements when a state retains ownership of “mineral or sub-surface resources.” First, parties must “establish or maintain procedures through which they shall consult these [indigenous] peoples,” prior

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<sup>63</sup> Convention No. 169, *supra* note 3.

<sup>64</sup> *Id.*, Art. 15(1).

to engaging in, or allowing, resource exploitation, to determine the extent to which “their interests would be prejudiced.”<sup>65</sup> Second, affected peoples should, “wherever possible,” participate in the benefits of development. Third, in the alternative, they should receive “fair compensation” for any damages caused by the extractive industry.<sup>66</sup> Similar requirements are contained in the Draft Declaration on the Rights of Indigenous Peoples produced by the Inter-American Commission on Human Rights, which would require “participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands,” in addition to sharing in benefits and compensation for damages associated with extractive industry.<sup>67</sup>

Although the requirement that indigenous peoples participate or be consulted in the decision-making process prior to decisions to develop sub-surface resources does not grant indigenous communities an absolute right to refuse permission for development, it imposes, in practice, a responsibility upon states to gain indigenous communities’ genuine agreement to any development plans. First and foremost, international law requires that states perform treaty obligations in good faith.<sup>68</sup> Pro-forma consultations with a predetermined outcome would mislead participants as to their options and make a mockery of the consultation process. Furthermore, ILO Convention No. 169 also

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<sup>65</sup> *Id.*, Art. 15(2).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, Art. 18, Para. 5. However Canada, in its evaluation of the proposed declaration, criticized the use of the term “participation,” suggesting instead that “there should be a fair process established to consider whether exploiting those resources would adversely impact” indigenous lands or traditional activities, and that “indigenous communities should be consulted in this assessment.” Government of Canada Comments on the Draft Inter-American Declaration on the Rights of Indigenous Peoples, Jan. 1997, *available at* [http://www.usask.ca/nativelaw/iadir\\_canada3.html](http://www.usask.ca/nativelaw/iadir_canada3.html).

<sup>68</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980, Art. 26.

requires that parties undertake consultations required under the treaty “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent.”<sup>69</sup> The ILO has emphasized that this article is “central to the way the Convention should be applied.”<sup>70</sup> Although the convention anticipates that the form of such “consultations with the objective of agreement” will vary depending on circumstance, any large-scale development projects such as oil and gas operations that could cause significant social, economic, and environmental impacts would naturally “require the maximum measures of protection offered by these various provisions.”<sup>71</sup>

James Anaya and Robert Williams, leading scholars in the field of indigenous rights and international law, argue that, at least in the inter-American system, these principles have reached the status of binding customary international law, because of the weight and consistency of the relevant international, regional and national laws.<sup>72</sup> Specifically, Anaya and Williams reason that state obligations under customary international law include three requirements similar to those outlined in ILO Convention No. 169 and the draft American Declaration: to consult and reach agreement with indigenous peoples; to take affirmative steps to prevent or mitigate negative impacts of development activities; and to ensure that indigenous peoples realize benefits from

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<sup>69</sup> Convention No. 169, *supra* note 3, Art. 6(2).

<sup>70</sup> ILO Guide to Convention 169 (1995), at 10.

<sup>71</sup> Laurie Sargent, *The Indigenous Peoples of Bolivia’s Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451, 478.

For example, Canadian law, which confers upon the state has a fiduciary duty toward aboriginal peoples, includes a right to “consultation” if the state infringes property rights; for proposed development of native lands, the Canadian Supreme Court has held that:

There is always a duty of consultation. . . . [T]his consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, [the duty] will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation. . . .

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 168 (Can.).

<sup>72</sup> S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS J. 33 (2001).

development projects that affect them and their lands.<sup>73</sup> Anaya and Williams argue that these requirements are the minimum needed to ensure that the right to property is upheld, as it “would have little meaning for indigenous peoples if their property could be encumbered without due consultation, consideration, and, in appropriate circumstances, just compensation by the state.”<sup>74</sup>

In addition to international and regional law, Anaya and Williams point to consistent national laws as support for their customary international law argument. Every party to the American Convention on Human Rights has passed some sort of legislation requiring that indigenous communities be given property rights or rights to participate in development decisions.<sup>75</sup> For instance, the Colombian Constitutional Court has interpreted Art. 330 of its constitution (which guarantees indigenous peoples the right to be consulted regarding natural resource development in their territories) consistently with international law, holding that consultation must be “broad and meaningful,” including full disclosure of the proposed development projects and their possible consequences, and opportunity for discussion and response.<sup>76</sup> This case arose in the context of a development venture on lands that had historically been held by the native U’wa people.

The U’wa have lived for thousands of years in the mountains in what is now Northeastern Colombia.<sup>77</sup> One scholar describes negotiations between the U’wa and Occidental Oil, a company that the Colombian government had invited to conduct oil exploration on land that included traditional U’wa territory:

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<sup>73</sup> *Id.*, at 78-81.

<sup>74</sup> *Id.*, at 78.

<sup>75</sup> *Id.*, at 59-74.

<sup>76</sup> *Id.*, at 61, citing Sentencia No. T-188 de mayo 12 de 1993 [Corte Constitution] 354 (Colom.).

<sup>77</sup> Martin Wagner, *The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: a Brief Case Study*, 24 *Hastings Int’l & Comp. L. Rev.* 491, 491 (Spring 2001).

U'wa representatives stated that although the U'wa were generally opposed to oil exploitation in their traditional territory, the representatives could not make a formal response concerning the project without first consulting U'wa elders and religious leaders ... Occidental claims the U'wa representatives signed a memorandum at the meeting that established conditions for seismic exploration on U'wa land; the U'wa representatives, who are illiterate, recall being told they were signing an attendance sheet. Despite an agreement to reconvene the consultation in February, the Colombian government granted Occidental an exploration license without any further meetings with the U'wa.<sup>78</sup>

The Colombian Constitutional Court ultimately ruled that these consultations did not meet constitutional requirements of meaningful consultation.<sup>79</sup>

While the standard of consultation is ultimately not as stringent as a rule of consent, authoritative interpretations that require consultation to be “meaningful” result in a rather robust right for indigenous peoples. ILO Convention 169, which has achieved broad uptake and ratification, lays down consultation as a baseline practice for companies interacting with indigenous communities on traditionally held lands. Some projects, however, may more severely impinge upon the rights described in Part I of this memo.

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<sup>78</sup> Id. at 501.

<sup>79</sup> Sentencia SU-039 febrero 3 de 1997 [Corte Constitucional] 655 (Colom.).

The U'wa themselves were not satisfied with this ruling. In an open letter to the Colombian government and people, U'wa leaders explained,

[I]t is therefore not sufficient to say that [the government] should talk and listen to us. It is necessary that the Colombian state recognise that when the life of our people is at risk, it must respect our decisions. They say that in this consultation the government will sit down with us in order to see how, in our territory, we can live with OXY and their oil exploration, without our culture, our world, being destroyed. For us, this is impossible. It is as if they had not heard us at all, as if they understood nothing of what we said. . . . If this is to be the result of the Constitutional Court's verdict, then we have gone nowhere.

Colombia: Court Decision Undermines Indigenous Rights: U'wa Threaten Collective Suicide if Occidental Drills on their Land, at <http://saiic.nativeweb.org/actions/urgent8.html> (last visited April 25, 2003).

Examples from the following section illustrate how certain jurisdictions and international bodies have established practices of consent to deal with these critical situations.

## **B. The Right to Full and Informed Consent**

Though meaningful consultation requirements impose strict guidelines on extractive industries, some national legislation and draft instruments set an explicitly higher standard than that of ILO No. 169 by requiring peoples' "free and informed consent" before allowing development. Free, prior and informed consent originated as a concept in fields such as medical research and contract law, and has been included in collaborative research agreements that use indigenous knowledge and biological resources. The concept has also been developed in several international instruments.<sup>80</sup> The United Nations Working Group on Indigenous Populations, established in 1982, has produced a Draft Declaration on the Rights of Indigenous Peoples, which would require that states obtain indigenous peoples' "free and informed consent" prior to authorizing development of indigenous lands and territories, including through resource extraction.<sup>81</sup> This robust consent language meets the same concerns as ILO Convention No. 169, while maximizing flexibility. This draft declaration establishes a broad, free-standing mandate of consent that does not anchor itself in other rights or depend on the context of the proposed development. Similarly, a 1997 General Recommendation by the CERD Committee confers upon indigenous communities a broad right of consent with respect to

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<sup>80</sup> *E.g.*, Draft International Covenant on Environment and Development (Art. 43.2); Convention on Biological Diversity (Art. 8j); and the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification.

<sup>81</sup> Art. 30. In full:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

all “decisions directly relating to their rights and interests.”<sup>82</sup> Other instruments and authorities have established more discrete policies of consent, discussed below, grounded in larger substantive bodies of law.

### **1. Consent Rules Based on Property Rights**

Indigenous communities may gain a right of consent to development by virtue of their property rights in land. Although an indigenous community’s ownership rights do not traditionally attach to the minerals located beneath its lands, some governments explicitly recognize indigenous property interests in subsurface resources. Australia’s Aboriginal Land Rights (Northern Territory) Act of 1976, for instance, granted some freehold land title<sup>83</sup> to Aboriginal peoples and set up a system that mining companies must follow if they are interested in beginning exploration in Aboriginal-owned land.<sup>84</sup> Central to this system is the requirement that companies obtain the prior informed consent of Aboriginal populations before commencing development.<sup>85</sup>

Other lands in Australia are subject to “native title,” which, though not a freehold property right, provides registered native title holders with a “right to negotiate” with

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<sup>82</sup> Gen. Rec. XXIII Concerning Indigenous Peoples, 51<sup>st</sup> Sess., 1235 mtg, para. 4(d), UN Doc. CERD/C/51/Misc.13/Rev.4 (1997). MacKay argues that the comments of the CERD should be given special weight given the strength and importance of the non-discrimination norm. See MacKay, *supra* note 15 at 610.

<sup>83</sup> Freehold land title is the broadest property interest allowed by law, and the most common type of title granted to landowners within the United States.

<sup>84</sup> Mining companies must first apply for an exploration license, and then obtain government approval to negotiate with the Aboriginal Land Council, a governmental body set up by the 1976 Act to “consult with and express the wishes of Aboriginal people about the management of their land.” The negotiation process is intended to include disclosure of all aspects of the proposed exploration and consultation with affected communities. See The Northern Land Council, “What the NLC Does,” at [http://www.ozemail.com.au/nlc95/What\\_the\\_NLC\\_does.htm](http://www.ozemail.com.au/nlc95/What_the_NLC_does.htm) (19 March 2000).

<sup>85</sup> See Aaron Marc Goldzimer, *Prior Informed Consent of Project-affected Indigenous Peoples: An Analysis of Case Studies*, unpublished master’s thesis, on file with the Lowenstein Clinic, 15. The veto of Aboriginal communities may be overridden by the Governor General in cases of “national interest,” but this provision has never been exercised.

companies interested in exploration and mining.<sup>86</sup> The actual scope of native title is not settled and the subject of debate. Native title *may* include the “full” and “exclusive” or “shared” right to occupy certain lands, “usufructuary rights” to those lands’ resources, or “the right to pass over certain lands to reach important cultural and religious sites.”<sup>87</sup>

These rights are “analogous to common law property tenures: estates in fee, profits a prendre, and easements.”<sup>88</sup> These rights are not, however, exhaustive; “other novel rights unknown to the common law may be cognizable under the rubric of native title.”<sup>89</sup>

Two mining companies examined in an Australian case study committed extensive time and resources to negotiating land-use agreements with the affected indigenous communities, in deference to Aboriginal land entitlements.<sup>90</sup> The Queensland agreement

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<sup>86</sup> Native title was first recognized by the Australian High Court in *Mabo v. Queensland*, 66 A.L.R. 408 (Austl. 1992). Parliament responded to *Mabo* with the 1993 Native Title Act, which sets out the requirements that prospective developers must meet if they are interested in land held by registered native title holders. For more information, see the National Native Title Tribunal, <http://www.nntt.gov.au/>.

<sup>87</sup> Gary D. Meyers. “Water, Water Everywhere ...” But is any of it subject to offshore native title claims in Australia? 9 Int’l Legal Persp. 93, \*94-95 (1997)

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> “The Mining, Minerals and Sustainable Development (MMSD) Project,” International Institute for Environment and Development, at [http://www.iied.org/mmsd/what\\_is\\_mmsd.html](http://www.iied.org/mmsd/what_is_mmsd.html). The Sustainable Development Australia Project was conducted under the auspices of the Mining, Minerals and Sustainable Development (MMSD) Project, “an independent two-year process of consultation and research with the objective of understanding how to maximize the contribution of the mining and minerals sector to sustainable development at the global, national, regional and local levels.” Initiated in April 2000, it was “managed by the International Institute for Environment and Development in London, UK, under contract to the World Business Council for Sustainable Development (WBCSD). The project was initiated by WBCSD and supported by the Global Mining Initiative (GMI).” Australia was one of MMSD’s regional partners. Australia produced its own regional version of the MMSD report. According to the MMSD website, the MMSD was needed because “The mining and minerals sector is subject to a number of powerful trends that will shape the business environment in which the industry operates in the new century. Perhaps none of these is more challenging than the call for a global transition to sustainable development, a vision based on achieving a better quality of life for the world population today, while preserving and increasing the ability of future generations to achieve a higher quality of life for themselves. A number of initiatives addressing elements of the mining, minerals and sustainable development agenda existed prior to MMSD, but critical bottlenecks such as lack of trust among companies, governments and civil society, and the absence of the necessary skills, resources and institutional capacity to deliver were slowing progress. MMSD attempted to encourage a greater coherence in these activities, and increase their collective impact. To achieve this it aimed to draw together a wide range of actors to develop a comprehensive and intelligible agenda around which global stakeholders could come together to create change.”

is notable because it recognizes the indigenous community's native title right to their traditional lands and their rights to participate in consultations on future developments, to benefit from the development, and to retain ownership of the land after the project ends.<sup>91</sup>

In the Philippines, the 1997 Indigenous Peoples Rights Act recognizes the right of indigenous people to control their own lands. The Act provides for Certificates of Ancestral Domain Title (CADT), the Philippines' equivalent of Australia's native title, and "the mechanism providing for the recognition of an indigenous cultural community's (ICCs) claim to an ancestral domain."<sup>92</sup> The National Commission on Indigenous Peoples (NCIP) awards CADTs to indigenous communities to request them and meet certain standards, established by statute. Once a CADT has been awarded, "a mining company, or other extractive industry must secure ICC's consent before permits can be granted."<sup>93</sup> The IPRA has come under attack as being "overdone, giving more rights to indigenous groups than ordinary citizens."<sup>94</sup> This may be a legitimate criticism if the government issues CADTs to groups who lack the cultural and environmental attachments to their land that bring into play the rights outlined in Part I. If the IPRA is insensitive to the nature and degree of the human rights affected by development projects, as measured on a case by case basis, a flat rule of consent may be excessive.

Still, the system in the Phillipines offers an illustrative model of how rules of consent may be systematically operationalized. These examples from Australia and the

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<sup>91</sup> Facing the Future. A report by the Mining Minerals and Sustainable Development Project. pp. 59-60 available at [http://www.iied.org/mmsd/mmsd\\_pdfs/100\\_mmsdaustralia.pdf](http://www.iied.org/mmsd/mmsd_pdfs/100_mmsdaustralia.pdf) [ Last Checked March 13, 2003]

<sup>92</sup> Patricia Thompson. "Human Rights and the Environment: Philippines Indigenous Peoples Rights Act." 1998 *Colo. J. Int'l. Env'tl. L. Y.B.* 179.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Phillipines suggest a recognition not just of indigenous modes of land ownership,<sup>95</sup> but also of the value of consent in protecting native property interests.

## **2. Consent Rules Based on Cultural Rights**

Consent to sub-surface exploration and exploitation may also be required if proposed extraction would threaten harm to other fundamental human rights, such as an indigenous people's right to continued cultural survival. These rights appear to apply whether or not a community has technical ownership over its lands and any underlying minerals. As early as the mid 1980s, the Inter-American Commission on Human Rights found that Brazil's failure to protect the Yanomami, an indigenous group, from incursions by "miners and others" into ancestral lands threatened the Indians' physical well being, culture, and traditions.<sup>96</sup> While culture does and can change, such decisions should be made by affected communities rather than national governments or outside industries.

The right to cultural integrity is not absolute, however. Whether an indigenous group ought to be given the right to consent to mining in order to prevent serious harm to their right to life or to cultural survival requires a case-specific inquiry into the harmful environmental effects that a particular mining project would have on traditional land or cultural, spiritual, or economic activities, as shown by the Human Rights Committee's consideration of the *Lansmann* case. The Finnish government had allowed quarrying in

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<sup>95</sup> The Awas Tingni case also recognized indigenous property rights, but did not extend its holding to create a right for indigenous communities to consent to subsurface operations.

<sup>96</sup> Res. No. 12/85, Case No. 7615 Inter-Am. C.H.R. 24 (1985), in Annual Report of the Inter-American Commission of Human Rights 1984-85, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985). The Commission therefore recommended that the government secure the boundaries of a reserve for the Yanomami to protect their cultural heritage. Brazil responded by establishing the Yanomami Reserve and by amending its constitution in 1988 to provide greater protections to Indians and their lands.

Sami<sup>97</sup> areas, allegedly disturbing reindeer herds and causing environmental harm to Sami cultural and sacred sites. The Human Rights Committee decided that reindeer herding was protected under Art. 27 of the ICCPR and noted that any significant expansion of mining activity would violate Art. 27 rights. But the Committee also concluded that in this case, the adverse effects were not yet severe enough to constitute a violation of the Sami's Art. 27 right to enjoyment of their culture.<sup>98</sup> This reasoning suggests a context-sensitive approach being adopted by international forums when deciding how to involve indigenous communities in decisions that may impact their cultural rights. This approach leaves room for consent and consultation, but does not issue a flat prescription of either rule. The constitutional court and legislature of Norway, for instance, have responded to the mandate of Art. 27 by creating participatory structures within which the Sami can make decisions about extractive and other industry interests that may affect their culture.<sup>99</sup> Where the potential effects of extractive industry are severe enough to cause a deprivation of rights such as indigenous culture, requiring prior consent would be an appropriate means to avoid such after-the-fact determinations of legality.

### **3. Consent Rules Based on Right Against Forced Relocation**

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<sup>97</sup> The Sami, an indigenous people living in northern Norway and other Nordic countries, have subsisted off the land through traditional activities such as reindeer-herding. See Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237, 251 (2001/2002).

<sup>98</sup> See J.E. Länsmann v. Finland, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (Länsmann II) (Sami reindeer herding in certain land area is protected by Art. 27, despite disputed ownership of land); Länsmann et al. v. Finland, Communication No. 511/1992, U.N. Hum. Rts. Comm., CCPR/C/52/D/ 511/1992 (1994) (Länsmann I) (reindeer herding part of Sami culture protected by Art. 27); Kitok v. Sweden, Communication No. 197/1985, U.N. Hum. Rts. Comm., A/43/40, annex VII.G (1988); Länsmann et al. v. Finland, Communication No. 511/1992, U.N. Hum. Rts. Comm., CCPR/C/52/D/ 511/1992 (1994).

<sup>99</sup> See generally Watters (PINs).

The standard of consent is most forcefully established with respect to relocation of indigenous communities. International instruments dealing with native peoples specifically bar relocation in the absence of consent or extraordinary circumstances. ILO Convention No. 169 states that indigenous peoples “shall not be removed from the lands which they occupy” and that if relocation is necessary as an “exceptional measure,” it should take place either with communities’ “free and informed consent” or by following “appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.”<sup>100</sup> Indigenous peoples who have been displaced without their consent are to be returned as a matter of right or granted compensation equal to their loss.<sup>101</sup> International lending organizations also bar involuntary resettlement; the Inter-American Development Bank’s operational policy notes that because indigenous and other low-income ethnic-minority communities are most vulnerable to the harmful effects of relocation, it will only support development projects “if the Bank can ascertain that . . . the people affected have given their informed consent to the resettlement and compensation measures.”<sup>102</sup>

#### **4. Consent and Compensation, as Established through Nuisance Law**

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<sup>100</sup> ILO Convention No. 169, Art. 16, paras 1 and 2. *See also* Proposed U.N. Declaration on Indigenous Peoples, Art. 10: “No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Similarly, the Proposed American Declaration, Art. 18, para. 6, states,

Unless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, and in all cases with prior compensation and prompt replacement of lands appropriated, which must be of similar or better quality and which must have the same legal status; and guaranteeing the right to its return if the causes that gave rise to the displacement cease to exist.

<sup>101</sup> ILO Convention No. 169, Art. 16, paras 3 and 4.

<sup>102</sup> Quoted in Aaron Marc Goldzimer, *Prior Informed Consent of Project-affected Indigenous Peoples: An Analysis of Case Studies*, unpublished master’s thesis, on file with the Lowenstein Clinic.

Nuisance doctrine historically originated within Anglo-American common law, but has been assimilated into a wide variety of legal systems across continental Europe and throughout the world.<sup>103</sup> The basic template for a nuisance is where one landowner's activity creates "a substantial and unreasonable interference" with another landowner's "use and enjoyment of his real property."<sup>104</sup> Classically, nuisance actions involve harmful effects that originate with one landowner and "spill over" into neighboring parcels of land. While nuisance law thus derives from property rights, the doctrine allows a community that claims title to surface rights in an area to bring suit against their underground "neighbors." Through application, nuisance doctrine has generated rules closely resembling consent and compensation – allowing landowners to enjoin or recover damages for nearby activity that harms the environment, disrupts one's enjoyment of property, or offends community mores. The wide spread and acceptance of nuisance law indicates an international recognition of the propriety of consent standards.

Available remedies in nuisance actions include pecuniary damages and injunctive relief. American law sets a high bar for parties seeking to enjoin nuisance activity.<sup>105</sup> Still, the outcome is that U.S. courts often give landowners and communities an effective veto, in the form of an injunction, over disruptive development activities in their neighborhoods. While nuisances typically can be challenged in court only once

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<sup>103</sup> See, e.g. B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 18 (translated from German) (analyzing section 906 of the German code, relating to nuisance); Pierrick Le Goff, *The French Approach to Corporate Liability for Damage to the Environment*, 12 Tul. Euro. Civ. L.F. 39, 49 (1997).

<sup>104</sup> Osborne M. Reynolds, Jr., *Distinguishing Trespass and Nuisance: A Journey Through a Shifting Borderland*, 44 OKLA.L.REV. 227, 228 (1991).

<sup>105</sup> See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 280 (1970); RESTATEMENT (SECOND) OF TORTS § § 822, 826(a), 829A, 826(b) (1977) [*hereinafter* Restatement]. In drafting the Restatement, the American Law Institute largely adopted *Boomer's* law and economics approach, which allows a plaintiff to enjoin a nuisance only when the gravity of its harm outweighs its public utility. In other cases, the plaintiff may seek no more than an award of damages.

underway, most American jurisdictions allow “anticipatory” nuisance actions to be brought in certain, rare circumstances.<sup>106</sup> Anticipatory injunctions are an palpable example of a Western consent standard, as operationalized by national courts and legislatures.

Nuisance law also encompasses a broad conception of what constitutes an “interference” with one’s enjoyment of property. In addition to the traditional harms associated with nuisance – pollution, other forms of environmental damage, and threats to health – U.S. jurisdictions have on occasion recognized both aesthetic<sup>107</sup> and moral<sup>108</sup> interferences as actionable nuisances. In this sense, U.S. law recognizes interests that correspond to the international rights to culture, property and a healthy environment. Typical moral nuisances include casinos, nude beaches and adult bookstores that fall near residential areas. These expansive applications of nuisance doctrine reveal tendencies in Western jurisprudence toward recognizing communities’ rights of control over the environmental, cultural and religious well-being of their lands.

The development of nuisance doctrine offers an intriguing model, insofar as it takes a variety of cultural and environmental factors into account and, reacting to the nature and degree of harm, offers landowners one of a range of remedies to the identified harms. In some cases, the landowner’s right amounts to nothing more than

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<sup>106</sup> See generally Andrew H. Sharp, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENV’T L. AFF. L. REV. 627 (1988); Charles Doane, *Beyond Fear: Articulating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENV’T L. AFF. L. REV. 441 (1990); Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENV’T L. & POL’Y REV. 223 (1995).

<sup>107</sup> See *Allison v. Smith*, 695 P.2d 791 (Colo. Ct. App. 1984); *Robie v. Lillis*, 112 N.H. 492, 299 A.2d 155 (1972); *Hay v. Stevens*, 271 Or. 16, 530 P.2d 37 (1975); *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982); *Martin v. Williams*, 141 W. Va. 595, 93 S.E.2d 835 (1956); *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923). Most jurisdictions, nevertheless, decline to allow recovery for aesthetic nuisances.

<sup>108</sup> See generally John Copeland Nagle, *Moral Nuisances*, 50 Emory L.J. 265 (2001) (describing a recent resurgence in courts’ acceptance of moral nuisance claims).

compensation; but where the landowner's rights are more critically threatened, the court grants the claimant a power that operates very much like a rule of consent. While the nuisance doctrine, as applied to urban and suburban development, is necessarily less rigorous than the protection required by indigenous communities, the roots of a consent standard are visible in American law.

#### **Part IV. Conclusion**

Indigenous peoples' right to consent can be thought of as a procedural mechanism, necessitated by several widely recognized substantive protections. A system that guarantees the self-determined ability of local communities to practice their culture, enjoy their property, avoid relocation and form a healthy relationship with their environment, must confer control to those communities over decisions that vitally affect all of those rights. In cases where extractive industries would harm those rights, consent is clearly the only means of assuring the protection of local communities.

Not all development projects, however, critically implicate these rights. If an indigenous group has been displaced into an urban setting to which they attach no cultural or historical significance, an extractive venture on their lands may not cause exceptional or irreparable harm, and international law may require nothing more than compensation. The diversity of scenarios in which indigenous communities confront proposals for development calls for a case-specific inquiry and a flexible set of rules. Ultimately, courts and other legal arbiters should look to the full range of relevant factors – property rights (whether or not the state has granted formal title), and other human rights threatened by development – to determine whether sufficient community interests exist to require the group's consent. But one critical benchmark for anchoring this

“sliding scale” is ILO Convention No. 169, which insists that developments occurring on the native lands of indigenous communities satisfy at least a process of meaningful consultation.<sup>109</sup> This law reduces the selection of legal standards in many instances to a binary choice between robust consultation and free, prior and informed consent. In deciding which of these practices to follow, the relevant determinants are the human rights criteria enumerated in Part One of this paper. When proposed developments would threaten any of these rights, international law requires the consent of affected communities.

Cases involving non-indigenous communities, or indigenous communities that have migrated from traditionally held lands should be subject to a looser “sliding scale” framework. U.S. nuisance law offers a rough, inchoate prototype for such a system, giving courts a choice between injunctions and damages, awarded before (as in anticipatory nuisance) or after the harm has been done. The balancing test employed in nuisance cases may not be adequately sensitive to the full range of human rights, and probably would require recalibration to be brought in accordance with international law. Still, the blueprint of nuisance doctrine offers an approximate analogue for the solution this memo proposes. Having identified a proper legal standard, we turn to the equally central institutional question: How, and by whom, can the proposed standard be operationalized? This issue will be the subject of our future research.

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<sup>109</sup> See generally Convention No. 169, *supra* note 3.