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“Water is Life”

The Human Right to Water and Indigenous Peoples

Submission to the Human Rights Council Independent Expert on the human right to water, Ms. Catarina de Albuquerque by the International Indian Treaty Council, NGO in Special Consultative Status to the UN Economic and Social Council

April 7, 2010

I. INTRODUCTION

The International Indian Treaty Council is pleased to respond to the Human Rights Council’s Independent Expert on the right to water, Ms. Catarina de Albuquerque and her HRC mandated study on private sector participation in the provision of water and sanitation services.

The IITC submitted the present report to the High Commissioner for Human Rights in her 2007 study on the human right to water. We believe the report is also relevant to the Independent Expert’s own study and have updated it for this purpose. Again, we underscore the urgent need to review current relevant standards impacting this issue, and to conduct a comprehensive study on the human right to water which takes into consideration to concerns, perspectives, expertise and experiences of Indigenous Peoples around the world.

For Indigenous Peoples, their relationship with the rivers, streams, waterfalls, lakes, oceans, hot and cold springs, groundwater, rain and snow, coastal seas and sea ice which they have traditionally used and protected since time immemorial provides the basis for their traditional subsistence economies (farming, hunting, gathering, herding and fishing), physical health, sanitation and collective material survival. But this relationship is also a fundamental requirement and prerequisite for their spiritual relationship with the natural world which is, in turn, the basis of their cultural identity, ceremonial practices and sacred responsibility to the survival of their future generations.

In 2007 we welcomed and applauded the historic decision by the United Nations Human Rights Council of November 26th 2006 recognizing the right to water as a human right. We again welcome the Human Rights Council decision to mandate the Independent Expert to conduct this study, focusing on the human right to water and the private sector.

Indigenous Peoples’ Right to Water including the right to safe drinking water and many other interrelated rights has been and continues to be violated by a range of policies and practices

being carried out, condoned and/or allowed by states with regard to private sector activities. These include:

1. The implementation and domination of globalization and free trade, which includes the privatization, commodification and wide-spread appropriation of water without the free prior informed consent of the Indigenous Peoples affected;
2. The imposition of non-sustainable development projects by the governments and private companies. These include mining and other extractive industries, damming, deforestation, high-pesticide use, toxic waste dumping and incineration, and energy generation based on fossil fuels which directly result in widespread contamination, diversion and depletion of clean natural water sources as well as promotion of desertification and climate change.
3. National policies and legal systems that allow, favor and give precedence to private and or/industrial use of water rather over traditional subsistence use by indigenous peoples which is based on collective use, responsibility for protection and sustainable methods.
4. National laws and policies adopted by states which restrict access and control for Indigenous Peoples of their traditional lands, territories and natural resources including water, often in violation of existing Treaties, Agreements and Constructive Arrangements with these same states.

These policies and practices result in violation of a wide range of internationally-recognized Human Rights for Indigenous Peoples around the world. These include the Rights of the Child under the Convention Article 24, the Rights to Health, Food Security, Development, Life, Physical Integrity, Permanent Sovereignty over Land and Natural Resources, Treaty Rights, Free Prior Informed Consent, Self-determination, Cultural Rights, Religious Freedom and the Right of Peoples not to be Deprived of their own Means of Subsistence.

II. INDIGENOUS PEOPLES' RELATIONSHIP TO WATER

At the 3rd World Water Forum in Kyoto, Japan in March 2003, Indigenous Peoples from all regions of the world issued a Declaration affirming the comprehensive and fundamental nature of their Relationship to Water:

“Relationship to Water

“1. We, the Indigenous Peoples from all parts of the world assembled here, reaffirm our relationship to Mother Earth and responsibility to future generations to raise our voices in solidarity to speak for the protection of water. We were placed in a sacred manner on this earth, each in our own sacred and traditional lands and territories to care for all of creation and to care for water.

“2. We recognize, honor and respect water as sacred and sustains all life. Our traditional knowledge, laws and ways of life teach us to be responsible in caring for this sacred gift that connects all life.

“3. Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations. We assert our role as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water. We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life.”

UNESCO, at the same 3rd World Water Forum in Kyoto, on 22 March 2003, issued a Statement to the Ministerial Conference recognizing the Indigenous Declaration and Indigenous Peoples’ relationship to Water:

“Preamble

“1. The UNESCO Universal Declaration of Cultural Diversity (2001) and the Johannesburg Declaration on Sustainable Development (2002) urge the dialogue and cooperation within human society and among cultures in order to wisely use and sustainably manage earth’s resources. Water is a vital resource, having economic, ecological, social and spiritual functions. Consequently its management determines to great extent sustainability. Due to its fundamental role in society’s life, water has a strong cultural dimension. Without understanding and considering the cultural aspects of our water problems no sustainable solution can be found.

“Issues

“2. Relations between peoples and their environment are embedded in culture.

“3. The ways in which water is conceived and valued, understood and managed, used or abused, worshipped or desecrated, are influenced by the cultures of which we are a part.

“4. Water is life, physical, emotional and spiritual. It should not be considered merely as an economic resource. Sharing water is an ethical imperative and expression of human solidarity. The intimate relationship between water and peoples should be explicitly taken into account in all decision-making processes.

“5. As the frequent failure of “imported solutions” has proven, water resources management will fail without the full consideration of these cultural implications.

“6. Cultural diversity, developed during the millennia by human societies, constitutes a treasure of sustainable practices and innovative approaches. Indigenous knowledge holders should be full partners with scientists to find solutions for water-related problems.

“7. Indigenous ways of life and knowledge are an integral part of humanity’s heritage and cultural diversity. Indigenous peoples have an important role to play in

sustainable water resources management. In this context, due respect must be given to indigenous peoples' rights.

Indigenous Peoples at the Fourth World Water Forum, held in Mexico City, Mexico, March 17-18 2006, issued the Tlatokan Atlahuak Declaration reaffirming the Kyoto Declaration and the key principles it contained:

“We reaffirm the Indigenous Peoples Kyoto Water Declaration of the 3rd World Water Forum of Kyoto, Japan of March 2003. It recognizes our relation with our Mother Earth and our responsibility to future generations. We raise our voices in solidarity and proclaim the responsibility to protect and defend water. We have been placed upon this earth, each in our own traditional sacred land and territory to care for all of creation and water.

“We reaffirm the same Declaration to honor and respect water as a sacred being that sustains all life. Our traditional knowledge, laws and forms of life teach us to be responsible and caring for this sacred gift that connects all life.

“We reaffirm that the relationship we have with our lands, territories and water constitute the physical, cultural and spiritual basis of our existence. The relationship with our Mother Earth obligates us to conserve our fresh water and seas for the survival of present and future generations. We assume our roles as guardians, with rights and responsibilities that defend and guarantee the protection, availability and purity of water. We unite to respect and implement our traditional knowledge and laws, and to exercise our right of self determination to preserve water and life.”

III. CULTURAL RIGHTS, SPIRITUAL SURVIVAL AND INDIGENOUS PEOPLES' RIGHT TO WATER

Water is a fundamental element in the ceremonial life and spiritual practices of Indigenous Peoples. It is a sacred and vital cardinal element which can not be owned and must never be destroyed, disrespected or desecrated. Without water there can be no life.

The Teachings and Words of our Elders

For the traditional Dineh (Navajo), of the Southwest United States, water is the sacred essence and source of life, the Female Deity giving life to the world.

In the words of one traditional Dineh, Nebahe Kateney, which were submitted by the IITC to the former UN Commission on Human Rights in 2002:

"She is given the most ultimate respect not only when drank but when she is approached at a stream whether It be a brook or a river.

"Water is Great among the traditional Dineh of Big Mountain because the geography of Black Mesa has two canyons: the Blue Canyon (or Moencopi Wash)

and the Wide Ruin Canyon. These two canyons with all its natural springs represent the Energy Flows of The Resting Male Mountain and The Resting Female Mountain. Where the two Gender Entity's heads nearly meet is where the current Peabody Coal mines are located. Where the feet of these two Spirit Entities is where the confluence of the Wide Ruin and Blue Canyons are located. It is said that their feet rest upon this "Y" shaped help support their resting Beings.

"These represent Life of Earth and Sun as they combined its energy to create all living things. These represent Man and Woman whom, according to these Supreme Laws, will dwell upon these lands to make the Life for the People. Life means the vegetations, the medicine, the wild berries, the natural tobacco, the big and small game, and a traditional lodge with its fireplace. Water Spirits of Black Mesa and Big Mountain means that the Supreme Law is for the Dineh to always continue to make Offerings of Precious Stones and Corn Pollen to all of its Sacred Springs. Today, the ancient Chants that go with the Offerings to the summit of Big Mountain or to its Sacred Springs recite the stories of such times of creation.

During the 59th session of the UN Commission on Human Rights, Traditional Elder Kee Watchman, Dineh (Navajo) of Cactus Valley/Red Willow Springs Sovereign Community of Big Mountain, Arizona, USA offered similar testimony as Mr. Kateney. They both voiced concern over the treat to Water that their Peoples face from Peabody Western Coal Company as well as the United States government and Bureau of Indian Affairs and the plan to extend the strip-mining of coal within the boundaries of Dineh ancestral lands and use a slurry, a hundreds of miles long pipe to transport the crushed coal in water to a power generating plant.

“Water is life... to Indigenous cultures and to many other cultures of the world, water is sacred. Our sacred springs are drying up now, and our sheep can't find water to drink and our corn needs the water to grow.”

Mr. Watchman submitted additional testimony to the IITC stating that contaminated water from mine run-offs have now destroyed the wild onions, garlic and spinach plants used for food as well as plants used for medicine in the Blue Canyon area near his community.

James Main, Sr., a White Clay (Gros Ventre) Elder from Montana, USA provided information in for a 2004 case study submitted by the IITC to the Convention on Biological Diversity COPS 7 in Kuala Lumpur. He addressed the irreplaceable spiritual significance of the Fur Cap or Little Rocky Mountains in his homeland, and the devastating impacts of 20 years of heap leach cyanide extraction by the Pegasus Gold Mine on the water systems of those mountains which had once provided clean drinking water for the Peoples and animals alike.

“Some of [us] got power up there, you know, for healing and helping people... but they poisoned it, you know. People used to haul water out of there in barrels, go up there with a team of horses, their wagons, fill their barrels, real nice cold clear

water. Lots of fish in there, trout.” He adds, “All that, they just destroyed it, all the grasses, all the plants and killed the deer. They poisoned deer in those [cyanide] pits. They found a lot of dead deer and deformed deer. Birds, they say that when they come to work at those settling ponds there’d be dead ducks, so they’d shoot them with a .22 so they’d sink you know, wouldn’t be floating on the surface.”

Mickey Gemmill, cultural leader, Iss-Ahwi (Abalone Shell People), known as the Pit River Nation in California, USA, before his passing in 2006 was one of the leaders in the ongoing struggle to prevent corporate geo-thermal energy development at sacred Medicine Lake at Mt. Shasta. He provided the following words to IITC in 2005 to describe the meaning of that place and convey the irreparable harm that would be bought about if plans to bring about energy development there succeed:

“To our People and many other tribal Nations, Medicine Lake is a very beautiful and special place. Medicine Lake and Mt. Shasta were gifts to our Peoples from the Creator, the One Above. These places are part of our creation and our teachings about how we leave this world. There is only one place like that for us, where if you bath in the water in the Lake, and follow the rules the Creator set down for that place, there can be healing for anyone. It is sacred to the tribes from all directions that traveled hundreds of miles to come there. It is a place of peace and healing, where you can both see and feel the spirits that are there. Our Spiritual People and healers received knowledge and power there, and it was a place of meditation and training where they went to receive these gifts to protect all life”.

These are but a few among countless examples of such teachings by Indigenous elders around the world describing the life-sustaining importance of water in all its forms. We share their words with great respect and honor, in hopes that they can convey at least a part of the profound meaning that water carries for Indigenous Peoples.

IV. WATER AND THE RIGHT TO FOOD

“Profit to non-Natives means money. Profit to Natives means a good life derived from the land and sea, that’s what we’re all about... The land we hold in trust is our wealth. It is the only wealth we could possibly pass on to our children. Good old Mother Earth with all her bounty and rich culture we have developed from her treasures is our wealth. Without our homelands, we become true paupers.”

Antoinette Helmer, Alaska Native

Profound relationships exist between all Indigenous Peoples and the Water, animals and plants that are central to their respective traditional food systems. This connection is deep and abiding for Indigenous Peoples and is essential for their survival. The Gwich’in of Canada and Alaska, for example, continue to maintain that their development and survival as a people is based on protection of the caribou and the ecosystem that sustains

them, rather than on oil development on their traditional lands. They maintain that such development would detrimentally affect not only the birthing place of the Caribou but would contaminate the water that supports all life. A statement issued in August 2002 by the Gwich'in Steering Committee, responding to renewed U.S. government threats to open the caribou calving ground in the Alaska National Wildlife Refuge to oil exploration, stated: *“Our traditional culture and way of life which is interconnected with the Porcupine Caribou Herd to meet all our essential needs such as food, clothing, tools, spirituality and social structure, is at stake.”*

Many Indigenous communities throughout California, USA including the Pit River and Elem Pomo also rely on the local waters and fish as their traditional means of subsistence. By 1999 a total of 13 Northern and Central California bodies of water were the subjects of fish consumption advisories due to contamination caused by hundreds of tons of mercury contamination, a toxic legacy of California Gold Rush which has never been adequately address or cleaned up. This impact goes beyond an attack on their right to health, means of subsistence and traditional economic development, although these are profoundly affected. The well-documented health impacts of mercury contamination of the water sources on unborn babies and young children are most severe.

The contamination of traditionally-used fish also undermines these Indigenous Peoples' spiritual and cultural identity, their primary connection to the natural world and their ability to practice their traditional ceremonies and religion, which both depend upon and revitalize this connection with each new year. According to Pit River Tribal representatives and elders from Northern California, USA, the salmon depicted in their People's flag *“stands for the cycle of life and revitalization of both the Nation and the salmon. It depicts the reliance of Indian Nations on salmon and on all of the natural world for their survival.”*

Indigenous Peoples have affirmed these profound connections and impacts at a number of international gatherings and through Declarations and other initiatives. In April 2002, a consensus of 125 Indigenous delegates (farmers, hunters, pastoralists, fishers, and gatherers) from 28 countries produced the “Declaration of Atitlán” at the first Indigenous Peoples' Global Consultation on the Right to Food and Food Security stated:

“IN AGREEMENT that the content of the Right to Food of Indigenous Peoples is a collective right based on our special spiritual relationship with Mother Earth, our lands and territories, environment, and natural resources that provide our traditional nutrition; *underscoring* that the means of subsistence of Indigenous Peoples nourishes our cultures, languages, social life, worldview, and especially our relationship with Mother Earth; *emphasizing* that the denial of the Right to Food for Indigenous Peoples not only denies us our physical survival, but also denies us our social organization, our cultures, traditions, languages, spirituality, sovereignty, and total identity; it is a denial of our collective indigenous existence,

TAKING INTO ACCOUNT that the right to development is a collective right of Peoples as well as of individuals, and that the Right to Food forms a part of the

development process, creating conditions for the enjoyment of all human rights, fundamental freedoms and well-being,

REMINDED that the Plan of Action and the Declaration of the World Food Summit (1996) stated that Food Security means "the access of all people to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life,"

REMINDED that Food Sovereignty is the right of Peoples to define their own policies and strategies for the sustainable production, distribution, and consumption of food, with respect for their own cultures and their own systems of managing natural resources and rural areas, and is considered to be a precondition for Food Security,

CONSIDERING that Article 5 of the Declaration on the Right to Development (1986) states that "the refusal to recognize the fundamental right of Peoples to self-determination," as a fundamental injustice against which the States should take resolute steps,

KEEPING IN MIND that Article 1 in Common of the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social, and Cultural Rights recognizes that **all** peoples, by virtue of the right to Self-Determination, may establish and implement their own economic, social, and cultural development, and their own development strategies, based on their own vision, and that "in no case may a people be deprived of its own means of subsistence,"

***RECOGNIZING* that for Indigenous Peoples, the rights to land, water, and territory, as well as the right to self-determination, are essential for the full realization of our Food Security and Food Sovereignty,(emphasis supplied).**

V. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Both United Nations and Indigenous experts have stressed the far reaching and inter-related aspects of Indigenous Peoples' relationship to their lands, territories, and natural resources, which by definition includes water, and have called upon states to uphold their obligations in this regard.

For example, in the Conclusions and Recommendations from the UN Seminar on indigenous peoples' permanent sovereignty over natural resources and their relationship to land, held in Geneva from 25 to 27 January 2006 (E/CN.4/Sub.2/AC.4/2006/3),

“Experts note that the right to lands, territories and permanent sovereignty over natural resources encompasses cultural, spiritual, political, economic, environmental and social elements which are essential for the existence and survival of indigenous peoples and

require recognition of indigenous peoples' own understandings of their traditional relationship to their lands, territories and natural resources, and their own definitions of development."

The Experts endorsed the similar conclusions and recommendations contained in the final reports of the Special Rapporteur Ms. Erica-Irene Daes on indigenous peoples and their relationship to their lands and indigenous peoples permanent sovereignty over natural resources (E/CN.4/Sub.2/2004/30 and E/CN.4/Sub.2/2001/21), which also strongly emphasized this relationship.

Notably for the purposes of this current study, in recommendation 2, the Experts also called upon States:

"... to address inconsistencies in their national laws, ensuring that laws recognizing indigenous peoples' rights over their lands and resources are not overridden or extinguished by other legislation, in particular in relation to extractive industries, natural resource use and the creation of "protected areas" and to "to ensure that their national laws and policies relating to Indigenous Peoples right to land and natural resources are not discriminatory or inconsistent with international human rights laws and standards."

VI. RELEVANT INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND FRAMEWORKS

A. The Right to Development and Related Rights:¹

"The legislation is regrettably even worse than feared. It ignores all of the concerns which Maori have raised about the issue and involves not just a taking of the coastline from Maori but also a very real restriction on our tikanga and our rights under international law and the common law."

-- Ngahiwi Tomoana, Chairman, Ngati Kahungunu Iwi Incorporated, Aotearoa (New Zealand), addressing the "Foreshore and Seabed Act" adopted by the New Zealand government in violation of the Treaty of Waitangi of 1840

The right to development under international law is an inalienable human right by virtue of which every human person and *all peoples* are entitled to participate in, contribute to, and enjoy. The right to development encompasses not only economic rights but social, cultural and political rights as inherent to the right to development. The full realization of the political right of peoples to self determination, including the exercise of their

¹ Taken from An Analysis of United States International Policy on Indigenous Peoples, the Human Right to Food and Food Security prepared by the International Indian Treaty Council for the First Nations Development Institute, November 15, 2002

inalienable right to full sovereignty over their natural wealth and resources including water, are fundamental to the right to development.

The United Nations Declaration on the Right to Development, concerned that all human rights are indivisible and interdependent, declares that the promotion and respect for, and the enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.² Any process of development that violates human rights, even if it improves the enjoyment of some rights, is by its very nature unsustainable and not consistent with the right to development.

The impact on Indigenous Peoples of the continued violation of this principle was noted by the 1990 United Nations Global Consultation on the Right to Development, which stated that, "the most destructive and prevalent abuses of Indigenous rights are the direct consequences of development strategies that fail to respect their fundamental right of self-determination."

The first International Conference on Human Rights also found that "the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights and there is a profound interconnection between the realization of human rights and economic development." It has long been the position of Indigenous Peoples and their representatives internationally, that the right to development requires the recognition of the right of all peoples, including Indigenous Peoples, to define and determine for themselves the processes and forms of development appropriate to their cultures, ecosystems and circumstances, based on the principle of self-determination.

As defined by the Commission on Human Rights' Independent Expert (Special Rapporteur), the right to development is a right to a particular process by which "all human rights and fundamental freedoms can be fully realized."³ Development itself is described by the Preamble to the Declaration on the Right to Development as, "a global process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from."

In this process of development, as States comply with their obligations to create conditions for the enjoyment of all human rights, the steps the State or international

² Declaration on the Right to Development, *Article 9*:

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

³ Fourth Report of the Independent Expert on the right to development, Mr. Arjun Sengupta, E/CN.4/2000/WG.18/2, December 20, 2001, Introduction, para. 2, citing, *inter alia* his prior reports: First report, E/CN.4/1999/WG.18.2; Second report, E/CN.4/2000/WG.18/CRP/1; and, Third report, E/CN.4/2001/WB.18.2.

actors take in the process of development should *actually improve conditions for the enjoyment of some human rights while not violating any other human rights.*

UNESCO, at the 3rd WWF, also found that in order to assure the right to water for Indigenous Peoples, all of their rights should be respected. The Indigenous Declarations from the 3rd and 4th World Water Forums referred to the right of Self Determination and the right to development, among important rights interdependent with the right to water.

B. Other United Nations Instruments and Activity Relevant to the Right to Water

1. The United Nations Food and Agriculture Organization, The World Food Summits and the Right to Food

The United Nations Food and Agriculture Organization (FAO) is the lead U.N. agency for agriculture, forestry, fisheries and rural development issues. It is made up of 180 member states or governments, plus the European Community. It was founded in 1945 to raise levels of nutrition and standards of living, to improve agricultural productivity and to improve the condition of rural populations. FAO promotes the pursuit of "food security," which was defined by world leaders who gathered at the World Food Summit in 1996.

The World Food Summit and the Rome Declaration on World Food Security (1996) reaffirmed that democracy and the promotion and protection of human rights and fundamental freedoms including the right to development are essential for achieving sustainable food security for all. The Rome Declaration considers the elimination of poverty essential to improve food security.

The World Food Summit Plan of Action contains a series of seven generalized commitments, each with a set of bases for action and specific objectives and actions towards reducing world hunger by half by 2015. Upon first impression, there are many laudable commitments and goals within the World Food Summit Plan of Action. Commitments include the creation of enabling conditions to eradicate poverty and for durable peace, based upon the full participation of women and men. Under this commitment, Commitment One, Objective and Action 1.1, the States "recognize and support (sic) indigenous people and their communities in their pursuit of economic and social development with full respect for their identity, traditions, forms of social organization and cultural values."

At the World Food Summit, the States also committed to creating conditions within their States that enable the eradication of poverty, the economic and physical access by everyone to food and the sustainable development of food production capacities. They committed to combating pests, drought and desertification on a national level.

Other commitments include the eradication of poverty through, among other things, basic education and access to land, water and credit, and sustainable development projects in food, agriculture, fisheries, forestry and rural development, in order to maximize the

incomes of the poor. Commitment Five details actions and goals that are offered in preparation for national emergencies in order to meet food requirements "in ways that encourage recovery, rehabilitation, development and capacity to satisfy future needs."

But the Commitments of the World Food Summit Plan of Action rely a great deal on the implementation of a "fair and market oriented world trade system." Commitment Four declares that "trade is a key element in achieving food security." Objectives and Actions under this commitment are the development of internal marketing and transportation systems to facilitate links with international marketing and transportation systems.

These are precisely the intended outcomes of Plan Puebla Panama and other mega-development schemes toward which Indigenous Peoples of Mexico and other Central American states have expressed profound objection and concern. The States rely on the World Trade Organization to "ensure that developing countries are equal partners working for effective solutions that improve their access to markets." These so-called "solutions" coupled with the promotion of genetically modified food plants and industrialized agriculture models have been identified by United Nations experts and Indigenous Peoples themselves as precisely the causes of the losses and degradation of Indigenous peoples lands and waters, which add to rather than reduce levels of poverty, hunger and malnutrition throughout the world.

In major part, the World Food Summit Plan of Action relies on capital flows, the investment of dollars with a dollar return, with little regard for larger human rights issues or impact. It relies on international trade and the WTO and its members to provide this capital investment. But simply investing dollars in agriculture and measuring the return, also in dollars, has not created conditions for the enjoyment of the right to food. This reliance on international trade and capital flows, this reliance on the generation of dollars, has not improved the human right to food. It has in fact violated other human rights while also violating the right to food and the right to water, as United Nations studies and experts,⁴ as well as Indigenous Peoples and many other non-governmental and civil society organizations involved in this process continue to point out.

The World Food Summit - five years later (WFS:fyl) was held from June 10 – 13, 2002, as a follow-up to the 1996 Rome Summit. The end product, the WFS:fyl Declaration entitled "International Alliance Against Hunger" does not improve on the 1996 Declaration, identifies no new targets or commitments and maintains the 1996 WFS promotion of free trade and biotechnology as solutions for food insecurity.

Yet as a result of Indigenous Peoples concentrated participation as a thematic group in the "Non Governmental Organization/Civil Society Forum for Food Sovereignty" that took place parallel to the WFS: fyl, FAO officials have accepted for consideration a list

⁴ See, Special Rapporteur on the Right to Food, third report to the Human Rights Commission, UN doc. E/CN.4/2002/58, 10 January 2002. See also, Report of the High Commissioner on Human Rights, submitted in accordance with Commission on Human Rights resolution 2001/32, Globalization and its impact on the full enjoyment of human rights, UN doc. E/CN.4/200254, January 15, 2002, para. 6.

of action proposals that includes those contained in the Indigenous Peoples' Declaration of Atitlán.

The voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security were adopted by the 127th session of the FAO Council in November 2004.

In its part II, Enabling environment, assistance and accountability. The guideline 8 about access to resources and assets state:

8.1 States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people's livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, *water*, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen pro-poor growth. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources.

Guideline 8C in part II state:

Water

8.11 Bearing in mind that access to water in sufficient quantity and quality for all is fundamental for life and health, States should strive to improve access to, and promote sustainable use of, water resources and their allocation among users giving due regard to efficiency and the satisfaction of basic human needs in an equitable manner and that balances the requirement of preserving or restoring the functioning of ecosystems with domestic, industrial and agricultural needs, including safeguarding drinking-water quality.

Guideline 8E in part II state:

Sustainability

8.13 States should consider specific national policies, legal instruments and supporting mechanisms to protect ecological sustainability and the carrying capacity of ecosystems to ensure the possibility for increased, sustainable food production for present and future generations, *prevent water pollution*, protect the fertility of the soil, and promote the sustainable management of fisheries and forestry.

2. U.N. Conventions on the Environment⁵ and Indigenous Peoples

In 1972, the United Nations held the World Conference on the Human Environment in Stockholm, Sweden. The resultant Declaration of the United Nations Conference on the Human Environment was the first pronouncement by the international community on the

⁵ See, fn. 2.

world's environment. Calling for an environment of a quality that permits a life of dignity and well being, the Conference established the United Nations Environmental Programme (UNEP), to serve a clearinghouse function for United Nations activity the field of the environment.

The Stockholm Declaration addressed the issue of the environment and development but left it up to the States to deal with the growing problem of environmental degradation as a result of development throughout the world. The Stockholm Declaration did recognize the connection between human right and the environment, but in its formulation of a right to the environment, it framed this right as an individual right even though the right to the environment, like the right of self determination, the right to development, and the right to peace, are all so-called "third generation" collective rights of peoples.

The World Conference on the Environment and Development (Rio) was held twenty years later, in 1992, in Rio de Janeiro, Brazil. Popularly known as "Rio," this conference led to an explosion of international activity, including international conventions, with regard to the environment. These include the Convention on Climate Change, the Convention on Biodiversity and the Convention on the Elimination of Persistent Organic Pollutants, none of which have been ratified as yet by the United States.

The Rio Conference did nothing to establish the environment as a human right. Mother Earth herself has no rights that are recognized by international law. Instead, Rio focused on international trade, calling for a "supportive and open economic systems" that "lead to economic growth and sustainable development." Its solution to poverty is more "sustainable development" and the "equitable sharing" of its benefits, with no definitions or parameters provided for these key terms. Meanwhile, globalization and imposed industrial development continues to lay waste to the world environment and to the lands and territories of Indigenous Peoples.

Principle 22 of the Rio Declaration recognizes that:

Indigenous Peoples and their communities... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of their sustainable development.

But Principle 12 calls for "supportive and open international economic systems" that lead to economic growth and sustainable development, and trade measures that are not "disguised restrictions on international trade."

The quandary for Indigenous Peoples posed by Rio is two-fold. Although it recognized the importance of Indigenous Peoples' role in the preservation of Mother Earth, Rio also called for greater trade globalization; and, while calling for (but not defining) "sustainable development," it explicitly promotes growth and more development. Many Indigenous Peoples' representatives regard Rio's use of the undefined term "sustainable

development” as an oxymoron, a self-canceling phrase, which is used to promote globalization and forms of destructive resource extraction such as mining that pollutes and poisons ground water and entire river systems for generations.

Agenda 21, the major product of Rio, is a detailed plan of action that attempts to somehow reconcile these diametrically opposed positions. Section 3 of Agenda 21 calls for strengthening the roles of major groups in development, elements of civil society that would counter “unsustainable” development. Nine Major groups are identified, including women, children and youth, non-governmental organizations, local authorities, workers and trade unions, business and industry, the science and technological community, farmers, and Indigenous Peoples. But globalization has progressed without regard to whatever influence these groups have been able to exert on the World Trade Organization or regional trade organizations like the North American Free Trade Agreement or international agencies of economic cooperation, like the IMF.

The World Trade Organization and the International Monetary Fund seem to be impervious to the perspectives and opinions of these “major groups.” And these international financial and trade institutions have substantially more influence.

Indigenous Peoples have their own Chapter 26 in Agenda 21, which calls for a “full partnership” with Indigenous Peoples in the accomplishment of the goals of Agenda 21. Chapter 26.3 calls upon the States to “strengthen and facilitate” Indigenous Peoples’ participation in their own development and in external development activities that may affect them. But only “[I]n accordance with national legislation,” should Indigenous Peoples be accorded greater self-control over subsistence practices. Indigenous Peoples’ rights to their means of subsistence, universally and totally dependent on clean water sources are profoundly affected in negative ways by such national legislation.

Chapter 26 pretends to recognize Indigenous Peoples’ rights already established under International Labor Organization Convention No. 169. But it goes no further than calling upon the States to seek and incorporate the views of Indigenous Peoples and their organizations in the implementation and design, adoption and strengthening of policies to protect Indigenous Peoples intellectual and cultural property.⁶

⁶ Agenda 21, Chapter 26, 26.4 and 26.5. See, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries: Article 2 (participation of Indigenous Peoples in development); Article 4 (protection of Indigenous cultures and environment); and Article 6 (consultations leading toward, but *not* requiring, consent on measures which may affect them directly). Indeed, Agenda 21 falls short of Article 27 of ILO #169, recognizing that Indigenous Peoples “shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands that they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.” ILO Convention 169 is the only international convention on Indigenous Peoples and can be regarded as the “bottom” or basic document establishing recognition of the rights of Indigenous Peoples from which the development of international human rights standards concerning Indigenous Peoples should evolve. In no way should United Nations actions or documents reflect lesser human rights standards than those found in this basic convention.

Other chapters of Agenda 21 also refer to Indigenous Peoples, primarily in the areas of traditional knowledge, in the case of fisheries and the incorporation of this knowledge into domestic marine ecosystems management plans, all related to water and subsistence.⁷ Chapter 11, Combating Deforestation, also calls for Indigenous “participation” in state activities pertaining to forests. Indigenous Peoples’ ability to sustain themselves, to provide for their major means of subsistence and to continue the millennial practices in providing for their own means of subsistence in keeping with their own world view, are profoundly tied to all of these themes addressed by Agenda 21.

To be sure, Agenda 21 was a step in the right direction, as it did recognize the importance of Indigenous Peoples in the preservation of the environment. But a primary failure of Agenda 21 for Indigenous Peoples is that it subsumed their international human rights to national actions and national legislation, failing to provide for their right to say “no” to development which negatively impacts their survival. Indeed, it created the right of States, and through the States, multinational corporations, to exploit Indigenous traditional knowledge, albeit with the “participation” of Indigenous Peoples. The inherent contradiction of recognizing international Indigenous “rights” on one hand but allowing States to determine their content on the other, can very well be seen as one step forward and two steps back.

Other elements in Agenda 21 related directly to water, such as the chapter on Protection of the Quality and Supply of Freshwater Sources, and Protection of the Oceans, have been given little to no attention, or concerted action. Like much of Agenda 21, these chapters remain promises unfulfilled.

Part of the explosion of international activity after Rio included the establishment of several United Nations organs to attempt the reconciliation of the contradictory messages of the Rio Declaration and Agenda 21. The Commission on Sustainable Development was meant to oversee the activities of Agenda 21, and to study the problem of “sustainable growth.” It was given a broad agenda, including forests and traditional knowledge. The ad-hoc inter-governmental panel on forests, later the Intergovernmental Forum on Forests, and now the permanent United Nations Forum on Forests, was established to work on new “international arrangements” including an international Convention on Forests that has yet to happen.

While Agenda 21 called for the preservation of forests and their expansion, forest area losses for the past 20 years exceed the size of India, over 16 million hectares per year. Worldwatch Institute cites illegal logging (2/3 of wood harvested in Indonesia is harvested illegally, 80% of logging in Brazil is illegal), and the over consumption of forest products by the north (77% of the world’s commercial timber harvests are consumed by 22% of the world’s people, in Japan, Europe, North America, and now

⁷ Agenda 21, Chapter 17, 17.17.

China) as leading causes of forest loss.⁸ And forest loss is directly related to loss of watershed, with devastating impacts for Forest dwelling Indigenous Peoples.

The World Summit on Sustainable Development (WSSD) was held in Johannesburg, Republic of South Africa, in August-September of 2002. It was called by the United Nations to assess the progress made since Rio on sustainable development and the world's environment, and to set new goals and priorities based upon that assessment.

In reality, globalization and un-sustainable development received a boost at the WSSD, primarily from the efforts of the United States, which, among other questionable actions, insisted on language in the declaration on "sustainable mining." In its assessment of the lamentable state of the world's environment, the WSSD did not address the negative impacts of the globalization of trade on the environment or on truly sustainable community-based development. It set no specific goals or deadlines on any theme relevant to the alarming deterioration of our Mother Earth and the source of all life which is water.

a) Climate Change

The Framework Convention on Climate Change was a major theme and accomplishment of Rio. As a framework convention, it is an agreement to agree based upon the principles and guidelines established by the convention. 170 Nations agreed at Rio to reduce voluntarily their emissions of greenhouse gasses to 1990 levels. The Kyoto Protocol on Climate Change was to secure firm commitments from State Parties to the Convention on specific greenhouse gas reductions and deadlines. The United States is a signatory but has not ratified either the Convention or the Protocol. The Bush administration recently withdrew the United States commitment made under the Kyoto protocol.

As long recognized by traditional Indigenous Peoples, all things are related, all things are interdependent. With regard to climate change, the massive loss of forests, particularly old growth, that serve as a filter to carbon in the atmosphere, has contributed to a global increase in greenhouse gasses in the atmosphere. Increased industrial production, particularly in the industrialized North, and China and a few other developing nations, is an obvious cause. Carbon emissions increased globally by 9% between 1992 and 2001. Such losses profoundly affect water.

Climate change affects Indigenous Peoples, their ecosystems and their means of subsistence profoundly. As peoples dependent on the natural world for subsistence, the effects on the food chain and the cycles of floods and drought caused by climate change are increasingly severe. With the melting of the Arctic icecaps, drying of lakes and springs, desertification, changes in agricultural and migration cycles, rising coastal waters and the resulting decrease in fish, birds, seal and bear, Indigenous Peoples are

⁸ Janet N. Abramovitz, *Too Much Talk, Too Little Action on Forests*, Worldwatch Institute, World Summit Policy Brief #3, <http://www.worldwatch.org/worldsummit/briefs/20020416.html>, visited September 9, 2002.

experiencing greater food insecurity, malnutrition and hunger. The WSSD decried climate change but, in keeping with the United States position, recommended no fixed goals or deadlines for carbon emission reduction.

b) Persistent Organic Pollutants (POPs)

The 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) was, like the Convention on Climate Change, a showcase convention at Rio. After several years of negotiations, in December, 2000 in Johannesburg, South Africa, the language for a Treaty on POPs was finally approved. The Treaty supports elimination rather than reduction (as was proposed by the United States), as well as the precautionary rather than “acceptable risk” approach. This language was strongly advocated by Indigenous representatives and non-governmental organizations participating in the negotiating sessions.

At present, the convention prohibits the production and use of 12 chemicals, 9 pesticides, polychlorinated biphenyls (PCBs) and industrial by-products, dioxins and furans. But there is little information on the other 80,000 chemicals on the market today and their effects on the environment, human health, and Indigenous Peoples’ health and subsistence.⁹ Less is known of the “cocktail effect” of the combination of these chemicals once released into the environment, on life in all of its forms.

The growth of industrialized agriculture in the production of food for export, relying in many cases on deforestation, and in most cases on high doses of pesticides, is also affecting the bio-diversity of our planet and our ability to sustain ourselves, particularly in developing countries and on Indigenous lands. Water is many times the first indicator of such pollution.

Industrialized agriculture, with its heavy use of pesticides and chemical fertilizers, is polluting Indigenous Peoples’ environment particularly the air and water. Trans-nationals (with the knowledge and consent of the governments involved) are marketing pesticides and fertilizers which are currently banned for use in the United States and Europe but are nevertheless approved for export to Guatemala, Mexico and other third world countries, further poisoning Indigenous farmers, their families, communities and their waters and ecosystems. In fact, Indigenous Peoples consider this to be a serious loophole in the Rotterdam Convention which violates human rights. The Convention calls upon exporting state parties to inform receiving parties of the banned or restricted status of the pesticides or other chemicals in question and provides for prior informed consent by receiving state parties. But it still allows for this trade in banned toxics, and the local communities who are the ultimate recipients, many times though unprotected use or indiscriminate aerial spraying, are not afforded the right to such “prior informed consent”.

⁹ Anne Platt McGinn, Reducing the Use of Toxic Chemicals Advances Health and Sustainable Development, Policy Brief #7, Worldwatch Institute, fn. 30.

Indigenous Peoples and their access to clean and safe water are profoundly affected. POPs proliferate in the atmosphere, carried by water and wind currents from their industrial origins to the colder regions of the world, where they bio-accumulate in living beings. Bio-accumulation is exacerbated in Northern climates where POPs tend to accumulate due to wind and water currents. For example, the Inuit living on Barring Island, Canada, carry seven times more PCBs in their body than people living in lower latitudes. Illustrating the potential and alarming impacts on future generations, POPs also pass through the placenta to the unborn child, causing birth defects and learning disabilities. Poisoned water accumulates in water plants and affects the entire aquatic food chain, poisoning fish and sea mammals such as seals, whales and walrus. Residues of POPs, such as PCBs, dichlorodiphenyltrichloroethane (DDT) and dioxins then accumulate in blood, fat and mother's breast milk of Indigenous Peoples dependent on fish and water mammals for their means of subsistence.

The Indigenous Peoples of the Great Lakes region of the United States and Canada are also being severely affected by POPs from industrial emissions and the dumping of industrial waste in much the same way, from eating contaminated fish and wildlife, drinking water, soil dermal contact from swimming and the consumption of mother's breast milk. Indigenous women of the Great Lakes area carry PCBs in their bodies in gross amounts that are passed on to future generations.¹⁰

In 1997 a study was conducted on the Indigenous Yaqui Nation in Rio Yaqui Sonora, an area targeted by the so-called "green revolution" and industrialized agriculture on the effects of the use of DDT on and around Yaqui traditional lands. The study detected high levels of multiple pesticides in the in the cord blood of newborns and in mother's milk. Yaqui children living in areas contaminated by the high use of pesticides were tested with severe learning and developmental disabilities. Children living in areas of traditional Indigenous agriculture and little or no use of pesticides, relying on unpolluted sources of water, scored significantly higher in neurological and behavioral testing.

The POPs Treaty also requires all Parties to "regulate with the aim of preventing the production and use" of new pesticides and industrial chemicals which have POPs properties (toxic, persistent, bioaccumulation, long range transport). Since the Treaty contains no mechanisms to insure industry responsibility, state parties will need to exercise maximum responsibility and vigilance to monitor compliance and full participation of industries, including multi-national corporations.

c) Biodiversity and Traditional Knowledge

¹⁰ Transboundary Persistent Organic Pollutants (POPs), Human Rights and Indigenous Peoples, Indigenous Environmental Network presentation to the Special Rapporteur on the illicit movement and dumping of toxic and dangerous products and waste, United Nations Commission on Human Rights, presented by Tom Goldtooth, National Director, IEN at a meeting with the Special Rapporteur, at the International Indian Treaty Council, San Francisco, California, December 13, 2001.

The Convention on Biological Diversity (CBD), the second of the showcase conventions adopted at the Rio Conference, has created some problems for the United States and its push to “rationalize” intellectual property schemes via the WTO. The CBD is another framework convention, laying out certain principles of agreement. This convention relies heavily on periodic meetings of the State Parties, called the Conference of Parties (COPS), to further the objectives of the convention and national plans that incorporate principles established by the convention and the COPS. The United States is not a party to the CBD although it attends the meeting of the COPS and takes a great interest in influencing their results.

The aim of the Convention on Biological Diversity is the conservation and sustainable use of the world’s biological resources.¹¹ Of major interest to Indigenous Peoples is the CBD’s recognition of Indigenous People’s contribution to the preservation of the world’s biodiversity. Although perhaps apocryphal, it is often said that over 80% of the world’s remaining biodiversity is found on Indigenous lands and territories. It is generally accepted that the dominant world has abused and used up its own.

The CBD’s Article 8(j) is of particular interest to Indigenous Peoples:

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

It must be kept in mind that the CBD is not meant to be entirely a convention for the conservation of the biosphere, but one devoted to the *use*, albeit “sustainable.” of biological resources. It also intends to promote the wider application of traditional knowledge and practices. Substantially, it is an intellectual property convention.

Indigenous Peoples have made some headway at the Conferences of Parties in participation as well as policy. At its fourth meeting in 1998 in Bratislava, Slovakia, COPS IV established an open ended Intersessional working group on the implementation of Article 8(j). This working group, attended by Indigenous Peoples as well as States, is meant to provide advice and recommendations to the COPS on the implementation of article 8(j). And although the CBD specifically recognizes the right of States (ironically calling it “sovereignty”) to exploit biological resources, it does offer the potential for

¹¹ “The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” Article 1, Convention on Biodiversity, found at <http://www.biodiv.org/convention>, visited September 11, 2002.

some measure of protection of biodiversity and traditional knowledge. But such protections are not extended to the water which sustains this biodiversity.

For example, under its national plan pursuant to article 8(j), the Philippines, by law, requires the free and informed consent of Indigenous Peoples before any prospecting, biological or mineral, on their lands. In the case of Indigenous Peoples, the law specifies that bio-prospecting and use shall be allowed “within the ancestral lands and domains of indigenous cultural communities only with the prior informed consent of such communities, obtained in accordance with the customary laws of the concerned community.”¹² Although the results have yet to be proven, Indigenous Peoples can defend their right to water under this Executive Order.

The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and *Waters* Traditionally Occupied or Used by Indigenous and Local Communities were developed pursuant to task 9 of the programme of work on Article 8(j) and related provisions adopted by the Conference of the Parties of the Convention on Biological Diversity at its fifth meeting, in May 2000:

IV. INTEGRATION OF CULTURAL, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS AS A SINGLE PROCESS

A. Cultural impact assessments

24. Through the cultural impact assessment process, and particularly during the screening and scoping phases, the issues that are of particular cultural concern should be identified, such as cultural heritage, religions, beliefs and sacred teachings, customary practices, forms of social organization, systems of natural resource use, including patterns of land use, places of cultural significance, economic valuation of cultural resources, sacred sites, ceremonies, languages, customary law systems, and political structures, roles and customs. The possible impacts on all aspects of culture, including sacred sites, should therefore be taken into consideration while developing cultural impact assessments.

4. Possible impacts on sacred sites and associated ritual or ceremonial activities

31. When developments are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, personnel associated with such developments should recognize that many sacred sites, and areas or places of other cultural significance may have important functions with respect to the conservation and sustainable use of biological diversity and, by extension, the maintenance of the natural resources upon which such communities rely for their well-being.

V. GENERAL CONSIDERATIONS

C. Impact assessments and community development plans

¹² Republic of the Philippine, Executive Order No. 247 (18.5.95), 1995.

56. Any developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities should maintain a balance between economic, social, cultural and environmental concerns, on the one hand, while, on the other hand, maximizing opportunities for the conservation and sustainable use of biological diversity, the access and equitable sharing of benefits and the recognition of traditional knowledge, innovations and practices in accordance with Article 8(j) of the Convention, and should seek to minimize risks to biological diversity. The cultural, environmental and social impact assessment processes should reflect this.

C. International Human Rights Instruments and Jurisprudence

Some of the most significant existing protections and affirmations of the Right to Water and related rights for Indigenous Peoples can be found in the existing Human Rights Covenants and Conventions and the conclusions of the corresponding UN Treaty monitoring bodies.

For example:

1. The International Covenant on Civil and Political Rights (ICCPR)

Article 27 of the ICCPR states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

General Comment 23 of the Human Rights Committee is meant to serve as guidance to the States in their compliance with Article 27:

“7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous Peoples. That right may include such traditional activities as fishing or hunting, and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.”¹³

In formulating this General Recommendation, the Human rights Committee relied on their own jurisprudence, Bernard Ominayak and the Lubicon Lake Band v. Canada.¹⁴

¹³ General Recommendation No. 23, the rights of minorities (article 27), CCPR/C/21/Rev.1/Add.5, 08/04/1994.

¹⁴ Communication No. 167/1984; Canada. 10/05/90, CCPR/C/38/D/167/1984 (Jurisprudence).

This very early complaint, filed in 1984 under Optional Protocol 1 to the Covenant concerned the Provincial government of Alberta's granted of leases to Japanese transnational corporations for the exploitation of oil, gas, timber and other natural resources, and the construction of a pulp mill on Lubicon Lake Band territory.. The resulting environmental degradation had a devastating effect on the environment including "bodies of water," and as a consequence, on the health of the Lubicon Lake Band, and on their traditional subsistence practices and traditional culture and way of life.

Six years after the filing of a complaint, the Committee found a violation of Article 27 of the ICCPR. [cite] In reaching this conclusion the Committee recognized that control and use of traditional lands, including bodies of water, was necessary in the practice of Lubicon culture. Interference with Indigenous traditional land uses by environmental degradation is not permitted under the ICCPR Article 27.

The Human Rights Committee has also referred to other rights of the Covenant relevant to water as a natural resource in their examination of State periodic reports, as for example, their 1999 examination of Canada (CCPR/C/79/Add.105, 7 April 1999):

7. The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report.

8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

With reference to Article 27, the Human Rights Committee recommended that Suriname adopt specific legislation to prevent the poisoning of Indigenous Peoples/ water.¹⁵

¹⁵ CCPR/CO/80/SUR, 2004.

Clearly, under the International Covenant on Civil and Political rights, particularly Articles 1 and 27, the enjoyment of the right to water is critical to the enjoyment of the right of Self Determination and the right to the practice of culture.

2. The International Convention on the Elimination of all Forms of Racial Discrimination

Great advances in the recognition of Indigenous human rights and fundamental freedoms continue to be made by the CERD Committee. These advances also indicate the importance of water to the survival of Indigenous Peoples as Peoples.

The CERD Committee's General Recommendation XXIII, Indigenous Peoples (Fifty first Session, 1997) sets the following standards:

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.

4. The Committee calls in particular upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) 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;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the

right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The CERD Committee frequently has examined Indigenous People's access to water in their consideration of State Periodic Reports. In an examination of Guyana's, the Committee voiced concern over the State's recognition of rights of ownership and possession of "bodies of water and subsoil resources."¹⁶ In examinations of Costa Rica and Colombia, the Committee noted the lack of access to water by Indigenous Communities.¹⁷ And in their Statement to the World Summit on Sustainable Development, the CERD Committee affirmed that State policies violate the rights of Indigenous Peoples to freedom, equality and adequate access to basic needs such as clean water. The Committee also noted that negative aspects of globalization included water pollution.(cite)

The CERD Committee, under its Early Warning and Urgent Action Procedure, raised the issue of water and Indigenous Peoples of Peru, in a letter dated August 18, 2006. The letter requested further information in the State's next periodic report on allegations involving the drainage of surface and underground water from the grasslands of the Altiplano, leading to the desertification and sanitization of the ancestral lands of the Aymara Indigenous Peoples. Among other information sought, the letter raised the issues of the subsistence of Indigenous Peoples and the actions of transnational mining companies in Peru.

More recently, in their 2007 examination of Canada's Periodic report, based upon parallel reports from Indigenous Peoples and their organizations, such as the Western Shoshone in Nevada, United States, and Guatemala, concerning the poisoning and pollution of water abroad, by Canadian transnational gold mining corporations, the CERD Committee made the following Conclusions and Recommendations:¹⁸

17. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (article 2.1d), article 4 a) and article 5e)).

In light of article 2.1 d) and article 4 a) and b) of the Convention and of its general recommendation 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the

¹⁶ CERD/GUY/CO/14.4, April 2006.

¹⁷ Costa Rica, CERD/C/60/CO/3, 2002; Colombia, CERD/C/304/Add.10, 1996.

¹⁸ CERD/C/CAN/CO/18, 20 March 2007.

Committee recommends to the State party that it explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard. (emphasis supplied)

The same observation and recommendation was made to the United States in the consideration of their 2008 Periodic Report.¹⁹ This groundbreaking finding by the CERD Committee hopefully will have a great impact on the rights of Indigenous Peoples to clean and safe water all over the world.

3. The International Covenant on Economic, Social and Cultural Rights

With regard to Indigenous Peoples, the ICESCR Committee General Comment No. 14: The right to the highest attainable standard of Health (Article 12), recognizes in paragraph 27, the importance of lands and resources to the health of Indigenous Peoples:

The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole, and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbolic relationship with their lands, has a deleterious effect on their health.

This same paragraph calls for the protection of Indigenous Peoples' "vital medicinal plants, animals and minerals necessary to the full enjoyment of health..." These elements necessary for the enjoyment of the right to health rely on clean water.

Again, all of these rights, in relation to Indigenous Peoples, protect their right to water.

General comment No. 15: The right to water (arts. 11 and 12 of the Covenant) echo these rights and issue direct standards for Indigenous Peoples' right to water:

7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see general comment No. 12 (1999)). Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.

¹⁹ UN Doc. CERD/C/USA/CO/6, February 2008, para. 30.

16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum- seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design deliver and control their access to water;

The ICESCR Committee has applied these norms relative to water and related rights including health, in their Concluding Observations from their examination of State Periodic reports under the Covenant. The following are examples from 2006:

- Norway, E/C.12/1/Add.109, 23/06/2005

26. The Committee urges the State party to ensure that the Finnmark Act, which is currently being considered by parliament, gives due regard to the rights of the Sami people to participate in the management and control of natural resources in the county of Finnmark. The Committee requests the State party to provide in its next periodic report updated information about the implementation of the Finnmark Act and the extent to which the opinions of representatives of the Sami people have been taken into consideration.

- Chile, E/C.12/1/Add.105 26 November 2004.3

7. The Committee welcomes measures taken to improve the situation of indigenous peoples, including the adoption of the Indigenous People Act (Act No. 19.253) of 1993, the establishment of the National Indigenous Development Corporation (CONADI) and the Indigenous Land and Water Fund, and the recently announced New Deal Policy (*Política de Nuevo Trato*) 2004-2010.

The Committee notes with concern the lack of constitutional recognition of indigenous peoples in the State party and that indigenous peoples, despite the existence of various programmes and policies to improve their situation, remain disadvantaged in the enjoyment of their rights guaranteed by the Covenant. It also regrets that the State party has not ratified ILO Convention No. 169 (1989) concerning indigenous and tribal peoples, and that unsettled claims over indigenous lands and national resources remain a source of conflict and confrontation.

- Canada, E/C.12/CAN/CO/5, 19 May 2006

5. The Committee notes with appreciation the reduction in disparities between Aboriginal people and the rest of the population in the State party with regard to infant mortality and secondary education.

11. The Committee regrets that most of its 1993 and 1998 recommendations have not been implemented, and that the State party has not addressed in an effective

manner the following principal subjects of concern, which were stated in relation to the second and third periodic reports, and which are still relevant: [...]

d) The disparities that still persist between Aboriginal peoples and the rest of the Canadian population in the enjoyment of Covenant rights, as well as the discrimination still experienced by Aboriginal women in matters of matrimonial property.

15. The Committee is concerned that, despite Canada's economic prosperity and the reduction of the number of people living below the Low Income Cut Off, 11.2 percent of its population still lived in poverty in 2004, and that significant differences in levels of poverty persist between Provinces and Territories. The Committee also notes with particular concern that poverty rates remain very high among disadvantaged and marginalized individuals and groups such as Aboriginal peoples,

African-Canadians, immigrants, persons with disabilities, youth, low -income women and single mothers. In a number of jurisdictions, including British Columbia, poverty rates have increased among single mothers and children in the period between 1998 and 2003. The Committee is also concerned by the significant disparities still remaining between Aboriginal people and the rest of the population in areas of employment, access to water, health, housing and education, and by the failure of the State party to fully acknowledge the barriers faced by African-Canadians in the enjoyment of their rights under the Covenant.

- México, E/C.12/CO/MEX/4, 17 May 2006

10. The Committee is concerned about reports that members of indigenous and local communities opposing the construction of the "La Parota Hydroelectric Dam" or other projects under the Plan Puebla Panama are not properly consulted and are sometimes forcefully prevented from participating in local assemblies concerning the implementation of these projects. It is also concerned that the construction of the La Parota Dam would cause the flooding of 17.000 hectares of land inhabited or cultivated by indigenous and local farming communities, that it would lead to environmental depletion and reportedly displace 25.000 people and that it would also, according to the Latin American Water Tribunal, violate the communal land rights of the affected communities, as well as their economic, social and cultural rights.

27. The Committee notes with concern that the collective authorship of indigenous peoples of their traditional knowledge and cultural heritage is not protected by the Federal Copyright Act or in other legislation of the State party.

28. The Committee urges the State party to ensure that the indigenous and local communities affected by the La Parota Hydroelectric Dam Project or other large-scale projects on the lands and territories which they own or traditionally occupy or use are duly consulted, and that their prior informed consent is sought, in any decision making processes related to these projects affecting their rights and interests

under the Covenant, in line with ILO Convention No. 169 on Indigenous and Tribal Peoples.

The Committee also urges the State party to recognize the rights of ownership and possession of indigenous communities to the lands traditionally occupied by them, to ensure that adequate compensation and/or alternative accommodation and land for cultivation are provided to the indigenous communities and local farmers affected by the construction of the La Parota Dam or other construction projects under the Plan Puebla Panama, and that their economic, social and cultural rights are safeguarded. In this regard, the State party is referred to the Committee's General Comments Nos. 14 and 15 on the right to the highest attainable standard of health and on the right to water.

4. The Convention on the Rights of the Child

The Convention on the Rights of the Child, article 24, also recognizes the right of children to the enjoyment of the highest standard of health and mandates that state parties "shall pursue full implementation of this right." States are required to "take appropriate measures to combat disease and malnutrition..." through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution."

As a result of their Day of Discussion on the Rights of Indigenous Children, 15 Sept. – 3 Oct. 2003, the CRC Committee recommended, under the theme of non-discrimination, that States implement fully Art. 2 of the Convention, and called for equal access to water and sanitation by Indigenous Children.

In relevant part, the CRC Draft General Comment on Indigenous Children presently provides:

Child Welfare and Child Abuse (Articles 5, 9, 18, 19, 20, 21, 25 and 27)
State Parties ought to address issues of poverty, discrimination, dislocation and subsequent housing and potable water problems.

The CRC Committee has addressed the issue of "grave disparities in access to clean (drinkable) water by Indigenous children: see, India: 26/02/2004, CRC/C/15/Add.228 para. 62; and, Panama: 30/06/2004, CRC/C/15/Add.228 para.62.

In their examination of Peru's Periodic Report (CRC/C/PER/CO/3, 14 March 2006) the CRC Committee made the following Conclusions and Recommendations:

50. The Committee is concerned about environmental health problems arising from a lack of access to safe drinking water, inadequate sanitation and contamination by extractive industries, which mainly affect the health and livelihoods of vulnerable groups, including children.

51. The Committee reiterates the recommendation of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, that the State party carry out independent, rights-based environmental and social impact assessments prior to the setting up of all mining or other industrial projects that may have harmful impacts on the right to health of children. The Committee further recommends that the State party strengthen its efforts to provide sanitation and safe drinking water to all the population, with special attention to rural and remote areas.

73. The Committee, while acknowledging the State party's efforts in this respect, notes with concern that indigenous communities continue to face serious difficulties in the enjoyment of their rights, especially economic, social and cultural rights. In particular, the Committee is concerned about the lack of recognition of their land rights, pillaging of their resources, inadequate access to basic services, health and education, social exclusion and discrimination.

74. The Committee recommends that the State party pursue measures to effectively address the gap in life opportunities of indigenous children, and take adequate measures in order to provide protection for the rights of indigenous children as contained in the Constitution taking into due account the recommendations adopted by the Committee on its Day of General Discussion on the rights of indigenous children in September 2003.

5. The Convention on the Elimination of all Forms of Discrimination Against Women

In 2006, in their examination of the Philippines Periodic Report, the CEDAW Committee made the following Conclusions and Recommendations with regard to, *inter alia* Indigenous women and water (CEDAW/C/PHI/CO/6, 25 August 2006):

29. The Committee expresses its concern about the precarious situation of rural and indigenous women, as well as the Muslim women in the autonomous region of Muslim Mindanao, who lack access to adequate health services, education, clean water and sanitation services and credit facilities. The Committee is also concerned about women's limited access to justice in cases of violence, especially in the conflict zones, and the lack of sanctions against the perpetrators of such violence. The Committee is furthermore concerned that the practice of early marriage is persistent among Muslim women.

30. The Committee calls upon the State party to pay special attention to the needs of rural women, indigenous women and Muslim women living in the autonomous region of Muslim Mindanao, ensuring that they have access to health care, social security, education, clean water and sanitation services, fertile land, income generation opportunities and participation in decision-making processes. The Committee recommends that the State party ensure women's access to justice through the provision of legal aid and take steps to prosecute the perpetrators of

violence against them. It also encourages the State party to provide increased educational opportunities to Muslim girls to discourage early marriages. The Committee requests the State party to include in its next report sex-disaggregated data and information on the de facto position of rural, indigenous and Muslim women, and on the impact of measures taken and results achieved with policies and programmes implemented for these groups of women.

D. Other International Standards and Jurisprudence

1. ILO Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989)

ILO 169 is the only international convention that specifically address the collective human rights of Indigenous Peoples. Fundamentally, and in several Articles it expressly Recognizes “the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions...”.

This recognition extends to the right to control their institutions, including those institutions that determine the use of lands and natural resources and recognize Indigenous Peoples right to exercise their free and informed consent before the State can affect them or their lands, territories and resources (Articles 5, 6 and 7).

Although there is no specific reference to the right to water in the Convention, there is explicit and important recognition of Indigenous Peoples rights to lands and natural resources:

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

This “total environment” necessarily includes water and bodies of water necessary for the maintenance of subsistence, spiritual life and culture. And the ownership of these lands and resources is specifically recognized:

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be

taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Although only a handful of States have ratified ILO 169 and although the complaints procedure for violations of the Convention by States is cumbersome and difficult, it has served to define to the international community and to human rights fora, such as Treaty Monitoring Bodies and United Nations Rapporteurs, the collective rights of Indigenous Peoples. The sections quoted above, for example, appear to be the basis of the CERD Convention's General Recommendation XXIII, often cited in the CERD Committee's Concluding Observations and Recommendations. The CERD Committee also recommends as a matter of practice, the adoption of ILO 169 to States.

2. The Organization of American States Jurisprudence

Both the Inter-American Commission on Human Rights (CIDH) and the Inter-American Court of Human Rights have used ILO 169 to inform their decisions and judgments particularly with regard to the vindication of ancestral lands and resources of Indigenous Peoples. Although neither the American Convention on Human Rights or the American Declaration on the Rights and Duties of Man expressly recognize the right to water, an omission also found in the Additional Protocol of San Salvador (Economic, Social and Cultural Rights), the jurisprudence of both the Commission and Court have firmly established these rights as appurtenant to the right of Indigenous Peoples to the ownership and control of their lands and territories.

The right to water, necessary to sustain the life and culture of Indigenous Peoples has been amply recognized by the Inter-American Court under the American Convention Article 21, the right to property, in cases such as *Caso de la Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua*, Judgment of 31 August 2001 paragraph 144 164; and, *Caso Comunidad Sawhoyamaya vs. Paraguay*, Judgment of March 2006 paragraphs 118 – 121. The Inter-American Commission has made similar findings under the American Declaration, most notably in *Caso Comunidades Indígenas Mayas del Distrito de Toledo, Belice*, 12 October 2004.

3. The United Nations Declaration on the Rights of Indigenous Peoples

At the First Session of the new Human Rights Council, on June 29, 2006, the Council adopted the United Nations Declaration on the Rights of Indigenous Peoples. Although this historic step toward the recognition of the Collective rights of Indigenous Peoples has as yet not been adopted by the General Assembly, it still remains the final official pronouncement of Indigenous Peoples rights by the United Nations.

The United Nations Declaration recognizes the spiritual as well as material relationship with the land and water, Indigenous Peoples rights to the ownership and control of ancestral lands and resources and the right of free, prior and informed consent before the State may affect them:

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. 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 their mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

VII. CONCLUSION

The International Indian Treaty Council is pleased to provide this information to the Independent Expert for her study on the Right to Water, and we hope that her study has been aided by this submission.

We thank all the Indigenous Peoples who have made contributions and who continue to defend these vital rights in their homelands and communities.

It is clear that the material, spiritual and cultural dimensions of the right to water for Indigenous Peoples are not only real, but are recognized in various international human rights standards and jurisprudence. However, it is also clear that effective mechanisms for implementation of these rights, and in many cases the political will of states in this regard, are most urgently needed.

We very much hope that all these dimensions will be reflected in the Special Rapporteur's study. We look forward to providing additional input and information, including individual case studies, upon request.

For all our relations.