



# Forest Peoples Programme

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Office of the High Commissioner for Human Rights  
Working Group on the issue of human rights and transnational corporations and other  
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## **Submission on the Rights and Interests of Indigenous Peoples in the context of private sector development, business and human rights<sup>1</sup>**

FPP welcomes the opportunity to provide relevant background information into the deliberations of the 2<sup>nd</sup> Forum on Business and Human Rights. We are pleased to submit here for consideration information related to the rights of indigenous peoples in the context of private sector development, business and human rights.

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<sup>1</sup> This submission was originally provided as input into the thematic report on indigenous peoples and human rights in March 2013. It is being resubmitted as background documentation for the 2<sup>nd</sup> Forum on Business and Human Rights.

## A. Introduction

1. The United Nations system has treated indigenous peoples and their rights as a special category in its overall treatment of human rights. In addition to declaring two International Decades of the World's Indigenous People, the UN has established specific bodies – the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples – and appointed a Special Rapporteur to address standard setting issues, to give attention to violations of rights, and to ensure that the UN system as a whole devotes adequate attention to indigenous peoples' rights and issues. The current work of the Working Group on business and human rights in establishing a report on indigenous peoples and business and human rights can contribute to this standing body of work.

2. This sustained attention is in part an acknowledgment of the fact that indigenous peoples' rights continue to be violated on a regular basis in all regions of the world. This is especially the case in connection with extractive industries and agro-industry such as palm oil and soy cultivation, which disproportionately affect indigenous peoples.<sup>2</sup> The UN Committee on the Elimination of Racial Discrimination, for instance, explains that one of the reasons it adopted a General Recommendation on indigenous peoples in 1997 is because:

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.<sup>3</sup>

3. The litany of human rights abuses perpetrated by trans-national businesses against indigenous peoples is well documented and need not be repeated here.<sup>4</sup> Suffice it to say that these abuses span the full range of human rights guarantees and often take place with the active assistance or acquiescence of states, which, for a variety of reasons, will usually give precedence to the operations of businesses where conflicts arise with indigenous peoples'

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<sup>2</sup> On palm oil, see, M. Colchester et al, *Promised Land. Palm Oil and Land Acquisition in Indonesia: Implications for Indigenous Peoples and Local Communities*, Forest Peoples Programme, Perkumpulan Sawit Watch, HuMA and the World Agroforestry Centre (2006). Available at: [http://www.forestpeoples.org/documents/prv\\_sector/oil\\_palm/promised\\_land\\_eng.pdf](http://www.forestpeoples.org/documents/prv_sector/oil_palm/promised_land_eng.pdf)

<sup>3</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples*. Adopted at the Committee's 1235<sup>th</sup> meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 3.

<sup>4</sup> See, *inter alia*, D. Fagin, Achieving Restitution: the Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations, 76 *New York Univ. L.R.* 626 (2001); M. McFarland Sanchez-Moreno & T. Higgins, No Recourse: Transnational Corporations and Economic, Social and Cultural Rights in Bolivia, 27 *Fordham Int'l L.J.* 1663 (2004); M. Geer, Foreigners in their Own Land: Cultural Land and Transnational Corporations – Emergent Rights and Wrongs, 38 *Virginia J. Int'l L.* 331 (1998); M. Mullen de Bolivar, A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations under International Human Rights Law and Environmental Law, 8 *J. Transnat'l L. & Pol'y* 105 (1998); Patrick Macklem, Indigenous Rights and Multinational Corporations at International Law, 24 *Hastings Int'l. and Comp. Law Rev.* 475 (2001).

rights.<sup>5</sup> The main point we wish to make here is that dedicated and specific attention to the rights, special circumstances and needs of indigenous peoples is required.

4. That the Working Group is focusing now on the rights of indigenous peoples in the context of business and human rights concerns more generally is timely. The World Bank announced in 2012 a two year process of review and updating of the so-called ‘safeguard’ policies of the Bank, those policies intended to protect against social and environmental harm. The review includes Operational Policy 4.10 which is specifically designed to ensure that “[t]he development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples”.<sup>6</sup> Despite this, extensive evidence suggests that the policy has proved unable to effectively even consider the rights of indigenous peoples in the development process<sup>7</sup> and indigenous peoples’ organisations and others have called for an extensive redesign of this policy, not least to incorporate the UN Declaration on the Rights of Indigenous Peoples and other advances in international human rights law.<sup>8</sup>

5. Guidance from this Working Group to the Bank in this review is particularly relevant because for the first time, the World Bank has explicitly included in the remit of the review consideration of how the World Bank should deal with human rights in the context of safeguard policies.<sup>9</sup> Further, the UN human rights treaty system has highlighted the responsibilities of institutions like the Bank in the most recent General Comment from the Committee on the Rights of the Child which noted: “International organizations should have standards and procedures to assess the risk of harm to children in conjunction with new projects and to take measures to mitigate risks of such harm. These organisations should put in place procedures and mechanisms to identify, address and remedy violations of children’s rights *in accordance with existing international standards* including when they are committed by or result from activities of businesses linked to or funded by them”.<sup>10</sup> The same reasoning applies with regards to all other human rights; the procedures and standards of the World Bank as an international organization must be in line with existing international standards, including the rights of indigenous peoples.

## **B. Voluntary Self-Regulation by Business and Commodity Roundtables has not been effective**

6. Indigenous peoples in Southeast Asia, and more recently in Africa and Latin America, have been and continue to be profoundly affected by activities of the palm oil sector. They

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<sup>5</sup> *Inter alia*, S. Joseph, Taming the Leviathans: Multinational Enterprises and Human Rights, 46 *Netherlands Int’l L.R.* 171 (1999) (explaining some of the reasons governments do not enforce human rights in relation to TNCs).

<sup>6</sup> World Bank, *Operational Policy 4.10 on Indigenous Peoples*, July 2005: para. 1

<sup>7</sup> World Bank OPCS Working Paper, *Implementation of the World Bank’s Indigenous Peoples Policy: A Learning Review (FY 2006-2008)*, August 2011, in particular where it states “it is of particular concern that projects that affect land and water rights and could have had a positive impact on protecting or promoting the application of these rights, did not consider measures to address the land and resource rights which are often the condition *sine qua non* for the long-term wellbeing and sustainability of Indigenous Peoples’ societies and cultures”: para 81

<sup>8</sup> For an extensive list of correspondence with the Bank, please see <http://www.forestpeoples.org/tags/update-and-consolidation-world-bank-safeguard-policies-2010-13>

<sup>9</sup> See [www.worldbank.org/safeguardconsultations](http://www.worldbank.org/safeguardconsultations) for a full description of the review process.

<sup>10</sup> Committee on the Rights of the Child (CRC/C/GC/16), *General Comment on State obligations regarding the impact of the business sector on children’s rights*, General Comment 16, 7 February 2013 (emphasis added)

face particularly significant obstacles when seeking remedies for human rights grievances. Field findings reveal that the expansion of oil palm plantations, similar to other large scale agribusiness expansion, has rarely been accompanied by recognition or respect of the rights of indigenous peoples, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. Instead, it is routinely being carried out without their Free, Prior and Informed Consent (FPIC) and in violation of their right to self-determination and to control the lands, territories and resources they customarily own, occupy or otherwise use.

### **Assessment of Free, Prior and Informed Consent (FPIC) in the palm oil sector**

7. Companies in Indonesia and elsewhere are routinely failing to respect the rights of local communities to the full extent of their lands and to FPIC and this is the root cause of protracted and at times violent conflict between and within communities, with companies and with the State. Even where companies seek to acquire lands fairly, current statutory laws and administrative procedures with respect to land rights, land acquisition, legal personality and representation, sometimes make it hard or even impossible for companies to comply. This results from a gulf between national law on the one hand, and international human rights law on the other. To close this gap, governments must carry out tenurial reforms in favour of securing the rights to land and resources of communities. Widespread and effective compliance with the international human rights norms depends on respect for human rights, good governance, transparency, accountability, rule of law and access to justice. If land allocations are made in ways contrary to these principles, there are bound to be serious problems which even voluntary approaches such as those adopted by the RSPO will be hard pressed to overcome.<sup>11</sup>

8. There are many challenges that face communities stemming from the expansion of the palm oil sector and other export-oriented commodities. FPP has sought to identify these challenges, including by reviewing statutory laws and government policies which promote this expansion and monitoring and advising the RSPO, formed in 2004 in response to the urgent and pressing global call for sustainably produced palm oil. The RSPO has made a sincere but as yet insufficient attempt to adopt and uphold standards which are consistent with international human rights laws and respect the rights of indigenous peoples. As part of a coalition with international and national NGOs and community-based organisations in Africa and Southeast Asia, we help document abuses, promote dialogue with palm oil companies aimed at securing community lands, resolve existing conflicts and prevent further abuse, in line with international laws and agreed norms.

9. Work to improve this situation has proved difficult. In 2012, FPP and its partners embarked on a major programme of work designed to pressure specific companies operating in Indonesia to respect communities' rights to their lands and to FPIC, in line with international law and the requirements of the RSPO Principles and Criteria (P&C). This was achieved by carrying out six field reviews of a select number of RSPO certified or RSPO members' operations in various parts of Indonesia (West Kalimantan, Central Kalimantan, East Kalimantan, West Sumatra), Malaysia (Sabah and Sarawak), Philippines, Thailand, Liberia, Cameroon and Democratic Republic of Congo.

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<sup>11</sup> The case studies on Free, Prior and Informed Consent will be published as an authoritative book in the course of 2013 and some pre-publication drafts are available online (see Annex 1).

10. Through careful field research we documented any irregularities and made these available to relevant parties in order to support redress. Specifically, the project sought to ensure reforms in the way palm oil companies adhere to the principle of Free, Prior and Informed Consent when acquiring new lands for expanding their operations and; promote reforms to secure communities rights to lands and forests and FPIC. The studies also demonstrate the need to strengthen the voluntary standard adopted by the RSPO with regard to securing respect for customary lands, FPIC, transparency, livelihoods, food security, human rights, elimination of corruption and prevention of the misuse of security forces; as well as the grievance and sanctions procedures. The conclusions of this research served to confirm and strengthen the observation that companies and businesses – in particular those involved in agribusiness products – are routinely failing to respect the basic rights of indigenous peoples, including the right to Free, Prior and Informed Consent. This is frequently true even where those companies are members of commodity roundtables with stated commitments to those voluntary standards.

### **The need for consistency with international human rights when promoting rights and livelihoods in commodity roundtables**

11. The RSPO is only one of a number of voluntary standard-setting initiatives which recognise the importance of protecting customary rights in land and other natural resources and the right to Free, Prior and Informed Consent. Operating relatively independently of one another, these commodity roundtables have each developed, through multi-stakeholder processes, their own standards against which member companies are audited and certified. While these processes of text negotiation among stakeholders have encouraged an important degree of shared ‘ownership’ of the standards, a result of their separate evolution is that the various schemes have developed disparate and sometimes even contradictory approaches to the way they address critical issues such as human rights, land tenure, legality and permitting, livelihood security, risk avoidance and dispute resolution.

12. Last year a ‘Technical Workshop to Review Commodity Roundtables Standards on Free, Prior and Informed Consent, Customary Land, Conflict Resolution and High Conservation Values’ brought together the representatives of six commodity roundtable standards: the Roundtable on Sustainable Palm Oil, the Forest Stewardship Council, the Roundtable on Responsible Soy, the Roundtable on Sustainable Biofuels, Bonsucro and the Shrimp Aquaculture Dialogue. The workshop demonstrated the need for greater consistency in the way the commodity roundtables ensure respect for human rights, indigenous peoples and local communities. Consistency with each other can be achieved by a greater consistency with shared international human rights obligations, an area in which this Working Group could provide critical guidance.

### **Engagement with Southeast Asian National Human Rights Commissions and the ASEAN Intra-governmental Commission on Human Rights**

13. While voluntary standard-setting is important, the wider pattern of land conflict can only be resolved by more fundamental reforms of national laws, policy and procedure, which ensure respect for the rights of indigenous peoples and rural communities by the agribusiness sector. Engagement with regional human rights institutions and mechanisms is one such means of building regulatory capacity and standards in Southeast Asia by promoting the application of binding international human rights standards on the agribusiness sector,

thereby moving from a ‘business to business’ voluntary approach (as represented by the RSPO) to one that imposes normative human rights obligations on private sector operators and national governments. To this end, in 2011, a high-level workshop was convened by FPP, Indonesian palm oil watchdog Sawit Watch and the Indonesian National Commission on Human Rights to review the state of agribusiness in Southeast Asia and its impact on the state of human rights protections in the region. The resulting *Bali Declaration on Agribusiness and Human Rights* (available in Annex 1) presents a comprehensive framework of action to explore the sensitive and delicate issues regarding legal reforms of national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries’ human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence. Particular mention is made in the Declaration of the rights of indigenous peoples, women, workers, children and migrant populations.

14. In 2012, this initiative maintained momentum. A follow-up workshop (‘Making the Bali Declaration Effective: The Phnom Penh Workshop on Human Rights and Agribusiness’) was again hosted by the Indonesian National Human Rights Commission and attended by National Human Rights Commissioners from Thailand, Malaysia, the Philippines, Myanmar, Singapore, South Korea and Timor-Leste, the Indonesian representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the UN Special Rapporteurs on the Right to Food and on the Rights of Indigenous Peoples. The capacity of National Human Rights Institutions and of the AICHR to push for wider recognition of the Bali Declaration and better recognition of indigenous peoples’ rights in national laws were examined, as well as the need for the UN Special Rapporteurs to undertake a thorough analysis of the land grabbing phenomenon and its impacts in Southeast Asia.

### **The ‘Respect, Protect, Remedy’ Framework must provide greater protection for indigenous peoples’ rights**

16. In June 2008 UN Special Representative John Ruggie proposed a framework on business and human rights to the UN Human Rights Council which rested on three pillars: (1) the state duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) greater access by victims to effective remedy, both judicial and non-judicial. This framework, adopted by the UN Human Rights Council in 2008, is referred to as the ‘Protect, Respect, Remedy’ Framework. In March 2011, the Special Representative issued the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’, intended to promote and help states and businesses implement the framework.

17. While the UN Framework represents a significant step forwards in ensuring that human rights are recognised, respected and protected by governments and the private sector, it is our view that the Framework encourages voluntary self-regulation by the private sector instead of binding regulations obliging them to conform to human rights norms. The Framework also fails to give due prominence to the full range of international human rights laws which companies have a responsibility to respect and indeed undermines these by referring to observance by companies ‘*at a minimum*’ of the UN declaration, the two UN covenants and the core ILO conventions.

18. The UN Framework also gives insufficient guidance for business in the circumstances where strict compliance by trans-national corporations with national law in the country of operation may risk violating their responsibilities under international human rights law and/or their commitments to voluntary standards such as those set out by the various commodity roundtables. This includes a lack of proper advice on whether national law can be interpreted as a minimum obligation which does not prevent the business from exceeding that minimum obligation. For example, palm oil companies in Liberia have used the existence of official Government compensation rates to justify the inequitable compensation given to communities, without questioning whether these can be treated as a minimum rate that can be exceeded in rates negotiated with communities, and/or without properly engaging with the Government on how to meet requirements under both national and international law and voluntary commitments.<sup>12</sup>

19. This is particularly problematic for indigenous communities, for whom customary land ownership is the principal form by which land and natural resources are held, managed and controlled. While customary tenure is the reality for billions of people worldwide, many national law systems do not respect this. For trans-national businesses with interest in large areas of land and natural resources (such those in extractive industry and large-scale agriculture sectors), this is a key dynamic for which the UN Framework provides little assistance.

20. Furthermore, the Framework fails to adhere to existing international human rights standards in its lack of emphasis to the collective rights of indigenous peoples, as enshrined in international law (inter alia, the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organization Convention No. 169 and International Labour Organization Convention No. 107, African Charter on Human and Peoples' Rights) and by regional human rights mechanisms such as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. The Inter-American Court on Human Rights and the African Commission on Human and Peoples' Rights have also upheld the collective rights of indigenous peoples in their jurisprudence.

21. It is widely recognized that the unique relationships that exist between indigenous peoples and their lands and resources are central to the continued cultural, social and economic health – and indeed existence - of the peoples themselves. As the UN Special Rapporteur on the Rights of Indigenous Peoples has noted, this profound relationship has “social, cultural, spiritual, economic and political dimensions and responsibilities”, the “collective dimension of this relationship is significant” and the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability”.<sup>13</sup> Given this, it is widely recognized in international law, including in the Urgent Action/Early Warning Procedure of the Committee on the Elimination of Racial Discrimination, that specific and careful protections must be in place to protect this relationship.

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<sup>12</sup> See Siakor, S.K. *Uncertain Futures: The impacts of Sime Darby on Communities in Liberia*, WRM/SDI (2012), at pages 30 & 31.

<sup>13</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57*. UN Doc. E/CN.4/2002/97.

22. However the UN Framework and Guiding Principles underplay the importance of necessary legal implications of indigenous peoples' special and collective relationship to land. This includes the need for meaningful participation of rights-holders, in particular through processes that observe the right to FPIC in any decision-making processes that affect indigenous peoples, including in the design and execution of due diligence and grievance procedures that concern those collectivities. Related to this is the failure to give guidance on how business should engage with indigenous peoples in consultation or consent processes taking place e.g. under due diligence processes for example, the importance of communicating with communities through self-chosen representative structures in a culturally appropriate manner.

23. For indigenous peoples, secure, effective and collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural communities.<sup>14</sup> These rights are almost always collective in nature and often involve rights and duties held of and owed to previous and future generations. Recognition by the UN Framework of the collective nature of indigenous peoples' rights to land, territories and natural resources, in line with international law, is essential to ensuring that the protection, fulfilment and remedy of these rights are better enforced.

### **C. Recommendations**

24. We respectfully submit the following recommendations for the consideration of the Working Group in its work to compile information on the issue of indigenous peoples and human rights and business:

1. Recommend that the Protect, Respect, Remedy' Framework be revisited in consultation with indigenous peoples to ensure, *inter alia*, that collective rights are effectively recognized and protected
2. Ensure specific attention is paid to collective rights, including the right to lands and resources, in the development of any further guidance or frameworks related to human rights and business by this Working Group and the UN Forum on Human Rights and Business
3. Provide analysis regarding the right to Free, Prior and Informed Consent in the context of business activities, including specific attention to agribusiness and other forms of enterprise where the use or loss of lands and resources is a risk
4. Engage with Southeast Asian National Human Rights Institutions and the ASEAN Intra-governmental Commission on Human Rights to explore the role they can plan in pushing for better regulatory capacity and respect for human rights in the agribusiness sector

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<sup>14</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57.* UN Doc. E/CN.4/2002/97, at para. 39-40.



5. Recommend national legal reforms to bring countries into conformity with their international human rights obligations, including the state duty to protect against human rights abuses in their territories and/or jurisdictions by third parties
6. Note the efforts made by voluntary approaches to adopt a rights-based approach to business, but also their concomitant shortcomings and deficiencies, and the consequent need for revision of national laws to ensure effective protection of human rights in accordance with international human rights standards
7. Address the specific role of international organisations such as the World Bank in upholding, implementing and promoting the UN Guiding Principles, including through expert advice to the World Bank in the context of the review of the Bank's approach to addressing human rights concerns, particularly the rights of indigenous peoples, when safeguarding social and environmental harms from Bank-financed activities

## **Annex 1: Bali Declaration**

### **Bali Declaration on Human Rights and Agribusiness in Southeast Asia**

The international meeting of South East Asian Human Rights Institutions on '*Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform*' hosted by the Indonesian National Human Rights Commission (KOMNASHAM) was held in Bali, Indonesia, from 28th November to 1st December 2011. It was attended by 58 participants from the national human rights institutions of the Southeast Asian region, notable academics, representatives of indigenous peoples, as well as members of supportive national and international NGOs. The meeting focused on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of a rapid expansion of agribusiness, notably the palm oil sector, while recognising the right to development and the need to improve the welfare and situation of indigenous peoples and rural communities.

The participants expressed their thanks to the Indonesian Commission on Human Rights (KOMNASHAM), as represented by Ifdhal Kasim and Nur Kholis, Chairman and Vice-Chairman of the Commission respectively, for inspiring and hosting this meeting; and also convey their warm appreciation to SawitWatch, the Forest Peoples Programme, the Centre for Peoples and Forests, the Samdhana Institute and the Rights and Resources Initiative for co-organising and supporting this meeting. They welcomed the Statements of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, and the Member of the UN Permanent Forum on Indigenous Issues, Raja Devasish Roy.

The International Conference adopted the following Declaration to be known as the:

#### **Bali Declaration on Human Rights and Agribusiness in Southeast Asia**

*Recalling* the inherent dignity, equal and inalienable rights of all human beings, the need for universal and effective recognition of human rights and fundamental freedoms, and the promotion of social progress and better standards of life in larger freedoms, as expressed in the Universal Declaration of Human Rights;

*Recalling* the universality, indivisibility, interdependence and interrelatedness of all human rights;

*Emphasising* the importance of respecting the collective rights of peoples and the development aspirations of people in developing countries, as set out in *inter alia* the UN Declaration on the Rights of Indigenous Peoples and the UN Declaration on the Right to Development;

*Taking account* of the Edinburgh Declaration which encouraged the International Coordinating Committee (ICC) of National Human Rights Institutions (NHRI) and individual

National Human Rights Institutions to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuses, greater accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches;

*Welcoming* the UN Human Rights Council's continuing engagement with the business and human rights agenda, particularly through the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, which follows the work of the UN Secretary General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises; the greater understanding and clarity about the appropriate roles and responsibilities of States and business with regard to human rights and the right of victims to access remedy emanating from the "Protect, Respect, Remedy" Framework;

*Recognising* that the right to food implies that States take measures to ensure the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within their own cultures and that access to such food must be achieved in ways that are sustainable and do not interfere with the enjoyment of other human rights;<sup>15</sup>

*Emphasising* the findings of the UN Special Rapporteur on the Right to Food which highlight the threat to the right to food from large-scale land investments and show that because of inequitable access to land and capital, smallholders and agricultural labourers make up a combined 70% of those who are unable to feed themselves today and recommend that States and the private sector adopt enforceable laws, policies and procedures that respect the rights of indigenous peoples and rural communities to their lands and livelihoods and protect the rights and interests of smallholders, workers and women;<sup>16</sup>

*Taking into consideration* the recommendations of the UN Permanent Forum on Indigenous Issues, which note the need for corporations to adopt special measures to ensure that their operations respect the collective rights of indigenous peoples, especially where national legal frameworks are deficient;<sup>17</sup>

*Recalling* the report of the UN Expert Mechanism on the Rights of Indigenous Peoples on 'indigenous peoples and the right to participate in decision-making' which stresses the importance of State parties ensuring that corporations respect the rights of indigenous peoples to give or withhold their free, prior and informed consent to operations that may affect their rights;<sup>18</sup>

*Noting with grave concern* the numerous reports from the UN, the World Bank, the International Finance Corporation (IFC), National Human Rights Institutions (NHRIs), the media and civil society organisations which show that accelerated investment and poor governance is leading to the ill-regulated expansion of agribusiness in the region, especially oil palm, which is: causing serious violations of human rights; prompting the massive takeover of indigenous peoples' and rural communities' lands without consultation or consent; provoking serious long term land conflicts and outbreaks of violence; leading to

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<sup>15</sup> E/C.12/1999/5, 12<sup>th</sup> May 1999

<sup>16</sup> A/HRC/13/33, 22<sup>nd</sup> December 2009

<sup>17</sup> E/C.19/2007/CRP.6, 7<sup>th</sup> May 2007

<sup>18</sup> A/HRC/18/42, 17<sup>th</sup> August 2011

exploitative relations and other abuses of the rights of smallholders, migrants, workers, women, children, the elderly and detainees; the impoverishment of previously self-provisioning communities and peoples; and; leading to the destruction of forests and peatlands and high emissions of greenhouse gases.

*Recognising* the efforts of financial institutions, development agencies, investors and sectoral bodies to develop voluntary standards consistent with international norms to improve corporate performance, including the Food and Agriculture Organisation (FAO) ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests’; the FAO, the International Fund for Agricultural Development (IFAD), the World Bank and the United Nations Conference on Trade and Development (UNCTAD) ‘Principles for Responsible Agricultural Investment that Respects Rights Livelihoods and Resources’; the ‘Farmland Principles’ of major global investors and; the Principles and Criteria of the Roundtable of Sustainable Palm Oil (RSPO);

*Considering*, however, that such measures must be complemented by actions by States to comply fully with their human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of the means of subsistence;

*Considering* that, while in the Americas there is a full functioning human rights system, including the Inter-American Commission and Court of Human Rights and that in Africa the African Union, African Development Bank and the Economic Commission for Africa have adopted a ‘Framework and Guidelines on Land Policy in Africa- a framework to strengthen land rights, enhance productivity and secure livelihoods’ consistent with the African Union’s ‘African Charter on Human and Peoples’ Rights’, in (Southeast) Asia there is lack of a dedicated regional human rights system or regional norms on land development;

*Acknowledging* that the majority of States in Southeast Asia have ratified the core human rights treaties and / or have constitutional and other national legal provisions, which recognise that custom is a source of rights, and these plural legal regimes need to be strengthened to give greater protection of rights;

*Concerned* by the lack of respect of peoples’ rights by corporations, the fact that in many countries indigenous peoples’ rights remain weakly recognised or unprotected and that government capacity to defend these peoples’ rights is lacking;

*Concludes* therefore that there is an urgent need for States in Southeast Asia to protect, respect and secure the rights of indigenous peoples and rural communities whose rights are being violated by agribusiness investment and the operations of palm oil corporations.

**The Conference therefore resolves:**

To work with governments, legislatures and corporations in Southeast Asia to ensure that they take urgent steps to reform or reinforce national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so that they comply fully with their countries’ human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence.

We therefore recommend the following.

*Right to food:*

States need to accept that the right to food may be violated when people are denied access to land, fishing or hunting grounds, or are deprived of access to adequate and culturally acceptable food or by the contamination of food and water sources.

States therefore need to take measures to protect people's rights in land and allow land owners to decide on the use of their lands taking into account their own livelihoods and environments.

Recognising that peoples have diverse cultures and may relate to land in very different ways, States therefore have an obligation to respect collective property rights over lands, territories and resources, the right to culture and the right to self-determination (including the right to pursue their own economic, cultural and social development).

States likewise have an obligation to protect certain activities that are essential to obtaining food (e.g. agriculture, hunting, gathering, fishing) and an obligation to provide or ensure a minimum level of essential food that is culturally appropriate.

*Land rights:*

In reviewing their land tenure regimes, national governments and legislatures need to review and revise or reinforce their national policies and laws on agricultural development and land acquisition to ensure that they respect the rights of indigenous peoples and rural communities and do not facilitate the denial of people's rights to food, to land and to free, prior and informed consent.

In revising their tenure systems, State should recognise that, while security of tenure is indeed crucial, individual titling, poverty eradication and the creation of a market for land may not be the most appropriate means to achieve it.

Instead, States should, where relevant strengthen, customary land tenure systems and review or reinforce tenancy laws to improve the protection of land users.

Drawing on the lessons learned from decades of agrarian reform, States must pay renewed attention to policies and procedures of land redistribution to ensure that they respect peoples' rights to food, livelihood, cultural identity and self-determination. These reforms must be accompanied by measures to support smallholder farmers, indigenous people, and women to promote food security.

Land development schemes/programmes/mechanisms/projects must be designed in ways that do not lead to evictions, disruptive shifts in land rights and increased land concentration in the hands of corporations.<sup>19</sup>

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<sup>19</sup> Report of the Special Rapporteur on the Right to Food to the UN General Assembly A/65/281, 11<sup>th</sup> August 2010.

While many land development programmes and policies focus on areas considered to be ‘empty’, ‘marginal’ or ‘degraded’, States should recognize that there are few areas truly unoccupied or unclaimed, and that frequently land classified as such is in fact subject to long-standing rights of use, access and management based on custom. Failure to recognize such rights will deprive local communities and indigenous peoples of key resources on which their wealth and livelihoods depend.

*Free, Prior and Informed Consent:*

States must ensure respect for the right, of those with customary rights to lands and other resources, to give or withhold their free, prior and informed consent to operations planned on their lands. Such consent should be conveyed through their own freely chosen representative institutions. Any written agreements should be credible, transparent, fully implemented and agreed to by all parties involved.

Where rural communities have individualised rights in land through statutory law, land administration schemes, agrarian reforms and court decisions, all transactions in land should be regulated by impartial State agencies to ensure adherence to the ‘willing buyer/ willing seller’ principle.

States must exercise a Human Rights-based Approach (HRBA) to agribusiness expansion, limit the exercise of their power of eminent domain, and only forcibly acquire lands where: there is compelling justification in the national interest;<sup>20</sup> the gains expected are proportional to the losses; where sanctioned by previously existing law; where the development option is the least restrictive of human rights and; where such measures do not endanger peoples’ very survival.<sup>21</sup>

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.

*Right to personal integrity and security:*

States must ensure that there is rule of law, humane treatment and a peaceful environment in agribusiness development areas, and must secure people against violence and arbitrary arrest

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<sup>20</sup> With reference to the plans of the Indonesian Government to establish a 1.8 m ha. palm oil plantation in the centre of Borneo, the UN Committee on the Elimination of Racial Discrimination recommended that: *State party should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee’s general recommendation No. 23 (1997) on indigenous peoples* (UN Doc. CERD/C/IDN/CO/3 15th August 2007).

<sup>21</sup> According to human rights law, the term ‘survival’ must be understood as the ability of indigenous peoples “to preserve, protect and guarantee the special relationship that they have with their territory, so that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. That is, the term survival in this context signifies much more than physical survival.” See, inter alia, United Nations Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009; Inter-American Court of Human Rights, *Saramaka People v. Suriname. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of 12 August 2008. Series C No. 185; African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (February 2010).

and prohibit the use by agribusiness ventures of mercenaries, privately contracted police and para-militaries.

*Smallholders and community options:*

States must also balance policies and laws which allow corporate investment in land development, with laws and policies which promote indigenous peoples' customary management systems, community-based initiatives and smallholders' participation.

To achieve this balance, States must take measures to ensure that smallholders: capture a fair proportion of the value of their products; are able to represent themselves through their own freely chosen representatives or organisations; are able to organise freely as cooperatives or other farmers' organisations to improve their access to capital, technical assistance and markets and;

are able to choose the terms on which they agree or not to sell their produce to larger enterprises. Effective measures are also needed to identify and prohibit unfair practices and to reinforce the bargaining power of smallholders in order to equalize their relationships with the agribusiness sector. This can be achieved by prohibiting practices that constitute an undue exercise of buyer power and by combating excessive concentration in the food chain and abuses of dominant positions (including through competition regimes sensitive to excessive buyer power and competition authorities with effective complaints mechanisms).

Effective measures are also needed to avoid conditions conducive to debt slavery and other contemporary forms of slavery. Therefore, where companies provide credit, technical assistance and/ or markets for smallholders and workers, whether through contracts or informal arrangements, it is essential that there is full transparency and an absence of coercion in all transactions affecting smallholders and workers.

*Workers:*

States must improve the protection of local and indigenous agricultural workers by ratifying and fully complying with all ILO conventions and the ASEAN Declaration on the Promotion and Protection of the Rights of Migrant Workers relevant to the agrifood sector, and seeing these are implemented through national laws and regulations, and by ensuring that legislation sets a minimum wage.

*Women:*

In accordance with the principles of the Committee on the Elimination of Discrimination against Women (CEDAW), given that women are often disadvantaged in agricultural development schemes, States must take measures to combat discrimination and provide equal opportunities to women and strengthen women's access to, and control over, land while respecting family and other social networks, and cultural diversity and increase their participation in decision-making processes.

*Children:*

In accordance with the UN Convention on the Rights of the Child, States should adopt measures to ensure that children are; raised in a context of non-discrimination; have their best

interests secured; afforded protection and opportunities for development, and; participate in all matters which affect them so that their views are taken into account, in accordance with the General Recommendation of the Committee on the Rights of the Child on indigenous children. States must take urgent action to recognise the rights of, and provide identity and support for, Stateless children born out of wedlock in plantations due to unjust laws which prevent plantations workers to marry.

#### *Dispute Resolution:*

Considering that protracted land disputes between expanding agricultural development projects and rural communities and indigenous peoples are prevalent throughout the region, there is an urgent need for strengthened dispute resolution mechanisms in line with international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples.<sup>22</sup> As recommended by the UN Permanent Forum on Indigenous Issues, these should be tripartite processes which include indigenous peoples or rural communities, represented through their own freely chosen representative institutions and/or mediators and alternative dispute resolution mechanisms, the companies with which they are in dispute and government agencies with responsibility to regulate land issues.

#### *Access to Justice:*

Affected people also need access to justice and States must ensure the integrity and proper functioning of law enforcement agencies, courts and the independence of the judiciary. Due provision needs to be made for indigenous peoples to exercise their customary law, but also have access to effective conflict resolution mechanisms, including local and national courts where needed. States must ensure transparency and access to information, freedom of expression and freedom of assembly.

#### *Impact Assessments:*

States must also ensure that companies and investors carry out through public participation, publish and share with implicated parties participatory social and environmental impact assessments taking into account the Akwe:Kon Guidelines of the Convention on Biological Diversity;<sup>23</sup>

States must also strengthen their regulatory and monitoring mechanisms for land investments in agri-business through requiring human rights impact assessments. National Human Rights Institutions should develop robust systems both for assessing licences for agribusiness against human rights standards and for exacting sanctions.

#### *Right to Development and Human Rights:*

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<sup>22</sup> It is a norm of international law that violations of human rights give rise to a right of reparation for victims, which may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Theo Van Boven, 1993, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report 1993 in UN doc. E/CN.4/Sub.2/1993/8.

<sup>23</sup> The Akwe: Kon Guidelines may be found at <http://www.biodiv.org/doc/publications/akwe-brochureen.pdf>



States must ensure that in taking steps to secure people's right to development,<sup>24</sup> they recognize that, in conformity with the 1993 Vienna World Conference on Human Rights, while development facilitates the enjoyment of all human rights, the 'lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.<sup>25</sup>

*Ratification of Human Rights Instruments:*

States must ratify all relevant international human rights treaties and relevant optional protocols, and take steps to harmonise them with domestic laws.

Adopted by acclamation in Bali, 1<sup>st</sup> December 2011

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<sup>24</sup> *UN Declaration on the Right to Development*. UN Doc. A/RES/41/128 4th December 1986

<sup>25</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993.

## **Annex 2: Forest Peoples Programme Oil Palm and Human Rights Publications, Correspondence and News 2005-2012**

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