Written contribution of FIAN International to the Fourth Session of the Intergovernmental Working Group of the Human Rights Council working towards a Declaration on the Rights of Peasants and other People Working in Rural Areas.

Article 2. States Obligations

Geneva, 12 of May 2017

With this document[1], FIAN International aims to contribute to the understanding and legal justification of article 2 of the Draft Declaration to be negotiated during the fourth session of the IGWG on the Declaration of Peasants Rights and other people living in rural areas. This contribution includes a number of international law sources, which serve as fundament to the proposed text.

1. What are States' obligations with regards to the right of peasants?

All human beings are right holders of rights inherent to their human nature. Reciprocally, States are bound by obligations. These obligations can be claimed by people through political, administrative, quasi-judicial or judicial channels. Because of their nature as human rights, authorities are under the obligation to provide explanations on the way these rights are being implemented. As holders of such rights, we have the right to monitor their implementation and hold our authorities accountable in this regard.[2]

The recognition of the rights of peasants implies the recognition of a set of specific human rights for those considered as peasants[3] and of obligations for States regarding such individuals and communities.

It has been recognized under international human rights law that States have the obligation to respect, protect and fulfil all human rights. Accordingly, States have the same obligations regarding the rights which are recognized in the Declaration on the Rights of Peasants and other people working in rural areas (hereinafter: The Declaration).[4] The obligations are the following:

In the context of the Declaration, the obligation to respect means that States should not hinder the realization of human rights. This obligation is breached, for example, when States displace peasants, thus depriving them from the resources, which are essential in order for them to lead a life of dignity. It is similarly breached when States pass laws, which enable private actors to abuse the rights of peasants, as for instance mining or environmental laws which enable non-State actors such as private investors to have a preferential access to land or other natural resources thus generating an environment where the enjoyment of the rights of peasants is threatened or infringed. Under this obligation, States should not be accomplices of private actors that abuses the rights of peasants. This

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2 Committee of Economic, Social and Cultural Rights (CESCR), General Comment No. 9 on The domestic application of the Covenant, GC 9, E/C.12/1998/24, para.7, 10; CESCR, General Comment No. 3 on the Nature of States Parties' Obligations, GC 3, E/1991/23, para.5, 6; CESCR, Concluding Observations on Nicaragua, E/C.12/NIC/CO/4, para.34; CESCR, Concluding Observations on Senegal, E/C.12/1/Add.62, para.61; CESCR, Concluding Observations on the combined second and third periodic reports of Armenia, E/C.12/ARM/CO/2-3, para.7; CESCR, Concluding Observations on Jordan, E/C.12/1/Add.46, para.36;

[3] The definition of peasants and other people working in rural areas for the purposes of the Declaration is enshrined in the Article 1 of the draft Declaration under discussion: A/HRC/WG.15/4/2.

[4] CESCR, General Comment No. 7 on the right to adequate housing: forced evictions, GC 7, E/1999/22; GC 12-21; CEDAW, General recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW, GR 28, CEDAW/C/GC/28, para.9, 16, 20; CEDAW, General recommendation no. 30 on women in conflict prevention, conflict and post-conflict situations, GR 30, CEDAW/C/GC/30, para.1, 12, 44; CRC, General Comment No. 5 on general measures of implementation of the CRC, GC 5, CRC/GC/2003/5, para.7, 60-64; art.4, 42, 44, para.6

is the case, for example, when States grant environmental licenses knowing that the accepted activities will contaminate land and water, and therefore affect the right to water or to food and nutrition of the right holders.[5]

The obligation to protect requires States to adopt all the necessary measures to avoid that private actors, such as landowners or transnational and national companies, hinder the realization of the rights included in the Declaration. To comply with this obligation States must[6]:

- Regulate the activities of private actors, by defining for example which type of conduct would be sanctioned if private actors hinder the enjoyment of human rights[7].
- Supervise and monitor private actors: States must for example have mechanisms in place to ensure that the employers of agricultural workers comply with labour standards on salary, hygiene, sanitation etc.[8].
- Investigate when there are allegations of possible abuses. For example, if a peasant claims that a company wants to displace someone from its land to begin mining activities without previously informing her/him on the project and obtaining her/his free, prior and informed consent, the State must investigate in order to verify the veracity of such allegations[9].
- If during the investigation, the allegations against the private actors prove to be true, the State should sanction them, in compliance with national laws and in line with international human rights obligations which the State has committed to. The sanctions can be of economic, criminal or administrative nature[10].

[5]Sources on the obligation to respect the access to land in the UN Human Rights System: A/HRC/7/5/Add.2, para.59(d, f); Report of the Special Rapporteur on the situation of Human Rights in Myanmar, Tomas Ojea Quintana, A/HRC/25/64, para.27, 79; Report of the Independent Expert on minority Issues, Rita Izsak, A/HRC/25/56/Add.1, para.80; CESCR, Concluding Observations on Madagascar, E/C.12/MDG/CO/2, para.12, 33; ; CESCR, Concluding Observations on the third periodic Report of Nepal, E/C.12/NPL/CO/3, para.9, 23: FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Guidelines on the Responsible Governance of Tenure), 2012, para.3.2; FAO, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Guidelines for the Realization of the Right to Food), 2005, para.8.1, 8.10 Sources on the obligation to respect the right to food: Report of the Special Rapporteur on the right to food, RE Jean Ziegler, E/CN.4/2006/44/Add.1, para.22; Report of the Working Group on the UPR, HRC, Mozambique, A/HRC/17/16, para.91.9; Report of the Special Rapporteur on the right to food, RE Jean Ziegler, A/HRC/4/30/Add.2, para.2; Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Art. 14; CEDAW, General Recommendation No. 34 on the rights of rural women, CEDAW/C/GC/34

[6]CESCR, GC 7, E/1999/22; GC 12-21; CEDAW, GR 28, CEDAW/C/GC/28, para.9, 16, 20; CEDAW, GR 30, CEDAW/C/GC/30, para.1, 12, 44; CRC, GC 5, CRC/GC/2003/5, para.7, 60-64; Report of the SR on the human rights to safe drinking water and sanitation, SR De Albuquerque, A/HRC/27/55, part III; Report of the SR on the human right to adequate food, RE De Schutter, A/HRC/13/33/Add.2, para.30; Report of the SR on the human right to adequate food, RE Ziegler, A/57/356, para.22; Sepulveda; Guidelines for the Realization of the Right to food 4.38, FAO Guidelines on the Responsible Governance of Tenure, 3.2, 9.4; CESCR, Statement on the Obligations of States Parties regarding the corporate sector and ESCR, E/C.12/2011/1, para.1, 55

[7] Obligation to regulate: Report of the SR on the HR to adequate Housing, RE Rolnik, A/HRC/25/54/Add.1, para.81(h-m); Report of the SR on the HR to adequate Housing, RE Kothari, A/HRC/7/16/Add.2, para.91; Report of the SR on the human right to adequate food, RE de Schutter, A/HRC/19/59/Add.2, para.60(h);

[8] On the obligation to control and monitor: Concluding Observations of the CERD on Norway, CERD/C/NOR/CO/19-20, para.18; CESCR, Concluding Observations on the initial to third reports of the United Republic of Tanzania, E/C.12/TZA/CO/1-3, para.25; Conventions of the ILO, C148, C155, C170, C184 y C187

[9] On the obligation to investigate: Concluding Observations of the CESCR on Bolivia, E/C.12/BOL/CO/2, para.27; Concluding Observations of the CERD on Paraguay, CERD/C/PRY/CO/1-3, para.15; A/HRC/7/16/Add.2, para.94

[10] On the obligation to sanction: A/HRC/7/16/Add.2, para.94; CRC Concluding Observations on the combined fourth and fifth periodic reports of the Russian Federation, CRC/C/RUS/CO/4-5, para.21; CRC, General Comment No. 16 on State Obligations regarding the impact of the business on children's rights, CRC/C/GC/16, para.30, 31; General recommendation No. 19 of the CEDAW, GR 19; General recommendation No. 24 of the CEDAW, GR 24, A/54/38/Rev.1

- Provide for mechanisms of recourse and remedy, which means that if there are abuses and offenses of rights, peasants must be able to demand and obtain restitution, reparation, rehabilitation, compensation and guarantees of no repetition[11].

Under the obligation to fulfil, States have three additional obligations:

- Facilitate the realization of rights, which means that States must adopt all the legislative, administrative and other type of measures that enable right holders to exercise their rights. Therefore, for example, in order, for peasants to exercise their right to land, the State must incorporate into its national legislation The Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, initiate an agrarian reform or establish strategies in order to ensure that peasants have access to water for their crops, especially during times of drought[12].
- Promote: States must adopt measures to inform right-holders that they hold rights and are able to claim them.[13]
- Provide: When people are not able to access on their own the means that would enable them to guarantee their rights, the State must provide with goods and services in order to enable them to enjoy their rights, as for example food, water and housing. In times of disasters and situations in which the affected, individually or in association with others in their communities, are able to regain their autonomy, States must adopt all measures to ensure that these people can recover the capacity to access the goods and services they require[14] on their own.[15]

2. How should states comply with these obligations?

To comply with these obligations, States should take legislative measures, - such as laws that incorporate peasant's rights in national regulation-, administrative measures, - such as measures that ensure that these laws are implemented-, and judicial measures[16]. Additionally, States can adopt public policies, projects and strategies that would allow them to further the fulfilment of their obligations when these cannot be complied with immediately because, for example, more time and resources are needed. Regarding the rights of peasants and other people working in rural areas, States should for example ensure that they are recognized as legal subjects (art. 2.2 of the Draft Declaration) and that mechanisms are established to enable people and communities who are threatened with violations of their rights or who suffer of such violations to be able to present their claims. Courts should also be established to decide on disputes related to the rights of peasants or to decide on cases of conflicts in rural areas that involve the rights of peasants. In addition, they should ensure that such rights are

[11] CESCR GC 9, E/C.12/1998/24, para.3, 4, 9; CESCR GC 3, E/1991/23, para.5; CESCR, Concluding Observations on the combined second to fourth periodic reports of Egypt, E/C.12/EGY/CO/2-4, para.20; CESCR, Concluding Observations on the second periodic Report of the Islamic Republic of Iran, E/C.12/IRN/CO/2, para.22; CESCR, General Comment No. 7 on the right to adequate housing: forced evictions, GC 7, E/1998/22, para.13; CESCR, General Comment No. 12 on the right to adequate food, GC 12, E/C.12/1999/5, para.32

[12] CESCR, General Comment No. 14 on the right to the highest attainable standard of health, GC 14, E/C.12/2000/4, para.37; E/C.12/MDG/CO/2, para.12; E/C.12/NPL/CO/3, para.24; Concluding Observations of the CEDAW on Ethiopia, CEDAW/C/ETH/CO/6-7, para.37; CESCR GC 3, E/1991/23, para.3, 4, 13; GC 9, E/C.12/1998/24, para.7, 8

[13] CESCR, Concluding Observations on the fourth periodic Report of Belgium, E/C.12/BEL/CO/4; Report of the SR on the right to adequate food, RE De Schutter, A/HRC/22/50/Add.2; A/HRC/25/64, para.40, 79(h)

[14]CDESC, GC No. 19, E/C.12/GC/19, para.51; CDESC, CO, E/C.12/TUR/CO/1, para.26; CDESC, CO, E/C.12/LKA/CO/2-4, para.29, (31); E/C.12/EGY/CO/2-4, para.20; CERD CO, CERD/C/VNM/CO/10-14, para.15.

[15] CDH, Guiding Principles on Extreme Poverty and human rights, A/HRC/21/39, para.76, ACNUDH, 2012

[16] On the measures that States should adopt to comply with their Human Rights Obligations some relevant sources are: International Covenant on Economic, Social and Cultural Rights (ICESCR), 2.1; Para.2, 3, 8, 10; FAO, Guidelines for the Realization of the Right to food, 2005, para.3.2, 7.2, 17; RE De Schutter, A/HRC/13/33/Add.2; Report of the Special Rapporteur on extreme poverty and human rights, RE Sepulveda, A/67/278, para.96; FAO, FAO Guidelines on the Responsible Governance of Tenure, para.4.9;

protected or that constitutional jurisdiction is available for their human rights violations, considering their specific condition of peasants or communities working in rural areas, and taking into account the special relation that they have with land as well as their lifestyles and ways of production.[17]

Since it's a matter of human rights and not of mere gifts or charity gestures, the State must provide mechanisms for monitoring and mechanisms for recourse that allow those who are affected by violations of their peasants' rights, to litigate on such violations and seek redress, compensation, restitution, rehabilitation and guarantees of non-repetition.[18]

3. Where or with respect to whom should States meet these obligations?

States must comply with their human rights obligations, including the obligations arising from the rights of peasants in their within their territories or outside where they exercise jurisdiction. When we refer to cases in which States should comply with their human rights obligations outside their territories but within their jurisdiction, we refer to what is known as Extraterritorial Obligations of States. This is reflected in Article 2.1. of the Draft Declaration, where it is established that States must comply with their obligations to protect, respect and fulfil the rights of peasants and other people working in rural areas with respect to all people within their territory, but also in some cases beyond their borders, yet under their jurisdiction.[19]

According to the Maastricht Principles on Extraterritorial Obligations of States [20] in the Area of Economic, Social and Cultural Rights, principle 9 – Scope of jurisdiction, States have obligations to respect, protect and fulfil economic, social and cultural rights in any of the following circumstances[21]:

a) *Situations in which it exercises authority or effective control, regardless if such control is exercised in accordance with international law*[22].
   Thus, for example a State that occupies the territory of another State must respect, protect and fulfil the rights of peasants in the other State.
b) *Situations in which the acts of omissions of States have foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory*.[23]

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[17] Emanuelli aria Silvia, Rivas Rodrigo Gutiérrez, Manual para Jueces y Juezas sobre la Protección de Campesinos y Campesinas, FIAN, HIC, 2013. This manual refers to national and international legal sources related to judicial protection of the rights of peasants and includes national and regional cases in which the courts have begun to recognize peasants and others working in rural areas as subjects of human rights, applying the law to situations of specific violations suffered by this group of people in their condition as peasants.

[18] CESCR General Comment No.9, E/C.12/1998/28, par.7, 10, 11; CESCR, General Comment No.3 E/1991/23, par.2-4; Report of the Special Rapporteur on the right to food, RE Ziegler, E/CN.4/2006/44/Add.2, par.47; Report of the Special Rapporteur on the right to food, RE Hilal Elver on access to justice and right to food, A/HRC/28/65, part III; CESCR, concluding observations of Togo, E/C.12/TGO/C0/1, par.8.

[19] CESCR General Comment No.23 E/C.12/GC/23 par.70.

[20] The Maastricht Principles on the Extraterritorial Obligations of States (ETO) in the Area of Economic, Social and Cultural Rights are based on Human Rights International standards, referred to in the Commentary to the Maastricht principles; which develops the sources of every principle. The Maastricht Principles focus on ESCR but also apply to CPR. The UN HR system (instruments), including the CESCR, the human rights committee, the CERD, the CEDAW and the CRC referred to ETO. See CRC GC 16, CRC/C/GC/16, para.24-30, 40-46; A/HRC/28/65, part V, para.41-47; CEDAW, Concluding Observations the fourth and fifth periodic reports of Cameroon, CEDAW/C/IND/CO/4-5 para.15; CESCR, E/C.12/BEL/CO/4; CESCR, Concluding Observations on the fourth periodic Report Austria, E/C.12/AUT/CO/4; CESCR, Concluding Observations on the sixth periodic report of Canada, E/C.12/CAN/CO/6 para.16

[21] International Commission of Jurists (ICJ), Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles), 2012, Principle 9,

[22] Maastricht Principles, Principles 3, 4, 9a; Commentary to the Maastricht Principles, Human Rights Quarterly, 2012, De Schutter et al., Principles 4(4); 9(4); 18(3,4), which refers to sources of law and jurisprudence regarding this principle; General Assembly of the United Nations, *Declaration Universal de Rights Human (DUDH)*, 1948, 217 A (III), art. 55, 56

[23] Maastricht Principles, Principles 3, 4, 8a, 9b; General Comment No. 8 of the CESCR on the Relationship between Economic Sanctions and respect for ESCR, CESCR GC 8, E/C.12/1997/8, para.13; General Comment of the CDH on The Nature of the

If a State takes decisions and knows or should have known that such decisions can affect the enjoyment of the rights of peasants in another country, the State must also respect, protect and fulfil the human rights of peasants in that country when taking these decisions.

c) *Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize the rights in accordance with international law*[24].
For example, a State with strong political and economic influence in another State may use this influence to ensure that the State complies with the rights of peasants and should refrain from using such influence to promote activities that violate the rights of peasants. A State in this position is responsible when their influence results in human rights violations outside of its territory.

The Maastricht Principles are based on sources of international human rights law, in force at the time of its adoption. The legal sources of each principles are explained in the Commentary to the Maastricht Principles.[25] Since 2011, the extraterritorial obligations of states (ETOs) were repeatedly mentioned, notably in the Observations of the Human Rights Treaty Bodies, which interpret and apply the Human Rights Conventions.[26.]

Furthermore, the Draft Declaration (art. 2.2) establishes that States should give priority to people with special needs, including elderly people, women, young people, children and people with disabilities. One of the fundamental characteristics of human rights is that they prioritize the most marginalised or disadvantaged. This priority has been considered as being part of the minimum obligations (*minimum core obligations*) by the Committee on Economic, Social and Cultural Rights [27] and the Guidelines of the Right to Food. [28]

4. When should these obligations be met?

The obligations must be met immediately when possible, or progressively when their full compliance requires certain economic or administrative capacity [29] (Art. 2.1 of the Draft Declaration). The obligations of non-discrimination, of respect, of giving priority to the most marginalized groups in society or of taking measures, are obligations that States should fulfil immediately[30].

general legal obligation imposed on states parties to the covenant, HRC GC 31, CCPR/C/21/Rev.1/Add.13, para.2, 10; CEDAW GR 28, CEDAW/C/GC/28, para.12

[24] Maastricht Principles, Principles 3, 4, 9c;

[25] De Schutter Olivier, Eide Absjorn et al., Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Human Rights Quarterly 34, p. 1084-1169, 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf.

[26] European Parliament, Land Grabbing and Human Rights: The involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union, 2016, Annex 4: Legal Resources on Extraterritorial Obligations of the European Union and European Union Member States. The annex contains a list of legal sources including the last development until 2016. Http://www.europarl.europa.eu/thinktank/de/document.html?reference=EXPO_STU(2016)578007

[27] CESCR, General Comment No. 18 on the Article 6 of the ICESCR, GC 18, E/C.12/GC/18, para.26, 31; CESCR, General Comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, GC 17, E/C.12/GC/17, para.21, 34, 39; CESCR, GC 3, E/1991/23, para. 12; CESCR, GC 14, E/C.12/2000/4, para. 37, 43

[28] Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, FAO 2004, Guideline 13.

[29] GC 3, 1990, E/1991/23; GC 14, E/C.12/2000/4;

[30] CESCR, Substantive Issues arising in the implementation of the ICESCR: poverty and the ICESCR, E/C.12/2001/10, para.14-18; CESCR, Substantive Issues arising in the implementation of the ICESCR, E/C.12/1999/4; CESCR, General Comment No. 13 on the right to education, E/C.12/1999/10, GC 13 ; GC 14, E/C.12/2000/4; General Comment No. 15 on the right to water, GC 15, E/C.12/2002/11; GC 17, E/C.12/GC/17, GC No. 18, E/C.12/GC/18; Limburg Principles on the implementation of the ICESCR, Principle no. 25; Concluding Observations of the CESCR on Israel, E/C.12/1/Add.90, para.31; CESCR GC 20 para.7; CESCR GC 3, E/1991/23

Obligations of a progressive nature require time and financial and institutional resources in order to be met, such as for instance the obligation to provide access to land for all peasants and other people working in rural areas. In this case the State must take immediate action in order to be able to initiate, although for all to have access to land some time will be needed, measures should not be extended unjustifiably.[31] When a State has initiated the process towards fulfilling obligations of a progressive nature, the State cannot take a step backwards in this realization, except for very specific cases in which retrogressive measures can be justified.[32] In such cases, the State must prove that the measures are necessary and that the path towards fulfilling obligations of a progressive nature will be resumed as soon as the causes that justify such action disappear.[33]

The Committee on Economic, Social and Cultural Rights has developed criteria that States must comply with in order to justify such retrogressive measures.[34] Similarly, the Committee has recognised that although Article 2.1 refers to the progressive realisation of ESCR there are also dimensions of these rights that are to be enforced immediately: General Comment 3 and 9 establish that certain measures such as legal measures or the obligation of non-discrimination are immediate obligations.[35] From General Comment No. 14 onwards, the Committee includes the so-called 'minimum core obligations', which are to be implemented immediately.[36]

5. What does the obligation of States to obtain free, prior and informed consent of peasants and other people working in rural areas for the development and implementation of new legislation and policies related to the rights of peasants mean?

Investments on land, water, seeds and other resources are currently overrun. In many cases this has been made possible because of certain national laws that create a favourable environment for profit based solely on a mercantilist consideration of resources, without considering the impact they could have on human rights, in particular those of the peoples and communities who directly depend on their relationship with mother earth in order to subsist.

To prevent these situations from happening, the Declaration - inspired on already existing international standards, especially standards for indigenous peoples[37]- requires through its Article 3.3. that States implementing legislation, public policies, international agreements or projects that have an impact on the rights of peasants, obtain free, prior and informed consent[38] (FPIC) from peasants and other peoples working in rural areas that would be affected by such measures.

The principle of Free Prior and Informed Consent (FPIC) was codified in a legally binding instrument for the first time in 1989 in the 169 Convention on Indigenous and Tribal Peoples of the International Labour Organization (ILO)[39]. In its Article 15, it states that "the rights of the peoples concerned to the natural resources (…) shall be safeguarded, including to participate in the use, management and

[31] CESCR, GC 18, E/C.12/GC/18, para.21, 34; CESCR, GC 3, E/1991/23, para.9-13; CESCR, an evaluation of the Obligation to take steps to the "maximum of available resources" under an optional protocol to the covenant, E/C.12/2007/1; FAO, Guidelines on the Realization of the Right to food, Guidelines 7.1-7.4

[32] The right to adequate food. OHCHR, Fact sheet no. 34, III (B) (c); Committee, General Comment 12, para. 9

[33] UN General Assembly, ICESCR, art. 2(1); Report of the OHCHR, E/2015/59, III(c) (23)

[34] CESCR, GC 18, E/C.12/GC/18, para.21, 34; CESCR, GC 17, E/C.12/GC/17, para.27, 42; CESCR, GC 3, E/1991/23, para. 9; GC 13, E/C.12/1999/10, para. 45; GC 14, E/C.12/2000/4, para. 32

[35] CESCR, GC 3, E/1991/23; CESCR GC 9, E/C.12/1998/24

[36] CESCR, General Comment No.14, E/C.12/2000/4.

[37] The different normative sources are included in the document.

[38] FAO, respecting free, prior and Informed consent - Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition, available at http://www.fao.org/3/a-i3496e.pdf, consulted on 5th of August 2015.

[39] List of countries: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Bolivarian Republic of Venezuela

conservation of these resources" [40]. Paragraph 2 of Article 15 states that: "governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands" [41]. In addition, the Convention further stipulates that these people shall "participate in the benefits (…) and receive fair compensation for any damages" and "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their **free and informed consent**".[42] Article 6 of the Convention serves as a general principle and requires consultations to be undertaken in good faith, appropriate to the circumstances and with the objective of achieving consent.[43]

The Convention is complemented with other Human Rights sources, of soft and hard law, which contribute to the teleological and systematic interpretation of the FPIC. This is consistent with the principle of efficiency and *pro persona* of FPIC. Hereafter are the main instruments recognizing FPIC. Among others: the UN Declaration on the Rights of Indigenous Peoples as well as other instruments of soft law and environmental law. Likewise, the jurisprudence of the Human Rights treaty bodies increasingly recognizing FPIC, based on the rights of minorities, cultural rights and self-determination. The relevant sources are the following:

- Article 1 of the ICESCR and ICCPR[44] on the right of peoples to self-determination – as interpreted by the UN treaty bodies in their General Comments (CCPR GC No. 12) and jurisprudence – is the main Human Rights basis for FPIC. Article 2.2 of the ICESCR on non-discrimination, as interpreted in the General Comment No. 20 of the CESCR – is another important premise[45].
- The Human Rights Committee has interpreted Article 27 of the ICCPR as a basis to the FPIC, resulting from the rights of Minorities[46]. In its General Comment No. 23, the Committee highlights the need to take measures to ensure the effective participation of the members of minorities in the decision-making processes affecting them. This has been mentioned previously the Committee's General Comment No. 18 on non-discrimination.
- Article 5 of the Convention for the Elimination of Racial Discrimination (CERD), as interpreted in General Comment No. 23 of the CERD Committee, recognizes FPIC for indigenous peoples regarding their land and territories[47].
- General Comment No. 21 that interprets Article 15 of the ICESCR, refers to the right to take part in cultural life[48], includes the recognition of the right to land, to territories and to resources traditionally used that the State has the obligation to protect, and under paragraph 55 (e), FPIC is mentioned regarding minorities, indigenous peoples and other communities.

In addition to the General Comments and practice of the UN treaty bodies, there are judgements of the regional human rights system that recognize FPIC:

[40] ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 15 al. 1.
[41] Ibid., Article 15 al. 2
[42] Ibid, Article 16 al.2
[43] Ibid., Article 6
[44] Art. 1, ICCPR and ICESCR
[45] CESCR, GC No. 20 on non-discrimination in ESCR
[46] Ibid, para. 3.2; 7.
[47] CERD, General recommendation No. 23 on Indigenous Peoples, Art.4, 5, 1997.
[48] CESCR, General Comment No. 21 on the right of everyone to take part in cultural life, paras.7, 36-37, 55(e), 2009.

- The Inter-American Court of Human Rights recognized FPIC in the case Sawhoyamaxa vs. Paraguay[49] and referred to FPIC in at least two other cases.[5051] Furthermore, the Inter-American system explicitly recognized FPIC in the 2016 American Declaration on the Rights of Indigenous Peoples, in Articles 23 and 28 among others through an interpretation of Article 21 of the American Convention on Human Rights.
- In Africa, the Regional Human Rights Institutions, as other political institutions, recognize FPIC in the processes, including the "exploitation" of natural resources that could potentially affect local communities, indigenous or not. Among others, the African Commission on Human and Peoples' Rights adopted a resolution on the governance of natural resources with human rights based approach, which recognizes FPIC.[5253]
- At the national level, the Constitutional Court of Colombia,[54] as well as the Supreme Court of Canada [55], referred to FPIC.

In the framework of the UNDRIP, a group of expert, taking the ILO Convention No. 169 and other legal sources defining the principle of FPIC as a starting point,[56] proposed a more developed understanding of the different elements comprising the FPIC principle as follows[57]:
Free: implies no coercion or manipulation.
Prior: implies that the consent has been sought sufficiently in advance of any authorization, or commencement of activities.
Informed: implies that all information is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples.
Consent: implies that indigenous peoples have agreed to the activity[58] **with** consultation and participation, in good faith.[5960]

[49] Inter-American Court of Human Rights (IACHR), Indigenous Community Sawhoyamaxa v. Paraguay, para. 140.
[50] The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, Tara Ward, 10 Northwestern Journal of International Human Rights (JIHR) 54 (2011), Section 30, IACHR, *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Judgment of June 27, 2012, Series C, No. 245 (June 27, 2002), http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf
[51] IACHR, *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decision of August 31, 2001, Series C, No. 79, para. 142.
[52] Economic Community of West African States (ECOWAS), Directive C/DIR. 3/05/09 ECOWAS directive on the harmonization of guiding principles and policies in the mining sector, Abuja (May 26-27, 2009), http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf
[53] African Commission on Human and People's' Rights, (ACHPR), 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2012, http://www.achpr.org/sessions/51st/resolutions/224/; African Commission on Human and People's' Rights, 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, para 53-55, 58, (October 2001), :http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf; African Commission on Human and People's' Rights , 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, para 162 and 291 (May 2009), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf
[54] Constitutional Court of the Republic of Colombia, Judgements SU-039/97; T-652/98; T-380/93; T-376/12.
[55] Thsilhqot'in Nation v. British Columbia, 2014, SCC 44, Supreme Court of Canada, para. 76, 153.
[56] the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples was organized by the Permanent Forum on Indigenous Issues of the Economic and Social Council (ECOSOC),
[57] Indigenous peoples and Minorities Section, OHCHR Rule of Law, Equality and Non-Discrimination branch, UN OHCHR: Free, Prior and Informed Consent of Indigenous Peoples, September 2013, available on: http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.
[58] Ibid.
[59] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, E/C.19/2005/3, New-York, 17-19 January 2015
[60] UN Sub-Commission on the Promotion and Protection of Human Rights' Working Group on Indigenous Populations, 22nd session, para. 20

Even though FPIC was a right originally designed for indigenous peoples, the draft Declaration extends it to the peasants and other people working in rural areas. This extension relies upon the current tendency of broadening the scope of FPIC, of prior consultation or in general of the right to participation, applying these to other "tribal", "traditional" or "local" communities. This approach recognizes that communities that can be deeply impacted by a specific project should play an important role in the decision-making. Our analysis leads us to conclude that this approach is consistent with the treaty bodies' jurisprudence[61].

In fact, both Committees (CESCR and HRC) supported the right to effective participation and consultation for affected communities. The Human Rights Committee, in its GC No. 34, states that "under Article 27, the adoption of decisions of one State party that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities"[62].

CESCR also supported, in its document on poverty and economic social and cultural rights, the participation and effective consultation of affected communities. It further states that "the international human rights normative framework includes the right of those affected by key-decisions to participate in the relevant decision-making processes"[63]. Moreover, the CESCR recommended "that the State party carry out a national debate on investment in agriculture and seek, prior to any contract with foreign companies, the free and informed consent of the persons concerned" based on Article 1 (2) ICESCR[64].

At the regional level, the African Commission recognized FPIC in the Resolution 224 on natural resources that calls upon States to "ensure participation, including free, prior and informed consent of communities". In addition, Articles 21 – on natural resources – and 24 – on human rights and environment – of the African Charter on Human and Peoples' Rights recognized the obligation of monitoring and effective participation of affected communities, along with FPIC.[65]

FPIC for local communities has also been recognized in environmental law, among others in the UNCED Rio Declaration on Environment and Development[66], the Convention on Biological Diversity[67], and other related instruments[68]. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security also require the "consultation and participation (…) establish a relation with and look for support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken (…) respond to their contributions; take into account the unbalance of power that exists between the different parties and ensure active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making process".[69] The Guidelines express that "principles of consultation and participation, as set out in paragraph 3B.6 should be applied in the case of **other communities** described in this section. [70]

Furthermore, the Nagoya Protocol to the Convention on Biological Diversity explicitly refers to FPIC for local communities requiring that according to national laws, every party adopts measures, to ensure prior, informed consent or approval and involvement of indigenous and **local communities** for access

[61] *Ángela Poma v. Perú*, CCPR/C/95/D/1457/2006, 24 April 2009, Human Rights Committee, Communication No. 1457/2006, adopted on March 27, 2009, CCPR/C/95/D/1457/2006, paras. 7.2-7.6. See A/HRC/19/59/Add.2, Note 5.
[62] Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, Freedoms of opinion and expression, Article 19, September 12, 2011, para. 18.
[63] CESCR, E/C.12/2001/10, 10 May 2001, para 12.
[64] E/C.12/MDG/CO/2.
[65] See note 46.
[66] UNCED Rio Declaration on Environment and Development, 1992, Principle 22
[67] Convention on Biological diversity, 1982, Article 8 (j)
[68] Program of Work on the implementation of Art.8(j)and related provisions of the CBD, www.cbd.int/traditional/pow.shtml
[69] Voluntary Guidelines on the responsible governance of Tenure of land, fisheries, and forest in the context of national food security, 3B.6
[70] Ibid, 9.9

to traditional knowledge and genetic resources held by them.[71] The same was established in the Bonn Voluntary Guidelines on Access and Benefit Sharing[72] and the Akwe; Kon Voluntary Guidelines[73] in accordance to the UN Human Rights Committee[74].

The most recent human rights source broadening FPIC to non-indigenous communities is the General Recommendation No. 34 on rural women of CEDAW that interprets Article 14 of CEDAW and establishes that "States should: … d) obtain free and informed consent of rural women prior to the approval of any acquisitions or project affecting rural lands or territories and resources …"[75]. This provision doesn't restrict the application of FPIC to indigenous women, but extends it to all rural women.

6. How should relevant international agreements and other standards be interpreted when conflicting with the Declaration on the rights of peasants and other people working in rural areas?

Enshrined in the Art. 2.5 of the draft Declaration is the obligation of States to interpret and apply international agreements and relevant standards in consistence to their human rights obligations. This clause includes areas such as trade, investment, taxation, environment protection, development, cooperation and security[76].

It is necessary to assess that a consistent interpretation of the human rights obligations of States is guaranteed to avoid possible conflicts in the interpretation and implementation of treaties and to enable a harmonized implementation of international law.[77]

7. Why is it important to include an obligation of States to ensure that non-state actors do not nullify or impair the enjoyment of the rights of peasants and other people working in rural areas?

According to art. 2.6 of the draft Declaration, States must take necessary measures to ensure that non-State actors that are in a position to regulate, such as private individuals, organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of the rights of peasants and other people working in rural areas. This norm corresponds to General Comment No.31 of the Human Rights Committee that establishes that States obligations of ensuring the rights of the Covenant will only be entirely fulfilled if the individuals are protected by the State, not only against acts committed by its officials, but also against acts committed by persons or private entities that would impair the enjoyment of the Covenant rights in so far as they are amenable to

[71] Nagoya Protocol to the CBD on Access and benefit-sharing. The CBD/Nagoya Protocol are binding on the 196/62 countries that have ratified the convention.
[72] Bonn Guidelines on Access to Genetic resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, Art.13-16, 24-44, CBD, 2002
[73] Akwé: Kon guidelines, Art.8, 53, CBD, 2004
[74] *Ángela Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, Human Rights Committee Views on Communication No. 1457/2006, adopted on 27 March 2009, paras. 7.2-7.6. See A/HRC/19/59/Add.2, Nota 5.
[75] CEDAW, General recommendation No. 34, CEDAW/C/GC/34, 7 of March 2016.
[76] Inter-American of Human Rights (IACHR), Indigenous Community Sawhoyamaxa v. Paraguay, para. 140
[77] CESCR GC 12, E/C.12/1999/5, par.19, 36; CESCR GC 14, E/C.12/2000/4, para.39; CESCR GC 15, E/C.12/2002/11, para.31, 35-36. Guiding Principles on Human Rights Impact Assessments of trade and Investment Agreements, SR on the Right to Food De Schutter, 2011, A/HRC/19/59/Add.5, par. 1.3; UN Charter, Art.103; *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* U.N. GAOR, International Law Commission, 58th Session, para.41, U.N. Doc. A/CN.4/L.702; *concluding observations on the sixth periodic report of Canada*, CESCR, 57th Sess., U.N. Doc. E/C.12/CAN/CO/6, para. 16; *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, Commission on Human Rights, 52nd Sess., para. 63 U.N. Doc. E/CN.4/Sub.2/2000/13
[77] *General Comment No. 31*, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR, par.8, U.N. Doc. CCPR/C/21/Rev.1/Add. 13; CESCR, GC 14, para.39; CESCR, GC 15, para.31
[77] *General Comment No. 12: The Right to Adequate Food*, CESCR, para.15
[77] E/C.12/2011/1, Par. 5

application between private persons or entities.[78] On the other hand, the Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No.12 on the right to adequate food, recalls that the "obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."[79] Furthermore, in its statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights (46th session) the Committee explained the scope of the obligation to protect regarding non state actors, including its territorial and extraterritorial obligations recalling among others its General Comments 15, 18 and 19[80]. The Committee on the Rights of the Childs in its General Comment No. 16 also recalled the state obligation to prevent non-state actors to nullify or impair the enjoyment of human rights[81]. Finally The Maastricht Principles on Extraterritorial Obligations of States in the area of Social, Economic and Cultural Rights presents a consolidation of principles, based on the existing applicable law on the matter.

8. Why is international cooperation important, especially that which takes into consideration civil society organizations, including peasants' social movements and people working in rural areas?

Article 2.7 of the draft Declaration recognizes the importance of the international cooperation for the realization of the rights of peasants and other peoples working in rural areas and includes some examples on how to conduct this cooperation. The international cooperation in general has been recognized in various international documents of human rights, starting with the UN Charter, Art. 1. 33, 55 and 56. Some other important examples of recognition of the international cooperation are the ICESCR (Art 2.1 and 11) and the General Comments of the CESCR, in particular General Comment 3 on the Nature of States Parties' Obligations[82].

[78] *CCPR GC 31*, CCPR/C/21/Rev.1/Add.13, par.8; CESCR, GC 14, E/C.12/2000/4, para.39; CESCR, GC 15, E/C.12/2002/11, para.31
[79] CESCR, GC 12, E/C.12/1999/5, para.15
[80] E/C.12/2011/1, Par. 5
[81] Maastricht Principles, Principle 24; CESCR, E/C.12/2011/1, para. 5, 15; CRC GC 16, CRC/C/GC/16; CESCR, E/C.12/AUT/CO/4
[82] CESCR, GC 3, E/1991/23, par.9, 10, 12-14; United Nations Charter, Art.55-56; ICESCR, Art.2.1, 11; Maastricht Principles, Principles 30-35; International Convention on the Rights of Persons with Disabilities, Art.32; CESCR, GC 14, E/C.12/2000/4, par.40, 45; GC 15, E/C.12/2002/11, para. 34; E/C.12/2001/10, para.16, 17