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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya

Addendum

Communications sent to and received from Governments[*]

[*] The present report is circulated as received, in the languages of submission only.

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I. Introduction

1. The Special Rapporteur on the rights of indigenous peoples, James Anaya, submits to the Human Rights Council the present report on specific cases he has examined concerning alleged violations of the human rights of indigenous peoples in many parts of the world.

2. This report is complemented by, and should be considered along with, the joint communications report that is being submitted for the first time for all special procedures mandate holders (A/HRC/18/51). It has been determined that a joint communications report strengthens transparency and efficiency, and that it reduces documentation and related costs. Short summaries of allegations communicated to the respective State or other entity are included in the joint communications report. The complete texts of the communications sent and replies received are accessible electronically through hyperlinks in that report.

3. The communications sent by the Special Rapporteur on the rights of indigenous peoples on cases of alleged human rights violation between 1 December 2010 and 31 May 2011, as well as replies received from Governments between 1 February 2011 and 31 July 2011, are included in the joint communications report. As a transitional measure, the joint communications report also includes communications sent and replies received by the Special Rapporteur since he submitted his last communications report to the fifteenth session of the Council in September 2010 (in effect, the period covering 1 August 2010 to 1 February 2011). This is to ensure full coverage given that the last reporting period of the Special Rapporteur ended in July 2010.

4. For ease of reference, the present report contains a tabulation of the cases examined by the Special Rapporteur on the rights of indigenous peoples that are included in the joint communications report. The present report also contains, in annexes, the observations the Special Rapporteur has made, as well as descriptions of other follow-up measures he has taken, in a number of these cases.

II. The communications procedure

5. Since assuming his mandate in May 2008, the Special Rapporteur has placed particular focus on the Human Rights Council's directive "To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples" (H.R.C. Res. 15/14, para. 1(b)) and to "formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of [their] human rights" (para. 1(c)).

6. In accordance with his mandate, the Special Rapporteur has sent numerous communications to Governments transmitting information received by him of cases of alleged violations of human rights of indigenous peoples or individuals, and has solicited and in many cases received responses from the Governments. In some cases he has made detailed observations with specific recommendations or otherwise followed up to initial communications, all in a spirit of constructive dialogue and cooperation to address problem situations and their underlying causes.

7. In communicating with Governments on specific cases, the Special Rapporteur is for the most part responding to information submitted to him by indigenous peoples and their organizations, non-governmental organizations and other sources. Given the limited resources available, it is impossible for the Special Rapporteur to respond to every case that

comes to his attention. However, in general, he does his best to act on detailed and credible information that presents a serious situation falling within his mandate and in which intervention has a reasonable chance of having a positive impact, either by drawing needed attention to the situation or by prompting government authorities or other actors into corrective action. Alternatively, the Special Rapporteur may take action where the situation is representative of, or connected to, a broader pattern of human rights violations against indigenous peoples. The Special Rapporteur has been careful to respond to allegations of human rights violations from a wide range of regions and countries, as reflected in the table of communications sent and replies received below.

8. The cases brought to the Special Rapporteur's attention make known that many ongoing barriers to the full enjoyment of the rights of indigenous peoples persist throughout the world. Especially common are cases involving threats to the traditional lands and resources of indigenous peoples, including the forced removal of indigenous groups from their lands. A related concern is the lack of participation of indigenous peoples in decisions concerning the use of their traditional lands and resources, including for natural resource extraction projects. Also common are threats to the physical wellbeing of indigenous individuals, which in extreme cases have resulted in violent conflicts. Other cases involve alleged threats to indigenous peoples' sacred sites and issues related to reforms in laws and policies related to indigenous peoples at the national level.

9. The usual first step in taking action on a case is for the Special Rapporteur to write an allegation letter (AL) or, in cases requiring immediate attention, an urgent appeal (UA) to the Government concerned, along with a request that the Government respond. The cooperation of the Government is essential to the effectiveness of the procedure. The Special Rapporteur is thankful that many of the Governments to which he directed communications during the period under review provided responses. The Special Rapporteur often takes steps to follow up to initial letters of allegation or urgent appeals, as described in Part IV.

III. Communications sent and replies received

10. Below are references to the letters sent by the Special Rapporteur on the rights of indigenous peoples and replies received from the Governments concerned, along with short summaries of the allegations communicated, arranged in chronological order by the date of the letters sent by the Special Rapporteur. Included are communications sent and replies received since the last communications report of the Special Report (A/HRC/15/37/Add.1). Some of the replies by Governments refer to communications sent before the present reporting period. The complete texts of the communications sent and government replies can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the website of the Human Rights Council. The tabulation below is taken substantially from the composite tabulation of communications of special procedures mandate holders that is included in the joint communications report; it is included here for ease of reference.

Date Type	Case No. Country	Mandate(s)	Summary of allegations received	Reply
07/09/07 JUA	MEX 25/2007 México	Human rights defenders; Indigenous peoples; Torture; Violence against women	**Supuestas agresiones por parte de personas presuntamente al servicio del Ejército**. Según las informaciones recibidas, el 30 de junio de 2007, el Sr. Fortunato Prisciliano, miembro del pueblo indígena tlapaneca, habría sido víctima de golpes e intimidaciones por parte de personas presuntamente al servicio del Ejército. Dichas agresiones ocurrieron después de que el Sr. Fortunato se presentara en audiencia ante la Comisión Interamericana de Derechos Humanos (CIDH) para denunciar la violación sexual de su esposa por parte de tres miembros del ejército en marzo del 2002.	17/09/10
19/08/08 JUA	GTM 15/2008 Guatemala	Human rights defenders; Independence of judges and lawyers; Indigenous peoples	**Supuestas amenazas contra defensor de derechos humanos.** Según las informaciones recibidas, el 2 de agosto de 2008, el Sr. Amilcar Pop, abogado y presidente de la Asociación de Abogados y Notarios Mayas de Guatemala (AANMG), organización que proporciona asistencia legal a comunidades indígenas, habría sido perseguido y amenazado con un arma de fuego. Según se informa, a lo largo de los años 2007 y 2008, los integrantes de AANMG habrían recibido varias amenazas de muerte, tanto por teléfono, como por correo, para que dejaran de proporcionar asistencia legal a las comunidades de San Juan Sacatepéquez. Mediante una carta fechada el 20 de marzo de 2009, el Gobierno remitió un informe con su respuesta a la carta de alegación, ver A/HRC/12/34/Add.1, para 129.	20/03/09 06/09/10
26/01/09 AL	CAN 1/2009 Canada	Indigenous Peoples	**The alleged situation of the planned construction of TransCanada North Central Corridor pipeline through lands of Lubicon Lake Nation**. According to the information received, the TransCanada Corporation has obtained permission from the Alberta Utilities Commission to build the pipeline, in the absence of the Lubicon Lake Nation's consent or recognition of the Nation's asserted rights of the area. This has also been carried out in the absence of adequate consideration to the Lubicon's concerns over the health, safety and environmental impacts of the project. In addition, the Special Rapporteur expressed concern over allegations about the broader issues of the land rights and social and economic conditions of the Lubicon people. See the Special Rapporteur's observations on this situation, A/HRC/15/37/Add.1, paras. 104-135.	03/06/09 24/09/10
07/09/09 AL	KHM 10/2009 Cambodia	Indigenous peoples	**Alleged development activities in and around the Prey Lang Forest.** According to the information received, the Prey Lang forest, spanning Preah Vihear, Kompong Thom, Kratie, and Stung Treng provinces in northern Cambodia, is inhabited by nearly 350,000 indigenous people, primarily of Kuy descent. Road construction and other development projects have reportedly been taking place without complying with domestic norms that might safeguard the rights of indigenous peoples, and the indigenous communities stand to lose access to the forest resources upon which their livelihoods depend. In a letter of 30 March 2010, the Government of Cambodia responded to the communication, see A/HRC/15/37/Add.1, para. 75.	30/03/10 16/09/10

Date Type	Case No. Country	Mandate(s)	Summary of allegations received	Reply
24/09/09 JUA	IND 14/2009 India	Freedom of expression; Human rights defenders; Indigenous peoples; Torture	**Alleged arrest and torture of human rights defenders.** According to the information received, on 14 September 2009, Mr. Jiten Yumnam, member of the Coordinating Committee of the Asia Pacific Indigenous Youth Network and Joint-Secretary of Citizens' Concerns on Dam and Development, was arrested at Imphal Airport in Manipur, while on his way to a regional meeting on climate change in Bangkok, Thailand. On the same day, eight other individuals were arrested. On 15 September, all eight were brought before the Additional Chief Judicial Magistrate in Lamphel and subsequently remanded in police custody until 29 September. They had reportedly been charged with 'attempting to wage war' and 'conspiring to commit offences against the State.	06/12/10
22/12/09 AL	GTM 16/2009 Guatemala	Indigenous Peoples	**La situación de los derechos humanos de las comunidades afectadas por la mina Marlin, en las municipalidades de San Miguel Ixtahuacán y Sipacapa, Departamento de San Marcos (Guatemala).** Según la información recibida, el Gobierno habría otorgado una concesión a la empresa canadiense Montana Exploradora, S.A. (subsidiaria de la transnacional canadiense Goldcorp) para extraer y explotar oro y plata. El proyecto, llamada el proyecto mina Marlin, ocupa las municipales de San Miguel Ixtahuacán y Sipakapa, ocupados por pueblos mam y sipacapense. El Gobierno no habría consultado con la población antes de otorgar la concesión. Se alega que las actividades mineras en la zona han creado conflictos dentro de las comunidades afectadas, y que han resultado en efectos negativos sobre el medioambiente. Con la cooperación del Gobierno de Guatemala, el Relator Especial realizó una visita oficial al país para investigar estas alegaciones en junio de 2010. Véase el informe del Relator Especial sobre este caso, A/HRC/18/35.Add.3, y Anexo V, abajo.	16/02/11 02/05/11 06/06/11
13/08/10 UA	CHL 1/2010 Chile	Indigenous peoples	**Supuesta amenaza de desalojo forzado de familias del pueblo Rapa Nui.** Según la información recibida, aproximadamente 45 efectivos de tropas especiales de carabineros fueron enviados por el Gobierno de Chile a la Isla de Pascua – Rapa Nui con el fin de desalojar un grupo de alrededor de 15 familias del pueblo indígena Rapa Nui. Desde el 31 de julio de 2010, estas personas habían ocupado diversos establecimientos fiscales del Estado chileno como acto de reivindicación de sus tierras ancestrales. El 9 de agosto, se realizó un desalojo con base en una orden judicial, de las propiedades ocupadas, la cual se realizó pacíficamente. Sin embargo, existía el temor de que se realizaron más desalojos debido a las declaraciones de los funcionarios de Gobierno de estar dispuestos a desalojar forzosamente a las personas que mantienen "tomas ilegales" y no entreguen los lugares ocupados. Esta situación fue objeto de dos comunicaciones posteriores, ver CHL 4/2010, abajo. Véase también Anexo II, abajo.	08/10/10
16/09/10 UA	CHL 2/2010 Chile	Indigenous peoples	**Supuesta huelga de hambre por presos mapuche**. Según la información recibida, 34 personas mapuche en diversos centros de la región del Bío Bío y la Araucanía estarían participando en una huelga de hambre desde el 12 de julio de 2010. Los presos mapuche en huelga de hambre habrían demandado al Estado el término de la aplicación de la ley antiterrorista en causas que les involucran, el término del procesamiento de presos mapuche por la justicia militar, la desmilitarización de las zonas mapuche, y la restitución de tierras ancestrales mapuche. 58 personas mapuche o simpatizantes al pueblo mapuche habrían sido procesadas o condenadas bajo la ley antiterrorista por hechos de protesta vinculados a la reivindicación de derechos por tierras o de derechos políticos. Véase las observaciones del Relator Especial sobre este caso en A/HRC/15/37.Add.1, párrs. 145-165; y Anexo I, abajo.	

Date Type	Case No. Country	Mandate(s)	Summary of allegations received	Reply
18/11/10 JAL	MEX 27/2010 México	Adequate housing; Indigenous peoples	**Supuesta construcción de la presa hidroeléctrica.** Desde 2004, los Relatores Especiales han tenido un intercambio de comunicaciones con el Gobierno mexicano en relación con el Proyecto Hidroeléctrico La Parota. Según la nueva información recibida, en el transcurso de 2010 hubieron nuevas resoluciones judiciales que habrían ordenado la suspensión temporal del proyecto hidroeléctrico como medida cautelar. En particular, el 11 de abril del 2010, el Tribunal Unitario Agrario número 41, habría otorgado una medida suspensiva de carácter cautelar para evitar que la Comisión Federal de Electricidad (CFE) u otra entidad realice obras tendentes a la construcción de este proyecto hidroeléctrico. Según las alegaciones, a pesar de las resoluciones judiciales, el Congreso Federal (Cámara de Diputados) habría previsto la autorización del presupuesto para la construcción de esta presa hidroeléctrica. El director de la CFE habría además públicamente declarado que el próximo año se licitará la construcción de la hidroeléctrica La Parota.	
23/11/10 AL	CRI 5/2010 Costa Rica	Indigenous peoples	**Supuesta construcción de represa hidroeléctrica que inundaría las tierras del pueblo térraba.** Según la información recibida, el Instituto Costarricense de Electricidad estaría planeando la construcción de la represa hidroeléctrica el Diquís, que inundaría al menos el diez por ciento de las tierras tituladas del pueblo térraba en la zona sur del país. La construcción de la represa inundaría un gran número de sitios sagrados y sitios de importancia cultural para el pueblo térraba. Además de la pérdida del uso y disfrute de sus tierras, el inicio de las obras de construcción de la represa resultaría en la entrada de miles de trabajadores y sus familias en la zona donde viven los térraba. Los térraba no habrían sido consultados o permitidos a participar en las tomas de decisiones sobre la presa de Diquís, a pesar de sus muchas solicitudes al respecto mediante actos públicos tales como grandes marchas de protesta. Con la cooperación del Gobierno de Costa Rica, el Relator Especial realizó una visita oficial al país para investigar estas alegaciones; véase el informe del Relator Especial sobre este caso (A/HRC/18/35.Add.8) y el Anexo III, abajo.	
09/12/10 AL	CHL 4/2010 Chile	Indigenous peoples	**Presunta violencia y represión contra miembros del pueblo Rapa Nui**. Según las informaciones recibidas, el 3 de diciembre de 2010, aproximadamente 45 efectivos policiales desalojaron a miembros de la familia Tuko Tuki, quienes ocupaban una propiedad en Hanga Roa, la capital de la Isla de Pascua. El clan Tuko Tuki reclama dicha propiedad, actualmente a nombre de un propietario privado, como parte de su tierra ancestral. Tres personas Rapa Nui fueron detenidas: Roberto Ika Pakarati, Verenca Ika Pakarati y Margarita Pakarati Tuki. Un grupo de aproximadamente veinticinco Rapa Nui intentaron reingresar al terreno desalojado y fueron repelidas por los carabineros con balines, resultando heridas diecisiete personas, incluyendo el Sr. Nui Leviante Araki, presidente del Parlamento Rapa Nui. Esta situación fue objeto de una comunicación anterior (ver arriba, CHL 1/2010) y una comunicación posterior (ver abajo). Véase también Anexo II, abajo.	04/01/11
17/12/10 AL	THA 8/2010 Thailand	Indigenous peoples	**Alleged non-return of exhumed bodies from Hmong graves at Wat Tham Krabok.** According to the information received, Hmong have repeatedly sent delegations to dialogue with Government officials in order to achieve a resolution of the pending issues concerning the return of the exhumed bodies. The relatives of the deceased Hmong and members of the Hmong communities worldwide have made specific requests to the Thai Government and Thai foundations in possession of the remains of the exhumed bodies for what they would consider to be an acceptable solution to their grievances. This situation was the subject of observations by the Special Rapporteur; see A/HRC/12/34/Add.1, paras. 404-429, and Annex IX, below.	11/07/11

Date Type	Case No. Country	Mandate(s)	Summary of allegations received	Reply
10/01/11 AL	USA 1/2011 United States of America	Indigenous peoples	**Alleged use of reclaimed wastewater for commercial ski operations in a sacred site.** According to the information received, the San Francisco Peaks, located north of the city of Flagstaff, Arizona, – a site considered sacred by several Native American tribes - is being used by the Arizona Snowbowl Resort Limited Partnership to operate a commercial project for recreational skiing. The Government has approved the use of recycled wastewater to make artificial snow for the project. This may reportedly cause a significant negative impact on the religious practices and beliefs of the Native American tribes for which the area of the San Francisco Peaks is sacred. To them, the sacredness of the San Francisco Peaks depends on the purity of the water and plant life in the area, which allegedly will be contaminated if wastewater is introduced into the Peaks through the planned artificial snowmaking. See the Special Rapporteur's observations on this case in Annex X, below.	
12/01/11 UA	Chile	Indigenous Peoples	**Presunta violencia y represión contra miembros del pueblo Rapa Nui.** Según la información recibida, el 29 de diciembre de 2010 ocurrieron nuevos actos de desalojo en contra de aproximadamente 70 personas Rapa Nui que ocupaban pacíficamente la plaza Riro Kainga en el centro de Hanga Roa. Asimismo, el Relator Especial informó al Gobierno de Chile de su intención de hacer públicas sus preocupaciones sobre los repetidos desalojos y la falta de resolución de los asuntos subyacentes, por medio de una declaración pública. Esta situación fue objeto de dos comunicaciones anteriores, ver arriba CHL 1/2010 y CHL 4/2010. Véase también Anexo II, abajo.	25/01/11
01/02/11 AL	ISR 2/2011 Israel	Indigenous peoples	**Allegation that Bedouin people are being removed from their traditional lands.** According to the information received, land policy in Israel has failed to recognize Bedouin legal entitlement to their traditional lands in the Negev. Around half of the Negev Bedouins live in so-called "unrecognized villages", which allegedly lack basic services such as running water, electricity, waste removal, telephone lines, paved roads, schools and health facilities. Bedouins in these villages have experienced ongoing demolitions of their homes and villages in the Negev by Israeli authorities. The Government has created seven urban towns and moved Bedouin from the "unrecognized villages" to these towns. The people in these towns reportedly rank at the bottom of all social and economic indicators, and suffer from the highest unemployment rates and income levels in Israel. Bedouins reportedly cannot live in their traditional manner in these urban areas. The Israel Land Administration reportedly had plans to create several new villages or towns for the Bedouins. See the Special Rapporteur's observations on this case in Annex VI, below.	15/08/11 (copy of response not included in joint communications report due to receipt after cut-off date for replies)
07/02/11 UA	USA 2/2011 United States of America	Indigenous peoples	**Allegation that an indigenous activist serving life sentence had suffered from severe health problems.** According to the information received, Mr. Leonard Peltier, aged 66, an indigenous Anishinabe/Lakota activist, had been serving two life sentences in a United States federal prison, after being convicted in 1977 for the murder of two FBI agents. Over the years, Mr. Peltier has maintained his innocence, asserting that he was politically persecuted for his activities as a member of the American Indian Movement. Mr. Peltier reportedly suffers from severe health problems that require urgent and immediate medical treatment. In addition to his health situation, Mr. Peltier reportedly lives in substandard conditions at the maximum security prison in Lewisburg, Pennsylvania. The Lewisburg prison is allegedly known for violence among inmates.	

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15/02/11 UA	PAN 1/2011 Panama	Indigenous peoples	**Supuesta movilización de protesta por parte de pueblos indígenas.** Según la información recibida, el 10 de febrero de 2011, la Asamblea Nacional aprobó la controvertida reforma al Código de Recursos Minerales, facilitando la inversión extranjera en la explotación minera. Panamá cuenta con el segundo mayor yacimiento de cobre del planeta, ubicado en el Cerro Colorado, el cual se encuentra dentro de la Comarca Ngäbe-Buglé. Los pueblos indígenas Ngäbe-Buglé alegan no haber sido consultados sobre la reforma de la ley, y los dos pueblos no comparten una posición común con respecto a la reforma. Se han sucedido violentos enfrentamientos entre los mismos indígenas a la puerta de la Asamblea. Las movilizaciones y confrontaciones se habrían generalizado en todo el país.	12/04/11
18/02/11 UA	CHN 4/2011 China	Indigenous peoples	**Allegation that the construction of a hydroelectric dam could result in food insecurity, health concerns and conflict.** According to the information received, the Gibe III dam is being constructed by two Chinese companies. The dam will allegedly block the southwestern part of the Omo River, on the border of Ethiopia and Kenya, creating a 150 km long reservoir and reducing downstream flows. The Lower Omo River Valley is populated by some 500,000 people belonging to diverse indigenous peoples. Competition over land and resources has resulted in periodic conflicts among these groups. In addition to its importance for subsistence agricultural activities, the Omo River provides the grazing and watering necessary for raising cattle, goats and sheep. The river is also of special religious and cultural significance to many of the groups that inhabit the region, and it is used as a means of transportation and for bathing.	15/07/11
18/02/11 UA	ETH 1/2011 Ethiopia	Indigenous peoples	**Allegation that the construction of a hydroelectric dam could result in food insecurity, health concerns and conflict.** According to the information received, the Gibe III dam is being constructed by two Chinese companies. The dam will allegedly block the southwestern part of the Omo River, on the border of Ethiopia and Kenya, creating a 150 km long reservoir and reducing downstream flows. The Lower Omo River Valley is populated by some 500,000 people belonging to diverse indigenous peoples. Competition over land and resources has resulted in periodic conflicts among these groups. In addition to its importance for subsistence agricultural activities, the Omo River provides the grazing and watering necessary for raising cattle, goats and sheep. The river is also of special religious and cultural significance to many of the groups that inhabit the region, and it is used as a means of transportation and for bathing. See the Special Rapporteur's observations on this case in Annex IV, below.	
18/02/11 UA	KEN 2/2011 Kenya	Indigenous peoples	**Allegation that the construction of a hydroelectric dam could result in food insecurity, health concerns and conflict.** According to the information received, the Gibe III dam is being constructed by two Chinese companies. The dam will allegedly block the southwestern part of the Omo River, on the border of Ethiopia and Kenya, creating a 150 km long reservoir and reducing downstream flows. The Lower Omo River Valley is populated by some 500,000 people belonging to diverse indigenous peoples. Competition over land and resources has resulted in periodic conflicts among these groups. In addition to its importance for subsistence agricultural activities, the Omo River provides the grazing and watering necessary for raising cattle, goats and sheep. The river is also of special religious and cultural significance to many of the groups that inhabit the region, and it is used as a means of transportation and for bathing.	

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18/02/11 JAL	MYS 3/2011 Malaysia	Food; Indigenous peoples	**Alleged failure to recognize and respect native customary land rights.** According to the information received, the Kayan indigenous community of the Long Teran Kanan village in Tinjar, Miri, Sarawak had been involved in a legal dispute over their land for 12 years. The Miri High Court allegedly ruled in favour of the community on 31 March 2010. One of the defendants, IOI Pelita Plantation Sdn. Bhd., appealed the judgment and had allegedly not respected the court order in the interim, continuing palm oil operations in the community. The village's crops have reportedly been bulldozed and planted with oil palms, destroying the Kayan people's traditional livelihoods and threatening their right to food. This case is reportedly emblematic of the over 200 cases before the Sarawak courts relating to indigenous communities' ability to exercise their native customary rights over their lands, upon which they depend for fishing, hunting or farming, and which are essential to their cultural survival. See the Special Rapporteur's observations on this case in Annex VII, below.	15/07/11
19/04/11	GTM Guatemala	Indigenous Peoples	**Supuesto el proceso de reparación de los daños sufridos por las comunidades indígenas afectadas por la construcción de la represa hidroeléctrica Chixoy**. Según la información recibida, el Gobierno y la Coordinadora de las Comunidades Afectadas por la Hidroeléctrica de Chixoy (COCAHICH) habían negociado por varios años sobre la indemnización para 33 comunidades indígenas mayas que sufrieron el reasentamiento y otras violaciones a los derechos humanos a raíz de la construcción de la represa hidroeléctrica Chixoy entre 1975 y 1983. Se alega, sin embargo, que el Gobierno todavía no había firmado el "Plan de Reparación" acordado y que no se ha iniciado la elaboración de una ley para implementarlo.	06/06/11
26/04/11 AL	MEX 8/2011 México	Indigenous peoples	**Supuesto otorgamiento de concesiones mineras en sitios sagrados.** Según la información recibida, el Gobierno de México habría otorgado 22 concesiones mineras de exploración de plata en la zona de Wirikuta, pueblo Real de Catorce, estado de San Luis Potosí. Estas concesiones fueron compradas por la empresa canadiense First Majestic Silver Corp en noviembre de 2009. El área de las concesiones abarca el lugar donde los wixárika por más de 1000 años han recreado anualmente el camino de los antiguos kakauyarixi, los antepasados quienes según las creencias wixárika dieron nacimiento al mundo. Se alega que las concesiones fueron otorgadas sin consultar previamente al pueblo indígena wixárika (huichol) cuyos sitios sagrados serán afectados por el proyecto minero. Véase las observaciones del Relator Especial sobre esta situación en Anexo VIII, abajo.	19/07/11
10/05/11 JUA	USA 5/2011 United States of America	Cultural Rights; Freedom of religion; Indigenous peoples	**Alleged imminent desecration and destruction of ceremonial and burial site.** According to the information received, Sogorea Te, now located within the city of Vallejo, California, had been in existence for 3,500 years and has been used continually by the Northern California indigenous peoples, who consider this site sacred. Allegedly, the City of Vallejo had planned to level and pave over the Sogorea Te Sacred Area in order to construct a parking lot and public restrooms. A continuous occupation of the site by local native peoples and organizations had held off the bulldozers that were due to begin the works on 15 April 2011.	

Date Type	Case No. Country	Mandate(s)	Summary of allegations received	Reply
13/05/11 JAL	ETH 2/2011 Ethiopia	Indigenous peoples; Minority issues	**Alleged displacement of indigenous people from their ancestral land.** According to the information received, the Anywa people identify as an indigenous minority with a long historical attachment to ancestral land in the Gambella region. The Ethiopian Government allegedly leased 300,000 hectares of land occupied by the Anywa people to the Indian horticulture company Karuturi, and 10,000 hectares to the Saudi Star Company with another 240,000 hectares more likely to be leased to the Saudi Star Company. Reportedly this had been done without any prior consultation with local people. Moreover, the Federal Government had reportedly officially revealed its plan to displace 45,000 Anywa people (half of the total Anywa population) in the coming three years. In Abobo district, the Saudi Star agriculture company has allegedly already displaced Ochak-Chala village, Perbongo-Tierkudhi village, Perbongo-Oma and Awita-jwieo villages. The villagers were allegedly not consulted or compensated.	

IV. Observations and other follow-up by the Special Rapporteur

11. Within the bounds of available resources, the Special Rapporteur often takes concrete steps to follow up to his letters of allegation or urgent appeals. In the annexes hereto, the Special Rapporteur reports on cases in which he is providing such follow-up.

12. In most of the cases included in the annexes, the Special Rapporteur has provided detailed observations with analyses of the issues raised and specific recommendations to the States concerned. These observations were developed after cross checking or receiving government confirmation of the information received and after making a determination that the situations indicated pressing problems requiring focused attention. He will continue to follow up on these cases and may in the future provide detailed observations and recommendations for other cases included in this report. The Special Rapporteur offers these observations and recommendations in an ongoing effort to engage Governments in constructive dialogue conducive to finding solutions to problems and building good practices.

13. The annexes also report on cases in which he has provided other kinds of follow-up to communications of alleged human rights violations. Such other follow-up consists of additional correspondence in light of new developments or information received, on-site visits with in-depth reports, face-to-face meetings with Government officials, and public statements.

14. The Special Rapporteur strives to be appropriately selective in the cases to which he devotes significant follow-up efforts, focusing on situations that are especially problematic or are emblematic of issues that are faced by indigenous peoples in particular countries or throughout the world. Through the in-depth analysis of specific situations, the Special Rapporteur is aiming to consolidate approaches for addressing similar kinds of problems and developing appropriate responses. He also seeks to identify and promote good practices for addressing these common problems, where these exist, and to reinforce the application of relevant international standards. In this connection, the United Nations Declaration on the Rights of Indigenous Peoples provides the principle normative frame of reference for examining situations and making recommendations. Where appropriate, the Special Rapporteur has highlighted relevant articles of the Declaration, in addition to articles of other applicable human rights instruments, when communicating with States about specific cases and making evaluative observations.

Annex I

Chile: Situación de los presos mapuche en huelga de hambre por la aplicación de la ley antiterrorista en su contra

CHL 2/2010

1. El 16 de septiembre de 2010, el Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, llamó la atención al Gobierno de Chile sobre información recibida en relación con la situación de las personas mapuche encarceladas que realizaban una huelga de hambre en protesta por la aplicación de la ley antiterrorista en su contra. El texto completo de esta comunicación es accesible en la versión electrónica del informe conjunto de comunicaciones de los titulares de mandatos de los procedimientos especiales (A/HRC/18/51), disponible en el sitio web del Consejo de Derechos Humanos.

2. Esta situación se enmarcaba dentro de la problemática general de la aplicación de la ley antiterrorista en casos relacionados con los actos de protesta social realizados por miembros del pueblo mapuche la cual ha sido objeto de observaciones y recomendaciones por parte del Relator Especial en su informe sobre la situación de los pueblos indígenas en Chile de septiembre de 2009 (A/HRC/12/34.Add.6, párrs. 40-47 y 57-62) y en su informe sobre casos examinados en 2009-2010 (A/HRC/15/37.Add.1, párrs. 136-168).

3. El Relator Especial dio seguimiento a su comunicación al Gobierno de Chile sobre la huelga de hambre mediante conversaciones con el Gobierno y una declaración pública, emitida el 24 de septiembre de 2010. Posteriormente, el 5 de octubre de 2010, el Relator Especial envió otra carta al Gobierno relacionada con el acuerdo firmado el 1 de octubre de 2010 entre el Gobierno y los representantes de la mayoría de los presos mapuche en huelga de hambre.

Declaración pública del Relator Especial sobre la huelga de hambre

4. El texto completo de la declaración pública del Relator Especial emitida el 24 de septiembre de 2010 se encuentra a continuación:

- Quisiera dar a conocer a todos los interesados que en los últimos días he mantenido contacto permanente con el Gobierno de Chile, sosteniendo conversaciones y un intercambio de información acerca de la situación de las 34 personas mapuche que han estado en huelga de hambre por más de dos meses en diversos centros de la región del Bío Bío y de la Araucanía. He expresado mi más profunda preocupación por esta situación y la necesidad de avanzar hacia la solución de los varios asuntos relacionados a las demandas de las personas en huelga de hambre.

- Las 34 personas en huelga de hambre se encuentran entre las 58 personas mapuche y sus simpatizantes que han sido procesadas o condenadas bajo la ley antiterrorista (Nº 18.314) de Chile. Entiendo que los presos mapuche en huelga de hambre demandan al Estado: (1) el término de la aplicación de la ley antiterrorista en causas que les involucran; (2) el término del procesamiento de algunos de los presos mapuche por la justicia militar; (3) la desmilitarización de las zonas mapuche en que las comunidades reivindican derechos humanos políticos y territoriales; y (4) la restitución de tierras ancestrales mapuche.

- Tanto yo como mi antecesor, Profesor Rodolfo Stavenhagen, hemos expresado nuestra preocupación sobre la aplicación de la ley antiterrorista en este contexto y hemos hecho varias observaciones y recomendaciones específicas al respecto.

Asimismo, varios órganos de tratados de los Naciones Unidas, incluyendo el Comité de Derechos Humanos, el Comité contra la Tortura y el Comité para la Eliminación de la Discriminación Racial, han expresado su preocupación por la aplicación de la ley antiterrorista en este contexto. A pesar de ello, los acontecimientos recientes de la huelga de hambre indican una falta de implementación adecuada de estas recomendaciones, y ponen en evidencia el descontento existente en torno a los problemas de fondo que dan origen a la protesta social.

- Tal como he expresado anteriormente, desapruebo el uso de la violencia como medida de protesta, aún cuando la protesta sea por reivindicaciones legítimas, al igual que repruebo la falta de respeto a los derechos de los pueblos indígenas que puedan llevar a la conflictividad. A la vez, estoy más que convencido que la aplicación de la ley antiterrorista en este contexto conlleva una serie de problemas procesales y de fondo que solamente puedan agravar la situación, y que la calificación de los delitos imputados como actos de terrorismo podría ser inconducente e inapropiada dentro de la normativa internacional pertinente. Cualquier procesamiento penal de personas mapuche por hechos delictivos en este contexto debería ser a través de la justicia penal ordinaria, con todas las garantías aplicables del debido proceso.

- Junto con reiterar las recomendaciones citadas, insto al Gobierno a desarrollar el máximo esfuerzo para iniciar un diálogo de buena fe con los representantes de los presos mapuche, como paso fundamental para la búsqueda de soluciones constructivas orientadas a responder a las preocupaciones y solicitudes de la huelga.

- Al respecto, he recibido información por parte del Gobierno que, con el aval de las autoridades, el obispo de Concepción está ejerciendo buenos oficios para buscar una solución concreta. Quisiera instar al Gobierno a que en ese proceso de diálogo se hagan los esfuerzos por generar la confianza necesaria para llegar a una resolución exitosa de esta situación y que se exploren todas las alternativas de soluciones jurídicas y políticas. Igualmente, quisiera instar a las personas mapuche en huelga de hambre así como los demás líderes y miembros del pueblo mapuche interesados a que también realicen esfuerzos de buena fe para dialogar constructivamente con el Gobierno a fin de encontrar soluciones a sus demandas.

- Tomo nota de la información proporcionada por el Gobierno sobre los proyectos de ley para modificar la ley antiterrorista y la ley sobre justicia militar que están siendo considerados por el Congreso actualmente. Quisiera reiterar que es crucial que el Estado reforme la ley antiterrorista, adoptando definiciones precisas de los tipos penales de delitos de terrorismo ajustados a las normas internacionales aplicables, así como asegurar que las reformas de estas leyes se ajusten a los estándares internacionales sobre derechos humanos, en particular respecto al debido proceso. Considero de igual importancia es que se faciliten espacios de participación y consulta a representantes del pueblo mapuche en los procesos de reforma de estas leyes, las cuales han tenido una efecto directo sobre sus miembros.

- Asimismo, he recibido información del Gobierno, respecto al anuncio del establecimiento de una mesa de diálogo paralela integrada por el Gobierno, representantes del pueblo mapuche, las iglesias católicas y evangélicas y organizaciones civiles para tratar programas de desarrollo regional.

- Valorando la disposición del Gobierno de iniciar un diálogo de fondo con representantes del pueblo mapuche, quisiera señalar al Gobierno que es esencial asegurar que todo proceso de diálogo se realice en un marco de confianza y buena fe, y de acuerdo a las normas de consulta y participación que impone el Convenio 169 de la OIT en vigor en Chile.

- Finalmente, reitero que los distintos poderes del Estado deben abordar, en conjunto con los pueblos indígenas, los asuntos de fondo de la actual crisis los cuales se relacionan con la falta de implementación cabal de los derechos de los pueblos indígenas especial sobre sus tierras ancestrales, recursos naturales, consulta previa, así como a la participación en las decisiones que les conciernen. Al respecto, enfatizo que la Declaración de los Derechos de los Pueblos Indígenas de la ONU y el Convenio 169 de la Organización Internacional del Trabajo—que cumplió un año de vigencia en Chile—ofrecen los estándares y puntos de referencia aplicables para los procesos de diálogo y la búsqueda de soluciones a la situación actual y garantizar el respeto de los derechos de los pueblos indígenas en Chile."

Comunicación del Relator Especial al Gobierno de Chile del 5 de octubre de 2010

5. El 5 de octubre de 2010, el Relator Especial envió una carta al Gobierno de Chile relacionada con la información recibida sobre un acuerdo firmado el primero de octubre de 2010 entre el Gobierno de Chile y los representantes de los presos mapuches en huelga de hambre en las cárceles de Concepción, Temuco, Lebu y Valdivia, junto con información que había recibido sobre los presos mapuches en la Cárcel de Angol.

6. En resumen, el Relator Especial comunicó que el acuerdo alcanzado puso de manifiesto el valor del diálogo para resolver conflictos y de la existencia de voluntad de las partes, tanto del Gobierno como de los representantes de los presos mapuches por realizar esfuerzos para llegar a acuerdos. El Relator Especial instó al Gobierno de Chile a que el acuerdo fuera implementado cabalmente. El Relator Especial valoró que el acuerdo se enmarcaba en las obligaciones de Chile bajo el Convenio No. 169 de la Organización Internacional de Trabajo y expresó su esperanza de que este avance fuera reflejo del compromiso del Estado chileno en relación con la situación del pueblo mapuche y de todos los pueblos indígenas de Chile.

7. En relación a la situación de los presos mapuches en la Cárcel de Angol, de acuerdo a la información recibida, su negativa a adherirse al acuerdo respondía básicamente a la desconfianza en la efectiva implementación de un cambio en la política penal. El Relator Especial instó al Gobierno de Chile y a los representantes de los presos mapuches de Angol a persistir en el esfuerzo de diálogo a fin de consolidar lo avanzado y encontrar soluciones a las demandas.

8. El Relator Especial reiteró al respecto de sus observaciones hechas en su declaración pública del 24 de septiembre de 2010, que era crucial que el Estado reformara la ley antiterrorista adoptando definiciones precisas de los tipos penales de delitos de terrorismo ajustados a las normas internacionales aplicables. Asimismo, reiteró que los distintos poderes del estado deben abordar, en conjunto con los pueblos indígenas, los asuntos de fondo de la crisis, los cuales se relacionaban con la falta de implementación cabal de los derechos de los pueblos indígenas, en especial sus derechos sobre sus tierras ancestrales, recursos naturales, consulta previa y a la participación en las decisiones que les conciernen.

Observaciones del Relator Especial

9. El Relator Especial tiene conocimiento de acontecimientos recientes con relación a los presos mapuche y sobre la reforma y la aplicación de la ley antiterrorista. Al respecto, aunque percibe algunos avances importantes, se mantiene preocupado por esta situación y los asuntos subyacentes. Espera continuar en un diálogo con el Gobierno de Chile sobre esta situación

Annex II

Chile: Situación del pueblo Rapa Nui en la Isla de Pascua

CHL 1/2010, CHL 4/2010

1. El 13 de agosto de 2010, el Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, transmitió al Estado de Chile información recibida sobre la situación de amenaza de desalojo forzado de familias del pueblo Rapa Nui en la Isla de Pascua. Según la información recibida, docenas de carabineros fueron enviados por el Gobierno de Chile a la Isla de Pascua con el fin de desalojar un grupo de alrededor de 15 familias del pueblo indígena Rapa Nui, que habían estado ocupando diversos establecimientos en la isla. Los clanes ocupaban los establecimientos como un acto de reivindicación de sus tierras ancestrales y de los derechos que consideran les corresponden bajo el tratado de anexión de la isla que se suscribió con Chile en 1888. Con estos actos, exigían al Gobierno de Chile la devolución de tierras ancestrales de las familias Rapa Nui que por decenas de años habían sido propietarias de esas tierras y que actualmente están ocupadas por entidades estatales. También exigían un mayor control migratorio y mayor reconocimiento de su autogobierno. Se temía que dicho desalojo pudiera resultar en violaciones de los derechos humanos de los manifestantes.

2. El Relator Especial de nuevo llamó la atención del Gobierno a la situación del pueblo Rapa Nui mediante cartas al Gobierno de Chile con fecha de 9 de diciembre de 2010 y 10 de enero de 2011. Según la información recibida y transmitida en estas comunicaciones, el 3 de diciembre de 2010, aproximadamente 45 efectivos policiales desalojaron a miembros de la familia Tuko Tuki, quienes ocupaban una propiedad en Hanga Roa, la capital de la Isla de Pascua. El clan Tuko Tuki reclama dicha propiedad, actualmente a nombre de un propietario privado, como parte de su tierra ancestral. Tres personas Rapa Nui fueron detenidas: Roberto Ika Pakarati, Verenca Ika Pakarati y Margarita Pakarati Tuki. Un grupo de aproximadamente veinticinco personas Rapa Nui intentaron reingresar al terreno desalojado y fueron repelidas por los carabineros con balines, resultando heridas diecisiete personas, incluyendo el Sr. Nui Leviante Araki, presidente del Parlamento Rapa Nui.

3. En su carta del 10 de enero de 2011, el Relator Especial notó con preocupación que el 29 de diciembre de 2010 ocurrieron nuevos actos de desalojo, esta vez en contra de aproximadamente 70 personas Rapa Nui que ocupaban pacíficamente la plaza Riro Kainga en el centro de Hanga Roa. Asimismo, el Relator Especial informó al Gobierno de Chile de su intención de hacer públicas sus preocupaciones sobre los repetidos desalojos y la falta de resolución de los asuntos subyacentes, por medio de una declaración pública.

4. Posteriormente, el 12 de enero de 2011, el Relator Especial emitió la declaración pública sobre el asunto. El Relator Especial exhortó al Gobierno a evitar nuevos desalojos, desplegar el máximo esfuerzo para llevar a cabo un diálogo de buena fe con representantes del pueblo Rapa Nui para atender justamente sus reclamos, tomar las medidas necesarias para evitar amenazas o daños a la seguridad física de personas y sancionar a las personas responsables de cualquier uso excesivo o desproporcionado de la fuerza.

5. El Gobierno de Chile respondió a cada una de las comunicaciones del Relator Especial sobre este caso, mediante cartas del 8 de octubre de 2010, del 4 de enero de 2011 y del 25 de enero de 2011. En resumen, según la información proporcionada por el Gobierno, el Estado había tomado medidas para atender la situación del pueblo Rapa Nui, incluyendo la conformación de mesas de diálogo para tratar los reclamos de este pueblo sobre sus tierras, su autonomía y sobre control migratorio. El Estado asimismo informó que había

realizado investigaciones en relación con las alegaciones de abusos por parte de la fuerza pública durante los desalojos de manifestantes Rapa Nui realizados en diciembre de 2010, que había reducido el contingente policial en la isla y que había realizado otros esfuerzos para coordinar políticas públicas hacia los pueblos indígenas.

6. Los textos completos de cada una de las cartas enviadas por el Relator Especial así como de las respuestas recibidas del Estado de Chile son accesibles en la versión electrónica del informe conjunto de comunicaciones de los titulares de mandatos de los procedimientos especiales (A/HRC/18/51), disponible en el sitio web del Consejo de Derechos Humanos.

Observaciones del Relator Especial

7. Cabe reiterar las recomendaciones hechas por el Relator Especial en sus comunicaciones citadas. Es necesario asegurar que exista una verdadera representación del pueblo Rapa Nui, mediante sus propias instituciones representativas, dentro de los espacios de diálogo promovidos por el Gobierno con el fin de asegurar la efectiva resolución de los asuntos medulares planteados por los manifestantes. Asimismo, el Relator Especial espera que se eviten futuros actos de violencia y que la presencia policial en la isla no genere una mayor sensación de malestar para los miembros del pueblo Rapa Nui. El Relator Especial continuará monitoreando la situación del pueblo Rapa Nui en la Isla de Pascua y, si lo considera pertinente, podría presentar observaciones o recomendaciones adicionales en una fecha posterior.

Annex III

Costa Rica: Situación del pueblo Térraba y el proyecto hidroeléctrico El Diquís

CRI 5/2010

1. El 23 de noviembre de 2010, el Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, envió una comunicación al Gobierno de Costa Rica en relación con la información recibida acerca de los potenciales impactos del proyecto hidroeléctrico El Diquís sobre los pueblos indígenas que habitan la zona del proyecto. En esta comunicación, el Relator Especial expresó su interés en poder reunirse con representantes del Gobierno de Costa Rica para conversar sobre la situación. La solicitud fue aceptada por el Gobierno y la reunión tuvo lugar el 29 de noviembre de 2010 en Ginebra. En seguimiento a esta reunión, el 27 de enero de 2011, el Gobierno de Costa Rica envió una carta al Relator Especial expresando su "buena disposición" para recibir una visita del Relator Especial al país. En comunicaciones subsiguientes, las fechas para dicha visita fueron confirmadas.

2. El Relator Especial llevó a cabo su visita a Costa Rica del 24 al 27 de abril de 2011. Durante la visita, el Relator Especial se reunió en San José con varios representantes del Gobierno, incluyendo representantes del Instituto Costarricense de Electricidad (ICE), la entidad estatal responsable del desarrollo del proyecto El Diquís. El Relator Especial también se desplazó al territorio indígena Térraba, donde se reunió con representantes de pueblos de este y otros territorios indígenas y donde pudo visitar el área de construcción de la represa del proyecto hidroeléctrico El Diquís. El Relator Especial visitó también las instalaciones del ICE en la municipalidad de Buenos Aires, donde sostuvo reuniones con los principales oficiales y técnicos encargados del proyecto.

3. En base de la información recabada durante su visita, el Relator Especial elaboró un informe con observaciones y recomendaciones relacionadas a la situación del proyecto hidroeléctrico El Diquis (A/HRC/18/35/Add.8), que hizo público el 30 de mayo de 2011.

4. En seguimiento a su informe, el día 6 de julio de 2011, el Relator Especial llevó a cabo reuniones en San José, Costa Rica con representantes del ICE y de las comunidades indígenas afectadas por el proyecto El Diquís. Durante estas reuniones, el Relator Especial recibió información actualizada sobre el caso, y tuvo la oportunidad de hacer unas aclaraciones sobre las observaciones y recomendaciones hechas en su informe del 30 de mayo de 2011. Siguiendo esta reunión, el 22 de julio de 2011, el Relator Especial envió una carta al Gobierno con aclaraciones adicionales, a la luz de información llevada a la atención del Relator Especial por representantes indígenas de la comunidad Térraba y otras comunidades afectadas por el proyecto. Además, en la misma carta, el Relator Especial invitó al Gobierno a responder a las recomendaciones específicas expuestas en su informe y expresó su deseo de seguir colaborando con el Gobierno y los pueblos indígenas al respecto.

Annex IV

Ethiopia: Situation of the Gilgel Gibe III hydroelectric project on the Omo River

ETH 1/2011

1. In a communication of 18 February 2011, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, called the attention of the Government of Ethiopia to information received regarding the construction of the Gibe III hydroelectric project on the Omo River in Ethiopia. The full text of this communication can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council. This communication followed a previous letter sent by the Special Rapporteur on 10 June 2009, which was reflected his 2009 annual report to the Human Rights Council (A/HRC/12/34/Add.1, paras. 113-122). He regrets that, at the time of finalization of this report, there is no record of a response by the Government of Ethiopia in the files of the Office of the High Commissioner for Human Rights to either his communication of 18 February 2011 or his previous communication of 10 June 2009. In the absence of a response by the Government of Ethiopia to his communications about the Gibe III hydroelectric project within 60 days as requested, the Special Rapporteur developed the observations below, which include an evaluation of the situation within the framework of relevant international standards. These observations were transmitted to the Government on 13 July 2011.[1]

Background

2. According to the information received, Ethiopia is constructing the Gilgel Gibe III hydroelectric dam, which, once completed, will block the southwestern part of the Omo River on the border of Ethiopia and Kenya, creating a 150-km long reservoir. The Lower Omo River Valley is inhabited by a number of indigenous peoples, including the Dasenech, Karo, Hamer, Mursi, Murle, Mugugi and Nyangatom, who have developed complex land and resource use practices adapted to the harsh conditions of the region. These peoples rely on the Omo River for grazing and watering livestock, which produce blood, milk, and meat for subsistence as well as income.

3. Sources indicate that the natural flooding cycle of the river creates the conditions necessary for flood retreat cultivation, an essential agricultural practice in the semi-arid climate of the region. According to the information received, the Gibe III dam will

[1] The Special Rapporteur also brought aspects of this situation to the attention of the Governments of China and Kenya, by separate communications of 18 February 2011. The full text of these letters can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council. The Special Rapporteur addressed concerns to Kenya about the alleged impacts on several indigenous peoples in Kenya resulting from anticipated changes in the flow into Kenya of the Omo River as a result of the Gibe III dam. Concerns were addressed to China because, according to information received, the construction of the dam is being financed by a bank owned by the Government of China. China did respond to the Special Rapporteur's communication in a note dated 15 July 2011, the full text of which can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council. The observations below are directed only to the Government of Ethiopia, although in the future the Special Rapporteur may develop observations directed at the Governments of China or Kenya, or otherwise follow up with those Governments on this case.

eliminate this natural flooding cycle and reduce the flow of the river, threatening these traditional practices and means of subsistence, and potentially endangering local food security. Further, it is alleged that competition over increasingly scarce land and resources in Ethiopia could also exacerbate inter-ethnic conflict. The Gibe III project will also potentially affect the water and salinity levels of Lake Turkana, the only large body of water in Kenya's arid northwestern region. Lake Turkana is the primary water source for six indigenous ethnic groups in Kenya – the Turkana, Elmolo, Samburu, Gabbra, Rendille and Daasanach – comprising some 300,000 people.

4. Reportedly, although activities related to the construction of the Gibe III project began in 2006, the Government did not initiate assessment of the environmental and social impacts of the projects until 2008. There were also questions raised about the accuracy and impartiality of the Environmental and Social Impact Assessment in evaluating the impacts of the Gibe III dam. Finally, it is alleged that consultations about the dam were conducted by very few people, as compared to the total number of people affected, and did not take place until after construction of the Gibe III project had begun.

Observations of the Special Rapporteur

5. Although the Special Rapporteur never received a response from the Government of Ethiopia to his letters of 18 February 2011 and 10 June 2009, many of the concerns he raised in those letters have been directly addressed by the Government of Ethiopia in various public documents issued over the past months, including in the Government's website about the project[2] and in the report developed by the Ethiopian Electric Power Corporation entitled "Reaction to Issues Raised by 'South China Morning Post' concerning the Gibe III HEP"[3]. The principle issues raised by the Special Rapporteur that are addressed in these public documents relate to: (1) the effect of the Gibe III dam on the traditional flooding cycles of the Omo River, and consequently on the livelihoods of the indigenous peoples that depend on the river; (2) the effect of the Gibe III project on Lake Turkana and indigenous groups that depend on that lake, in Kenya; and (3) the adequacy of consultations carried out with affected indigenous peoples.

Social and Environmental Effects

6. With respect to the effects of the Gibe III dam on the traditional flood retreat cultivation and other traditional practices of affected indigenous peoples, the Special Rapporteur notes that the Government has, in fact, recognized that the dam will replace the Omo River's national flooding cycle, likely affecting some 100,000 people who practice traditional flood recession agriculture during a portion of the year. However, according to available information from the Ethiopian Electric Power Corporation, measures are being taken to create an artificial flooding system that simulates the natural flooding process of the Omo River, in order to ensure that the traditional flood retreat agriculture practices of indigenous peoples along the Omo River can continue, and to mitigate any adverse impacts in this regard. In fact, the Government of Ethiopia indicated that the hydroelectric project will actually bring positive benefits, since it will help protect against dangerous flooding of the Omo River and will involve small-scale irrigation projects that provide water resources to the region more consistently than under the current system. The Government also pointed out that this availability of water, as well as planned fish farming and animal

[2] http://www.gibe3.com.et/issues.html
[3] http://www.gibe3.com.et/report.pdf

husbandry initiatives contemplated alongside the project, will help stabilize any inter-ethnic conflicts in the region.

7. With respect to the impact of the Gibe III hydroelectric project on Lake Turkana in Kenya, the public documents issued by the Government assured that the results of studies carried out as part of the Government's environmental impact assessment, as well as independent assessments, have concluded that water levels in Lake Turkana will remain more or less consistent with their present state following construction of the hydroelectric project, with a maximum estimated fluctuation of only 0.6 meters, which will not result in changes to the drinkability of the water. In fact, the Government concluded that the Gibe III project and its artificial flooding initiatives will actually have a "positive impact on controlling the fluctuation of the lake water", especially during the dry season.[4] The information provided by the Government also emphasized that the communities around Lake Turkana have expressed support for Gibe III project.

8. The Special Rapporteur cannot help but notice that there appears to be a major divergence of opinion regarding the potential environmental and social impacts of the Gibe III project. On the one hand, the Government hails the benefits of the project and assures that it is taking measures to address in full any potential adverse impacts. On the other hand, sources of information with whom the Special Rapporteur has been in contact predict catastrophic consequences of the hydroelectric project on the environment and local communities, and indicate that the Government has not put in place adequate mitigation measures to offset these consequences.

9. Given the limitations of the mandate of the Special Rapporteur, he is unable to make any in-depth technical or scientific conclusions about the impacts of the Gibe III project. However, he will continue to review all available sources of information about the Gibe III project and may make additional observations in the future, taking into consideration this information. In addition, in light of the divergent views on this project, the Special Rapporteur encourages the Government to make all efforts to make public all studies on the Gibe III project and to continue to provide constant, impartial information about the hydroelectric project and its impacts to affected indigenous peoples and other stakeholders. Furthermore, the Government and in particular the Ethiopian Electric Power Corporation, should continue to identify and implement alternate or additional mitigation and compensation measures, and make any alterations to the project design, should these be deemed necessary.

Issues related to consultation

10. Finally, with respect to consultations carried out, the Government has stated that, from 2006-2008, it carried out a public consultation process, in accordance, says the Government, with the Ethiopian Constitution, which states that "People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly" (article 92.3). It bears mention that the information provided in the public documents of the Ethiopian Electric Power Corporation coincides with the information the Special Rapporteur received from other sources regarding the approximate number of people consulted about the Gibe III project. In particular, both the Government and other sources of information noted that only around 2,000 people participated in the public consultation process, even though some 100,000 people may be affected by the Gibe III project within Ethiopia. The Government has expressed that those consulted were "satisfied with the mitigation measures and the

[4] Ibid.

proposed plans of the project"[5] and believe that it "contributes to the attainment of the local, regional and national development goals"[6].

11. It is not clear from the Government's information whether these consultations were in fact carried out in accordance with the traditional decision-making structures of the affected indigenous peoples, as required by article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." However, the Special Rapporteur received information from other sources that alleged, under the traditional systems of the groups living along the Omo River, decisions are made in meetings involving the entire community, which indicates that consultations with only 2,000 out of 100,000 affected peoples would not conform to traditional decision-making procedures, as required by international standards. In this connection, it may be necessary for the Government to carry out additional consultations with a greater number of affected indigenous peoples in order to ensure that they have had the opportunity to consider the project and present their views in response, in accordance with their own representative institutions.

12. In addition, the Government's information does not provide a clear picture of the information that was provided to indigenous peoples in this public consultation process. In this connection, the Special Rapporteur would be grateful if the Government of Ethiopia could inform him of the content of information conveyed to the affected indigenous peoples during the consultations. The Special Rapporteur does note, however, that the Government has stated that the consultations were designed to "inform, and contribute to identifying potential impacts of the project, either negative or positive or both, and prioritize the remedial measures for the identified impacts; include the attitudes of the community and officials who will be affected by the project so that their views and proposals are mainstreamed to formulate mitigation and benefit enhancement measures; [and] increase public awareness and understanding of the project, and ensure its acceptance"[7]. While some aspects of these stated goals of the consultations coincide with international standards, the Special Rapporteur expresses his concern that the consultations were carried out with the goal to "ensure [the project's] acceptance", which indicates that the consultations were carried out with a predetermined outcome. Under relevant international standards, consultations should involve a genuine opportunity for indigenous peoples to present their views and to influence decision-making, and the option of not proceeding with the proposed project should not be foreclosed during these consultations.

13. The Special Rapporteur understands that the Government of Ethiopia has planned future public consultations on the Gibe III projects. In this connection, under article 32 of the United Nations Declaration on the Rights of Indigenous Peoples governments must "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources". In the present case, given the magnitude of the Gibe III dam project and its potential effects on indigenous peoples in surrounding areas, the Special Rapporteur notes that there is a need for concerted efforts to carry out adequate

[5] http://www.gibe3.com.et/report.pdf
[6] http://www.gibe3.com.et/issues.html
[7] Ibid.

consultations with affected groups and to endeavor to reach consensus with them on all aspects of the project affecting them.

Annex V

Guatemala: La situación de problemas sociales y ambientales generados por la mina Marlin y otros temas relacionados con esta situación

GTM 16/2009

1. El Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, ha estado monitoreando la situación de problemas sociales y ambientales generados por la mina Marlin situado en los municipios predominantemente indígenas de San Miguel Ixtahuacán y Sipacapa en el departamento de San Marcos, así como asuntos relacionados con este caso, desde 2009. Tal y como fue informado en su informe anual de 2010 (A/HRC/15/37/Add.1, paras. 185-186), en una comunicación del 22 de diciembre de 2009 el Relator Especial llamó la atención del Gobierno de Guatemala a información recibida en relación con esta situación. Posterior a esta comunicación, el Relator Especial solicitó y obtuvo de parte del Gobierno una invitación para realizar una visita a Guatemala, la cual se efectuó entre el 14 y 18 de junio de 2010, a fin de analizar la situación de la aplicación de los principios de consulta con los pueblos indígenas en el país en relación con las industrias extractivas, con un enfoque especial en la situación de los pueblos afectados por la mina Marlin en los municipios de Sipacapa y San Miguel Ixtahuacán.

2. En base al intercambio de información y comunicaciones con el Gobierno de Guatemala y otras partes interesadas, así como de la visita a Guatemala llevada a cabo en junio de 2010, el Relator Especial elaboró un informe con sus “Observaciones sobre la situación de los derechos de los pueblos indígenas de Guatemala en relación con los proyectos extractivos, y otro tipo de proyectos en sus territorios tradicionales”, con un anexo sobre el caso de la mina Marlin (A/HRC/18/35/Add.3). Este informe fue presentado públicamente mediante una videoconferencia el 4 de marzo de 2011, en la cual participaron representantes de pueblos indígenas, del Gobierno de Guatemala y de la comunidad internacional. Durante la videoconferencia, el Relator Especial proporcionó un resumen de su informe y respondió a las preguntas de los participantes.

3. El 2 de mayo 2011, el Gobierno de Guatemala transmitió observaciones adicionales al Relator Especial sobre el informe. Además, el Gobierno transmitió al Relator Especial una nota, fechada el 6 de junio de 2011, con nueva información relacionada al caso de la mina Marlin. Los textos completos de las cartas del Gobierno de Guatemala del 16 de febrero de 2011, 2 de mayo de 2011 y 6 de junio de 2011 son accesibles en las versión electrónica del informe conjunto de comunicaciones de los titulares de mandatos de los procedimientos especiales (A/HRC/18/51), disponible en el sitio web del Consejo de Derechos Humanos.

4. En relación con su informe sobre cuestiones conexas al caso de la mina Marlin, el Relator Especial mantuvo un diálogo con el Gobierno de Guatemala sobre el tema de la reglamentación del proceso de consulta con pueblos indígenas durante los primeros meses del año 2011. El Relator Especial elaboró observaciones detalladas sobre un borrador preliminar de un reglamento de consulta desarrollado por el Gobierno de Guatemala. Estas observaciones fueron transmitidas al Gobierno de Guatemala el 7 de febrero de 2011 y a organizaciones indígenas interesadas el 1 de marzo de 2011.

Annex VI

Israel: Situation of unrecognized Bedouin villages in the Negev desert

ISR 2/2011

1. In his communication of 1 February 2011, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, called the attention of the Government of Israel to the alleged demolitions of "unrecognized" Bedouin villages in the Negev desert and the relocation of their inhabitants to government-planned villages. The full text of this communication can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council. This communication followed a request by the Special Rapporteur for a visit to Israel to examine the situation of the Bedouin people in the Negev, transmitted to the Government on 1 September 2010. The Special Rapporteur had not received a reply to that visit request. Nor did the Government respond to his communication of 1 February 2011 within 60 days as requested by the Special Rapporteur. In the absence of a response to his communication, the Special Rapporteur developed the observations below, which include an evaluation of the situation and recommendations, within the framework of relevant international standards. These observations were transmitted to the Government on 16 June 2011. Subsequently, the Government submitted a response on 15 August 2011.

Summary of the information received and transmitted to the Government

2. According to the information received, the Bedouin have inhabited the area known as Negev since the seventh century, maintaining a semi-nomadic lifestyle, engaging in subsistence farming and raising livestock. Their land use practices were governed by an intricate system of customary land and water distribution and management. Allegedly, since 1948 the State of Israel has failed to recognize Bedouin legal entitlement to their traditional lands in the Negev, and instead most all of the lands in the Negev are officially designated as under ownership by the State. Rather than adopt a land policy that recognizes the villages established by the Bedouin in the Negev, from the 1960s to the 1980s the Government planned and created seven towns in the Negev and relocated Bedouin from their villages to these urban areas. These planned towns are Rahat, Ar'ara BaNegev, Tel Sheva, Kuseifa, Segev Shalom, Lakiya and Hura. Even though the Government has committed significant resources toward Bedouin housing and delivery of essential services within the planned towns, the people in the Government-created towns reportedly rank at the bottom of all the indicators used by the State to measure social and economic wellbeing. Furthermore, the Bedouin have complained that they cannot continue to live in their traditional manner in these urban areas, given that raising crops or animals in the towns is not allowed.

3. Reportedly, out of approximately 155,000 Bedouin living in the Negev today, around half live in the recognized towns created by the Government and half live in 47 so-called "unrecognized villages". According to the information received, although officially unrecognized, the majority of these villages were established prior to the creation of the State of Israel, and virtually all were established prior to the creation of the Government-created towns. The unrecognized villages are denied all forms of basic infrastructure and are not allowed to build or develop in any way. Building permits may not be issued in unrecognized villages, resulting in Bedouin individuals being indicted continually for

"illegal" construction and in countless Bedouin homes being subject ot demolition orders. It is further alleged that, since the early 1990s, Bedouin people living in unrecognized villages throughout the Negev desert have experienced ongoing demolitions of their homes and villages by Israeli authorities. Most recently, during the course of 2010 and 2011, the Al-Arakib (also spelled El-Arkib) village has been destroyed on nine occasions, after having been rebuilt by villagers following each demolition. Reportedly, the residents were given no notice or warning about the demolitions to retrieve their personal possessions and valuable items like gas stoves and water tanks. Their sources of livelihood – olive trees, poultry and sheep – were also destroyed.

Observations of the Special Rapporteur

4. Having cross-checked the information received and transmitted on this situation, the Special Rapporteur considers that in material respects the information is sufficiently credible to indicate a pressing problem that requires attention by the Government of Israel. In an ongoing spirit of constructive dialogue and cooperation, the Special Rapporteur offers the following observations, which include a series of recommendations, in the hopes that they may assist the Government of Israel to address this issue.

Duty to protect Bedouin rights to lands and resources in the Negev

5. The Special Rapporteur considers there to be strong indications that Bedouin people have rights to certain areas of the Negev based on their longstanding land use and occupancy, under contemporary international standards. It is undisputed that the Bedouin have used and occupied lands within the Negev desert long before the establishment of the State of Israel and that they have continued through the present to inhabit the Negev, maintaining their culturally-distinctive land tenure and way of life. Yet, claims have persisted that the rights of the Bedouin to the lands they traditionally use and occupy in the Negev have not been adequately recognized and respected by the Government of Israel, either historically or today.

6. The land tenure situation of the Bedouin in the Negev has been identified as a matter of concern by both the Human Rights Committee, in its review of Israel's compliance with the International Covenant on Civil and Political Rights[1], and by the Committee on the Elimination of All Forms of Racial Discrimination (CERD), in its review of Israel's compliance with the Convention on the Elimination of All Forms of Racial Discrimination[2]. In particular, the Human Rights Committee has stated that Israel "should respect the Bedouin population's right to their ancestral land and their traditional livelihood based on agriculture" (CCPR/C/ISR/CO/3, para. 24) and similarly, CERD has recommended that Israel give "recognition of the rights of the Bedouins to own, develop, control and use their communal lands, territories and resources traditionally owned or otherwise inhabited or used by them" (CERD/C/ISR/CO/13, para. 25).

7. The Special Rapporteur notes that the United Nations Declaration on the Rights of Indigenous Peoples sheds further light on the obligations of the State in relation to the Bedouin. The difficulties of the Bedouin in maintaining their distinct cultural identities and connections to their traditional lands are akin to the problems faced by indigenous peoples worldwide. The specific relevance of the Declaration, as evident by its terms, and of the various United Nations programs and mechanisms concerning indigenous peoples, including the mandate of the Special Rapporteur on the rights of indigenous peoples, is to

[1] CCPR/C/ISR/CO/3, para. 24 (2010).
[2] CERD/C/ISR/CO/13, para. 25 (2007).

those groups indigenous to a territory that are in non-dominant positions and that have suffered and continue to suffer threats to their distinct identities and basic human rights, in ways not felt by dominant sectors of society.

8. Accordingly, with respect to Israel's apparent failure to recognize and respect the rights of Bedouin to lands and resources in the Negev, it bears mentioning that the United Nations Declaration on the Rights of Indigenous Peoples affirms:

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

9. Further, the Special Rapporteur is concerned that there appears to be no effective land claim procedure for the Bedouin people to invoke, prior to their removal from lands they occupy or to the demolition of the unrecognized villages. The Special Rapporteur notes that, as provided by the Declaration on the Rights of Indigenous Peoples, States have an affirmative duty to establish a process for identifying and protecting indigenous land rights, and this process should be carried out in cooperation with the indigenous peoples concerned[3]. Given the failure of the State to establish a mechanism through which Bedouin may seek to have any existing rights to lands and resources recognized, Bedouin people appear to have been defenseless in the face of threats to their rights to lands and resource, threats that have materialized into the destruction of unrecognized Bedouin villages and forced removal of Bedouin people.

Limitations on rights to lands and redress

10. Like other property interests, the property rights of indigenous peoples based on their traditional land and resource tenure may be subject to limitations for legitimate, non-discriminatory public purposes in accordance with law. The Special Rapporteur would welcome information from the State of Israel about its justifications for the severe limitations on Bedouin land rights that are imposed by the demolitions of Bedouin villages.

11. According to the information the Special Rapporteur has received from other sources, possible explanations for the Government's demolitions of unrecognized Bedouin villages include the need to concentrate the Bedouin people into recognized towns and settlements so as to assist in the delivery of services to them. Another reason identified for the demolitions is to clear the way for maintaining a Jewish presence throughout the Negev, in order to offset the high population growth of the Bedouin, which is one of the highest in the world. With respect to the first of these possible justifications, there are questions regarding the non-discriminatory application of this policy, since according to the

[3] Article 27 of the Declaration affirms that "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process".

information received Jewish settlements in the Negev are provided with essential services while Bedouin settlements of comparable sizes and populations are not. The second of these possible justifications – assisting in maintaining a Jewish presence in the Negev in order to offset the high population growth of the Bedouin – is racially discriminatory on its face, and thus, even if it were established by law, could not count as a legitimate limitation on Bedouin land rights that comports with relevant international standards.

12. The Special Rapporteur further notes that, while in general, removals of people from their traditional lands have serious implications for a wide range of human rights, these implications are greater for groups like the Bedouin, who hold bonds of deep historical and cultural significance to the lands in which they live. In this context, consent is a precondition for any forced removal according to article 10 of the United Nations Declaration, which states that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return".

13. The Special Rapporteur has been informed that some of the past relocations of Bedouin from unrecognized villages to urban townships were, in some instances, carried out in consultation with and with the consent of the affected Bedouin people. However, according to the information received, which the Special Rapporteur finds to be credible, there have been several more recent cases, including the case of the Al-Arakib village, in which consent of the affected Bedouin was clearly not obtained prior to the demolition of their village.

14. In any case, even if, after careful analysis bearing in mind the above standards, restriction of the rights to land and resources of Bedouin is considered an option, these restrictions should only take place with adequate mitigation measures and, in the case of any removals, with the agreement of the affected Bedouin within a participatory, consensus-building process, and the opportunity to return to their traditional lands. In this connection, article 28 of the Declaration affirms the right of indigenous peoples "to redress, which can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent", and "[u]nless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress".

15. In the cases that have been brought to the attention of the Special Rapporteur, including the case of Al-Arakib, it is alleged that no alternative lands over which the Bedouin may continue their traditional ways of life have been set aside and no monetary compensation for the removals and the land loss has been provided. Moreover, a number of reports indicate that in the course of the forced removals, Bedouin have suffered the destruction of personal belongings and livestock, with no compensation.

Recommendations

16. In light of the foregoing the Special Rapporteur would like to make the following recommendations to the Government of Israel:

17. The Government should ensure that all laws and administrative practices related to lands and development align with international standards concerning rights of indigenous people to lands, territories and resources. To this end, the Government should undertake a comprehensive review of its land and development policies that affect Bedouin people living in the Negev, giving due attention to the recommendations in relevant reports of the

Human Rights Committee and the Committee on the Elimination of All Forms of Racial Discrimination. As part of this review, Israel should establish a mechanism to identify and protect the lands in the Negev over which Bedouin people have legal entitlement, in accordance with relevant international standards.

18. Israel should immediately cease to carry out any further demolitions of Bedouin villages in the Negev or any forced relocations of Bedouin from unrecognized villages to recognized townships, unless in consultation with affected Bedouin and pursuant to their free, prior and informed consent.

19. Israel should establish an adequate mechanism under which affected Bedouin can apply to receive redress for any restrictions to or infringements of their rights to lands and resources, including such restrictions or infringements resulting from demolitions and evictions carried out. Redress should include comparable alternative lands and monetary compensation for lands, resources and other property that have been lost, and the State should also provide the option of the return of groups to their traditional lands, at a future date, if possible and if they so desire.

20. Israel should ensure the delivery of essential services to Bedouin people, both within and outside of the recognized towns. In this connection, the Special Rapporteur supports and reiterates the recommendation of the Human Rights Committee that Israel should "guarantee the Bedouin population's access to health structures, education, water and electricity, irrespective of their whereabouts on the territory of the State party" [(CCPR/C/ISR/CO/3, para. 24 (2010)].

21. The Government should embrace a long-term vision for social and economic development of the Negev, including in the unrecognized Bedouin villages, bearing in mind the historical and cultural importance of these villages to the Bedouin and to the society at large. This long-term vision for development of the Negev should enable Bedouin to become active participants in and direct beneficiaries of any development initiatives affecting the lands the Bedouin traditionally use and occupy within the Negev.

22. These observations and recommendations represent only an initial assessment of this situation, and the Special Rapporteur would welcome the opportunity to maintain a continued dialogue with the Government of Israel in this regard. Therefore, the Special Rapporteur would like to reiterate his interest in carrying out an on-site visit to Israel to examine in greater detail the situation of the Bedouin in the Negev, in accordance with my mandate from the Human Rights Council to "examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples […] and to identify, exchange and promote best practices" (HRC Res. 15/14).

Response of the Government of Israel

23. In a letter dated 15 August 2011, the Government of Israel responded to the issues raised by the Special Rapporteur. The response was sent after the cut-off date for publication of government responses in the joint communications report of Special Procedures mandate holders. Therefore, the complete text of the letter will be available in the next joint report. With this in mind, the Special Rapporteur summarizes here the Government's response.

According to the Government:

- The State of Israel does not accept the classification of its Bedouin citizens as an indigenous people. Historically, Bedouin tribes arrived to the Negev area late in the Ottoman era, mainly from Saudi Arabia and Egypt, to an already existing legal regime.

- Certain Bedouin families claim private ownership to vast lands, relying upon Bedouin custom. The land laws of the State of Israel, as developed from the Ottoman and British laws that preceded them do not recognize Bedouin custom as a source for private land rights. The area in question includes thousands of dunams, situated between Rahat and Beer Sheva. This is State land ("mawat") according to Ottoman law, which was adopted during the British mandatory period and then absorbed into the laws of the State of Israel. As in other countries under the Ottoman and later British rule, private land transactions and claims of private ownership were subject to approval, acknowledgement and registration by government authorities. The Bedouins ignored these laws, for a variety of reasons, including economic considerations and a reluctance for making tax payments. Since the 1950s, the land has been held by Israel's Development Authority and the Israel Lands Administration.
- After the foundation of the State of Israel, some areas of the Negev region were expropriated for housing, security and development needs, and have since been considered as public domain. The expropriated lands remain used for their initial stated purposes including housing and agriculture. Bedouin claims regarding land ownership were collected by Israel in the 1970s as part of a legal procedure that was carried out by the State. Unlike in other regions and despite a lack of legal documentation for Bedouins claims, the State has tried to settle claims beyond the letter of the law, offering compensation and alternative land plots in state organized localities. This policy accompanied the transition of the Bedouin society over the years from semi-nomadic to permanent housing. The nomadic lifestyle, as was practiced in the last century, no long exists, and does not seem to suit the current needs of the community.
- The so-called El-Arkib village was simply an act of squatting on state owned land. The individuals never had ownership over this land. In the early 2000s, the Israel Lands Administration lawfully evicted the Bedouin families, but many individuals returned to the area without permission. This started a series of legal proceedings, held in three instances in including the Supreme Court, all of which ordered the Bedouin families to leave the area. The Israel Lands Administration continued to evict the families and they continued to return. Israel also offered the Bedouin families alternate agricultural lands at symbolic rates, but they refused and continued their illegal actions.
- Israel has a long-existing policy of offering alternative living arrangements for those who live outside established localities. The State of Israel allocated a significant budget to offer constructive solutions to the housing, services and infrastructure needs of the Bedouin community. Further, Israel plans to build new localities suitable for the lifestyle and occupations of the Bedouin community.
- The issue of the Bedouin settlement was recently examined by an independent public commission chaired by former Supreme Court Justice Eliezer Goldberg. The committee's report, submitted in 2008, contained a range of options, particularly from its Bedouin representatives. At the time of the submission of the report, the government appointed an implementation team for the report, which is scheduled to present its conclusions in the near future. The Goldberg Report does not envisage to give land to the Bedouins in the area taken over by the squatters and does not propose to establish a town at the site. The report emphasizes the need to stop the illegal construction in the Negev immediately, and it charges the authorities with vigorous enforcement of the law against the illegal construction.

Further observations by the Special Rapporteur

24. The Special Rapporteur thanks the Government of Israel for its response of 15 August 2011, although it comes well after the expiration of the time within which the Special Rapportuer had asked for responses to his earlier communications. The Special Rapporteur asked for a response to his initial communication of 1 February 2011 within 60 days, and he invited submission by 18 July 2011 of any comments the Government may have to his above observations, which were transmitted to the Government on 16 June 2011. Nonetheless, the Special Rapporteur welcomes the Government's response, and he would like to comment on it as follows.

25. First, the Special Rapportuer acknowledges the position of the State of Israel that it does not accept the classification of its Bedouin citizens as an indigenous people given that Bedouin tribes arrived to the Negev area late in the Ottoman era, mainly from Saudi Arabia and Egypt, to an already existing legal regime. The Special Rapporteur notes, however, the longstanding presence of Bedouin people throughout a geographic region that includes Israel, and observes that in many respects, the Bedouin people share in the characteristics of indigenous peoples worldwide, including a connection to lands and the maintenance of cultural traditions that are distinct from those of majority populations. Further, the grievances of the Bedouin, stemming from their distinct cultural identities and their connection to their traditional lands, can be identified as representing the types of problems to which the international human rights regime related to indigenous peoples has been designed to respond. Thus, the Special Rapporteur considers that the concerns expressed by members of the Bedouin people are of relevance to his mandate and fall within the ambit of concern of the principles contained in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.

26. In addition, the Special Rapporteur cannot avoid making principled assessments about the scope of his mandate in relation to particular groups in the course of addressing human rights concerns that are brought to his attention. In this connection, consistent with the terms of his mandate, the Special Rapporteur cannot simply accept without independent inquiry general assertions that particular groups are not within his mandate. Nor does he consider that the question of whether or not a particular group is indigenous and related considerations can be left entirely to the subjective determination of States. The very human rights principles that undergird international concern for indigenous peoples, and an understanding about the context in which indigenous issues arise in connection with those principles, instead must guide assessments of this type. The Special Rapporteur hopes that the Government of Israel will reconsider its position in this regard and that, in any event, it will work diligently toward ensuring full and adequate responses to the human rights issues raised regarding the situation of the Bedouin people in the Negev.

27. Second, the Special Rapporteur would like to respond to Israel's position that Bedouin people do not have customary rights to lands in the Negev given that the land laws of the State of Israel, as developed from the Ottoman and British laws that preceded them, do not recognize Bedouin custom as a source of private land rights. In the view of the Special Rapporteur, such a position, which is based in colonial era laws and policies, should be reviewed. Far from providing a justification for the current failure to recognize indigenous peoples' land rights based on their customs, the historical denial of these rights and the dispossession of indigenous peoples from their traditional lands are acts that are now understood to be inconsistent with international human rights standards. In this regard, the United Nations Declaration on the Rights of Indigenous Peoples specifically requires that States must provide "redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed

consent" (article 28). Finally, the Special Rapporteur does recognize the need for an orderly administration of land and a respect for the rule of law. However, legal and administrative policies related to land must also be consistent with international human rights standards and accordingly must also be adjusted where they fall short of those standards.

28. The Special Rapporteur reaffirms the recommendations made in the above observations, and he will continue to monitor the situation of the Bedouin in the Negev as appropriate.

Annex VII

Malaysia: Situation of the Long Teran Kanan village and native customary rights in Sarawak

MYS 3/2011

1. In a communication of 18 February 2011, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, together with the Special Rapporteur on the Right to Food, Olivier de Schutter, transmitted to the Government of Malaysia information they received related to the situation of the Long Teran Kanan community and the alleged failure of the Government to recognize and respect native customary rights in Sarawak and, consequently, the infringement of a range of human rights.

2. This communication took place alongside the Special Rapporteur's ongoing communications with the Government of Malaysia regarding a potential visit to the country. On 4 February 2011, the Special Rapporteur wrote the Government expressing his interest in carrying out a visit to the country. On 24 May 2011, he sent a follow-up letter describing the specific issues he be interested in examining during such a visit. As the Special Rapporteur noted in that letter, he would be interested in looking at issues related to land and development affecting indigenous peoples, and examine potential ways for harmonizing competing interests in this connection, in accordance with relevant international human rights standards related to indigenous peoples.

3. Although as of time this report was finalized the Special Rapporteur had not received a definitive response to his request for a visit, the Government did respond to the communication of 18 February 2011. The Government submitted its response by a note dated 15 July 2011. The full text of this note and the Special Rapporteur's communication to which it responds can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council.

4. Prior to receiving the response of the Government of Malaysia of 15 July 2011, and in the absence of a response to his communication of 18 February 2011 within 60 days as requested, the Special Rapporteur developed observations on the situation, which he transmitted to the Government on 29 June 2011. In its response of 15 July 2011 the Government did not specifically address the observations transmitted on 29 June 2011, but rather directed its comments at the Special Rapporteur's earlier communication of 18 February 2011. The Special Rapporteur would like to thank the Government of Malaysia for its response and for the clarifications it made, especially in relation to the case of the Long Teran Kanan community. Nonetheless, the Special Rapporteur notes that the observations he transmitted to the Government on 29 June 2011 continue to be relevant, and he reiterates those observations below, with some modifications made in light of the Government's response. By way of background, the Special Rapporteur first provides summaries of the information and allegations received in this matter and of the Government's response.

Summary of information received and transmitted to the Government on 18 February 2011

5. According to the information received, the Kayan indigenous community of the Long Teran Kanan village in Tinjar, Miri, in the state of Sarawak, has been involved in a legal dispute over its land for the past 12 years, which resulted in the Miri High Court

ruling in favour of the community on 31 March 2010. The Special Rapporteur understands that, in its decision, the Court affirmed the village's "native customary rights over their native customary lands" and held that the provisional leases issued within the area by the Sarawak Government to the Land Custody Development Authority and IOI Pelita Plantation Sdn. Bhd., all of whom were named as defendants in the case, were null and void. The Court further found that the rights of the Long Teran Kanan community under Article 5 (right to life) and Article 13 (right to property) of the Federal Constitution of Malaysia had been violated.

6. Nevertheless, IOI Pelita Plantation Sdn. Bhd. has reportedly appealed the judgment and has allegedly not respected the Court order in the interim, continuing palm oil operations in the Long Teran Kanan community. As a result of the continued presence of IOI Pelita Plantation in the area, community members reportedly have limited to no access to the lands that they traditional have used for agriculture and other subsistence activities. Allegedly, the village's crops have been bulldozed and planted with oil palms, destroying the Kayan people's traditional livelihoods and forcing them to purchase food, medicine and wood that they previously collected from their community lands. Moreover, most of the communitiy's former water catchment area has been cleared and planted with oil palms by the company, thereby depleting available water sources.

7. Allegations have also been raised regarding the implementation of the Government's "New Concept" policy announced in 1994, under which native customary communities are to receive 30 per cent of equity in development projects in exchange for a 60-year lease on their lands. Reportedly, native customary communities in Sarawak have not received the benefits to which they are entitled. Moreover, the manner in which communities' consent has been obtained for the transfer of land for various development activies in Sarawak has reportedly been problematic. For example, in a number of cases, agreement for surrender of land and native customary rights has allegedly been obtained by only the village chief signing an agreement with companies, without the knowedge of the broader community.

8. The Special Rapporteur has been informed that the case of the Kayan indigenous community of the Long Teran Kanan village is emblematic of the over 200 cases currently before the Sarawak courts relating to indigenous communities' ability to exercise their native customary right over their lands, upon which they depend for fishing, hunting or farming, and which are essential to their cultural survival. Despite the fact that the courts of Malaysia have upheld native peoples' customary right to land under the Constitution of Malaysia and the common law on several occasions, the Government of Sarawak has allegedly failed to implement these decisions and has failed to respect indigenous communities' customary rights to land in other cases.

Summary of response of the Government of Malaysia of 15 July 2011

9. With respect to the Long Teran Kenan community, the Government noted that the information received by the Special Rapporteurs was not entirely accurate. The Government reported that, while the High Court of Miri did affirm that the Long Teran Kanan community has native customary rights over the area in dispute, it also held that it would not be practical to ask the government of the state of Sarawak to cancel the leases that have been issued to IOI Pelita Plantation. Thus, the court granted the Long Teran Kanan damages instead. The Government reported that on 28 April 2010, both IOI Pelita Plantation and the state of Sarawak appealed the case to the court of appeal. The court of appeal had not yet heard the matter. Furthermore, on 22 March 2011 the High Court of Miri granted an injunction against the Long Teran Kanan community, restraining it from preventing the IOI Pelita Plantation from entering the concession area and from carrying out its palm oil activities.

10. The Government response also addressed issues related to consultation and consent regarding development activities within native customary lands in Sarawak and issues related to the sharing of benefits derived from those activities. Malaysia refuted the allegation that a native customary community's rights could be relinquished by the signature of one member of the community. The Government also clarified that only those native customary communities wishing to participate in the New Concept scheme in Sarawak are required to do so. Further, the Government refuted the allegation that indigenous peoples have been denied benefits under the New Concept scheme. Native customary landowners participating in the New Concept scheme have derived both financial benefits and benefits such as improved roads and heightened access to hospitals and schools.

11. Malaysia reported that both the Federal Constitution and the laws of Sarawak prohibit the compulsory acquisition or use of the land without compensation. Finally, the Government concluded by affirming that it has taken measures to give due respect to the judicial judgments in court cases involving indigenous communities and their native customary rights over land under the Federal Constitution of Malaysia, the laws of the state of Sarawak and other laws.

Observations of the Special Rapporteur

12. Malaysia should be recognized for its longstanding legal protection of native customary rights to land, both by statute, including the Sarawak Land Code, and in jurisprudence of Malaysia courts.[1] In the view of the Special Rapporteur, this legal framework, in particular the jurisprudence of Malaysia courts, is to a large extent in line with Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly in September 2007, with an affirmative vote by Malaysia, and which states:

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

13. Yet, from the information the Special Rapporteur has received regarding the situation of the Long Teran Kanan community and in the state of Sarawak in general, the Special Rapporteur observes that it is not uncommon for the protection of native customary rights to give way to competing interests over those same lands, including in relation to natural resourse extraction projects, especially forestry and palm oil activities. Further, it appears that, too often, political forces seek to undermine protections of native customary lands, in many cases for personal or political motives.

[1] See, e.g., *Adong bin Kuwau v. Kerajaan Negeri Johor* [1997] 1 MLJ 418; *Kerajaan Negri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158; and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

14. In general, the information that the Special Rapporteur has received also indicates that there is not an adequate mechanism of consultation with indigenous peoples affected by major development projects. According to numerous reports, with regard to many such projects, consultations have not taken place directly with the affected indigenous peoples through their own representative institutions, prior to approval of the projects and with the objective of achieving informed consent, as required the Declaration on the Rights of Indigenous Peoples (Arts. 19, 32.2).

15. As highlighted in the case of the Long Teran Kanan village, adding to these challenges with respect to native customary rights in Sarawak is the apparent absence of adequate mechanism of participation of indigenous peoples in the design and implementation of the development initiatives, the absence of adequate mitigation measures that take into account indigenous environmental and cultural concerns, and the absence of equitable sharing in the benefits of the development projects. The Special Rapporteur would like to note that Article 32 of the Declaration, with its call for the free prior and informed consent of indigenous peoples and measures of redress, provides an important template for avoiding these problems and for the possibility of such economic and infrastructure development projects to not just avoid harm to indigenous peoples but to advance their own development interests along with those of the larger society.

16. The Special Rappoteur understands that an in-depth inquiry into the situation of native customary rights to land, including the situation in Sarawak, is currently being undertaken by the Human Rights Commission of Malaysia (SUHAKAM). The Special Rapporteur expects that this study will also include a concerted investigation of the practices of government entities at all levels in issuing concessions for natural resource extraction projects in lands over which indigenous communities have native customary rights, with a view towards documenting potential irregularities in these practices and analyzing their compliance with national and international standards.

17. The Special Rapporteur welcomes this initiative by SUHAKAM and belives that it will be an important point of reference for the future task of fully harmonizing government laws, policies and initiatives for economic development with those that provide recognition and protection of the land and resource rights, and related rights, of indigenous peoples. The Special Rapporteur looks forward to examining the results of SUHAKAM's inquiry, and would like to offer assistance to the Government of Malaysia in connection with this process and future processes, if it would be deemed useful.

Annex VIII

México: Situación del supuesto otorgamiento de concesiones mineras en la región de Wirikuta, Real de Catorce, San Luis Potosí, donde se encuentran sitios sagrados del pueblo wixárika (huichol)

MEX 8/2011

1. El 26 de abril de 2011, el Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, llamó la atención al Gobierno de México sobre información recibida en relación con el supuesto otorgamiento de concesiones mineras en la región de wirikuta, Real de Catorce, San Luis Potosí, donde se encuentran sitios sagrados del pueblo wixárika (Huichol). Al no haber recibido una respuesta dentro de 60 días tal como había solicitado, el Relator Especial envió una segunda comunicación, con fecha de 7 de julio de 2011, en la que transmitió observaciones con su evaluación preliminar de la situación. Posteriormente, mediante su nota del 19 de julio de 2011, el Gobierno de México respondió a la información y alegaciones contenidas en la carta inicial del Relator Especial. Las observaciones transmitidas al Gobierno, con modificaciones hechas en vista de su respuesta, se encuentran abajo, después de resumes de la información recibida sobre el caso y la respuesta del Gobierno. Los textos completos de la comunicación del Relator Especial del 26 de abril de 2011 y la respuesta del Gobierno del 19 de julio de 2011 son accesibles en la versión electrónica del informe conjunto de comunicaciones de los titulares de mandatos de los procedimientos especiales (A/HRC/18/51), disponible en el sitio web del Consejo de Derechos Humanos.

Resumen de la información recibida y transmitida al Gobierno el 26 de abril de 2011

2. Según la información recibida, el Gobierno de México habría otorgado 22 concesiones mineras para la exploración de plata adquiridas por la empresa canadiense First Majestic Silver Corp., sobre un área de 6.327 hectáreas en la zona de Wirikuta, Real de Catorce, estado de San Luis Potosí. Se había alegado que estas concesiones fueron otorgadas por la Secretaría del Medioambiente y Recursos Naturales (SEMARNAT) y la Procuraduría Federal de Protección al Ambiente (PROFEPA), sin consultar previamente al pueblo indígena wixárika (huichol) el cual considera como sagrado el área donde se encuentran las concesiones. El área de las concesiones abarca una importante ruta de peregrinación que ha sido utilizada por los wixárika por más de mil años, en donde se encuentran numerosos sitios sagrados con alto significado cultural y religioso, se realizan ceremonias, se encuentran enterrados sus antepasados, y en donde también recolectan el híkuri (o peyote) para uso ceremonial. Se había alegado que de las 6.327 hectáreas que abarcan las concesiones de First Majestic, el 68.92 por ciento (4.107 hectáreas) se encuentra dentro un área protegida denominada Reserva Ecológica y Cultural Wirikuta, establecida en 1994 para proteger la ruta de la peregrinación wixárika, sus sitios sagrados en la región de Real de Catorce, y el ecosistema de la zona.

Resumen de la repuesta del Gobierno del 19 de julio de 2011

3. En su respuesta a la información y alegaciones resumidas arriba, el Gobierno afirmó que el “Plan de Manejo del Área Natural Protegida bajo la modalidad de Sitio Sagrado

Natural de Huiricuta y la Ruta Histórico Cultural del pueblo Huichol, en los Municipios de Catorce, Villa de la Paz, Matehuala, Villa de Guadalupe, Charcas y Villa de Ramos del Estado de San Luis Potosí" fue elaborado después de amplias consultas con el pueblo indígena huichol y comunidades no-indígenas de la zona, durante 2007 y 2008. El Gobierno notó que, de las 35 concesiones existentes para la explotación minera en la zona, 19 fueron otorgadas antes, 9 fueron otorgadas durante y 7 fueron otorgadas después de la publicación del Plan de Manejo en 2008. El Gobierno resaltó que el Plan de Manejo crea sub-zonas de "aprovechamiento especial" de la reserva, en las que se permiten las actividades minero-metalúrgica. Además, en su respuesta, el Gobierno describió el proceso de otorgamiento de concesiones bajo el artículo 11 de la Ley de Minería y bajo los artículos 16 a 18 y 22 a 28 del reglamento de la Ley de Minería, los cuales fueron debidamente acatados por las empresas involucradas.

4. En cuanto a la información que se ha proporcionado al pueblo wixárika sobre las actividades mineras de First Majestic en la región de Wirikuta y sus efectos, el Gobierno notó que el 13 de diciembre de 2010, en el Municipio de Real de Catorce, el representante de la empresa minera expuso información sobre el proyecto durante la sesión ordinaria del Consejo de Administración del Sitio Sagrado Natural de Wirikuta y la Ruta Histórico Cultural del pueblo Wixárika. Según el Gobierno, entre otra información proporcionada, la empresa especificó que la explotación de las minas sería de manera subterránea y no a cielo abierto y se aseguró que ninguno de los tres sitios sagrados de los Wixáritari será afectado por la explotación. El presidente del Consejo de Administración sugirió a los huicholes que se llevaran esta primera información de la minera y la consultaran con sus comunidades al respecto.

5. El Gobierno señaló que la empresa no ha realizado actividades en la zona de Wirikuta, y que la empresa todavía no cuenta con todos los permisos administrativos necesarios para tal fin. Como parte del procedimiento de procuración de los permisos necesarios para el inicio de actividades mineras, varias leyes y reglamentos en México y en el estado de San Luis Potosí requieren el desarrollo de participación ciudadana y la consulta con pueblos indígenas afectados. En particular, el estado de San Luis Potosí cuenta con una Ley de Consulta Indígena, que establece en su artículo 9 que el estado tiene la obligación de consultar con los pueblos indígenas "el otorgamiento de concesiones, contratos, y demás instrumentos jurídicos que afectan el uso y disfrute de sus tierras o recursos naturales". Asimismo, todavía está pendiente la realización de los estudios de impacto ambiental, y la procuración de permisos ambientales, en relación con los proyectos mineros en la zona de Wirikuta.

6. Además, el Gobierno informó que el día 27 de abril de 2011, se llevó a cabo una reunión con participación de los representantes de diversas instituciones federales y locales, durante el cual se llegó a un consenso de brindar todo el apoyo institucional necesario para la protección de los lugares sagrados de Wirikuta en el estado de San Luis Potosí. El 3 de mayo de 2011, según el Gobierno, los representantes del pueblo wixárika aceptaron el ofrecimiento institucional para la protección de sus lugares sagrados. Finalmente, el Gobierno hizo un resumen del marco jurídico mexicano respecto a las concesiones mineras.

7. Junto con su respuesta, el Gobierno transmitió al Relator Especial una copia de la "Ley de Consulta Indígena para el Estado y Municipios de San Luis Potosí", así como varios otros documentos relacionados con el caso.

Observaciones del Relator Especial

8. El Relator Especial quisiera expresar su agradecimiento al Gobierno de México por su respuesta detallada y por la información proporcionada. A continuación, el Relator

Especial presenta las observaciones que fueron transmitidas al Gobierno el 7 de julio de 2011, con modificaciones que toman en cuenta la respuesta del Gobierno.

9. La creación de la Reserva Ecológica y Cultural Wirikuta para proteger la ruta de la peregrinación wixárika y sus sitios sagrados refleja el reconocimiento por el Gobierno de México de la importancia de esta zona para la cultura wixárika, y de la necesidad de preservar el ecosistema de la zona. El Relator Especial considera, de hecho, que la Reserva Ecológica y Cultural Wirikuta pudiera representar un modelo ejemplar para garantizar el derecho de los pueblos indígenas "a mantener y fortalecer su propia relación espiritual con las tierras … que tradicionalmente han poseído u ocupado y utilizado de otra forma y a asumir las responsabilidades que a ese respecto les incumben para con las generaciones venideras", de acuerdo con el artículo 25 de la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas.

10. A pesar de lo anterior, la respuesta del Gobierno de México indica que el Estado todavía no ha elaborado un estudio sobre los efectos de las propuestas actividades mineras en Real de Catorce sobre la Reserva Ecológica y Cultural Wirikuta, aunque un porcentaje significativo del área concesionada está dentro de la reserva. En este sentido, es necesario, de acuerdo con el artículo 7 del Convenio No. 169 de la Organización Internacional de Trabajo sobre pueblos indígenas y tribales en países independientes, ratificado por México en 1991, que el Estado efectúe "estudios, en cooperación con los pueblos interesados, a fin de evaluar la incidencia social, espiritual y cultural y sobre el medio ambiente" de las concesiones mineras otorgadas en la Reserva Ecológica y Cultural Wirikuta.

11. Asimismo, el Relator Especial considera que es sumamente importante mantener continuamente espacios de acercamiento y diálogo entre los representantes del Gobierno, la empresa First Majestic y el pueblo wixárika, en el que los pueblos indígenas puedan recibir información objetiva y completa sobre todos los aspectos del proyecto que les podría afectar, y donde puedan aclarar y comunicar al Estado y a la empresa sus preocupaciones al respecto. Dentro de estos espacios, se debe buscar formas de evitar cualquier efecto perjudicial por parte de las posibles actividades de exploración y explotación minera sobre el área sagrada de los wixárika.

12. En esta conexión, el Relator Especial toma nota de la reunión llevada a cabo por la empresa el 13 de diciembre de 2010 para proporcionar información sobre el proyecto minero al Consejo de Administración del Sitio Sagrado Natural de Wirikuta y la Ruta Histórico Cultural del pueblo Wixárika. Además, el Relator Especial agradece la información del Gobierno sobre la intención de llevar a cabo consultas con el pueblo wixárika como parte del procedimiento de procuración de los permisos pendientes de explotación minera.

13. El Relator Especial hace recordar al Estado lo dispuesto en el artículo 19 de la Declaración sobre los derechos de los pueblos indígenas, según el cual el diálogo con el pueblo wixárika sobre las actividades mineras que les puedan afectar debería sostenerse con el objetivo de "obtener su consentimiento libre, previo e informado". El Relator Especial espera que el Gobierno pudiera coincidir en la opinión de que, si no se lograra el consentimiento de los wixárika al respecto, y fuese determinado que las actividades propuestas no pudieran desarrollarse de manera compatible con el conjunto los derechos relevantes del pueblo wixárika, no se debería avanzar con las actividades mineras.

14. Al respecto se debería prestar especial atención a su derecho a mantener y desarrollar sus creencias religiosas de acuerdo a la Declaración sobre los derechos de los pueblos indígenas, la cual dispone en su artículo 18 que "Los pueblos indígenas tienen derecho a manifestar, practicar, desarrollar y enseñar sus tradiciones, costumbres y ceremonias espirituales y religiosas…" Además, el artículo 25 de la Declaración afirma el derecho de los pueblos indígenas "a mantener y fortalecer su propia relación espiritual con

las tierras, territorios, aguas, mares costeros y otros recursos que tradicionalmente han poseído u ocupado y utilizado de otra forma y a asumir las responsabilidades que a ese respecto les incumben para con las generaciones venideras".

15. Es la intención del Relator Especial seguir monitoreando esta situación y quisiera reiterar su deseo de continuar manteniendo un diálogo constructivo con el Gobierno de México en este sentido. Quisiera asimismo expresar su disponibilidad de asistir a las partes en la búsqueda de medidas para evitar violaciones de los derechos de los pueblos indígenas en este caso, incluyendo a través de una visita *in situ* a la zona, si el Gobierno y las otras partes involucradas lo estimaran pertinente.

Annex IX

Thailand: Exhumation of Hmong Graves at Wat Tham Krabok

THA 8/2010

1. In a communication of 17 December 2010, the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, called the attention of the Government of Thailand to information received relating to the situation of the exhumation of Hmong graves at Wat Tham Krabok which occurred in 2005. This matter has been the subject of ongoing communications with the Government of Thailand, as reflected in the Special Rapporteur's 2008 and 2009 annual reports to the Human Rights Council (A/HRC/9/9/Add.1, paras. 473-479; and A/HRC/12/34/Add.1, paras. 404-429). In the absence of a response to his communication of 17 December 2010 within 60 days as requested, the Special Rapporteur sent another letter, dated 16 June 2011, in which he reiterated his concerns about the situation and again invited the Government to respond to specific recommendations. Subsequently, by a note dated 11 July 2011, the Government of Thailand responded to the Special Rapporteur's communications. The full texts of the Special Rapporteur's communication of 17 December 2010 and the Government's response can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council.

The Special Rapporteur's follow-up to earlier communications about the situation

2. The Special Rapporteur's letters of 17 December 2010 and 16 June 2010 follow up to earlier communications about the exhumation of Hmong graves at Wat Tham Krabok in 2005 and resulting grievances of Hmong relatives of the deceased. As expressed in previous communications, questions exist about the reasons for the exhumation of Hmong graves that occurred at Wat Tham Krabok as well as the level of the involvement of the Government of Thailand in the exhumations. In addition, ongoing information has been received about the continued harm felt by the relatives of the deceased and the absence of any action by the Government to remedy that harm.

3. According to information received, Hmong groups have repeatedly sent delegations to dialogue with Government officials in order to achieve a resolution of the pending issues concerning the return of exhumed bodies. The relatives of the deceased Hmong and members of the Hmong communities worldwide have made specific requests to the Government of Thailand and Thai foundations in possession of the remains of the exhumed bodies for what they would consider to be an acceptable solution to their grievances.

These requests include that:

- The three Thai foundations (Phothi Phavan Songkhao, Buddha Dahma and Wat Thamkrabok) return three petrified bodies they are holding to the relatives of the deceased without cost;
- The three Thai foundations return the 691 bodies that were confirmed by the Thai Ministry of the Interior to have been exhumed, at no cost. This figure includes 211 bodies currently in Huilin Cemetery and another 480 bodies that were originally falsely reported to have been cremated;

- The Government of Thailand and the authorities of Wat Tham Krabok allow the reburial of the 691 exhumed bodies at the original temple site at no cost; and
- The Government of Thailand establishes a memorial park and a monument at Wat Tham Krabok to commemorate the Hmong buried there.

4. In his letters of 17 December 2010 and 16 June 2011 the Special Rapporteur referred to these requests and urged the Government to give them special consideration, within a process of dialogue with Hmong representatives aimed at resolving this situation.

Response of the Government of Thailand

5. In its response to the latest communications of the Special Rapporteur regarding the exhumation of Hmong graves in Wat Tham Krabok, the Government stated that, in principle, Thailand does not have any indigenous people. The Government went on to state, however, that given the importance Thailand attaches to cooperation with the special procedures of the Human Rights Council, it appreciates the ongoing efforts of the Special Rapporteur to enegage with the Royal Thai Government and his willingness to help in the resolution of the matter.

6. The Government stated that the facts and position of the Royal Thai Government have been explained in its previous Note No. 21010/497 dated 9 July 2008 and Note No. 52101/884 dated 17 December 2008. Summaries of these letters can be found in the Special Rapporteur's previous reports to the Human Rights Council on cases examined (A/HRC/9/9/Add.1, paras. 475-478; and A/HRC/12/34.Add.1, paras. 406, 407, 409). In its letter of 11 July 2011 the Government reiterated points it had made on those previous letters, specifically that:

- Laotian Hmongs had migrated from Lao People's Democratic Republic to Thailand only from 2003 and thus could not be considered as indigenous people. They were allowed to take refuge in Wat Tham Krabok, a Buddhist Monastery in Saraburi Province, only for humanitarian reasons.
- Under Thai law, the management of Buddhist monasteries is under the authority of an abbot. The Hmong buried their deceased relatives on the monastery grounds without any permission from the abbot or the administrative committee of Wat Tham Krabok.
- When the monastery decided to convert parts of its land into a place for various religious facilities, the relatives of those Hmong buried at Wat Tham Krabok were informed in advance of the necessity to relocate he graves from the monastery grounds. Some Hmong came to reclaim their relatives' bodies for relocation. Additionally, representatives of the Hmong community had given their consent to the monastery to proceed with the relocation.
- Consequently, unclaimed bodies were exhumed and provided with a public cremation ceremony with full respect of the deceased as well as consideration for their families. In accordance with Buddhist practices, this mass grave exhumation and cremation ceremony were accompanied by rituals to honor the deceased.

7. The Government further stated that, although there was no official involvement in the exhumation of Hmong graves in Wat Tham Krabok, in July 2008, the National Hmong Grave Desecration Committee (NHGDC) from the United States had a meeting with the government authority of Saraburi Province and later in August 2009, representatives of the NHGDC revisited Thailand to meet with Hmong peoples residing in various areas. The Government expressed its hope that these dialogues would serve to address the concerns expressed by the Hmong families.

Observations of the Special Rapporteur

8. The Special Rapporteur is grateful for the response provided by the Government of Thailand to previous communications. Notwithstanding the assertions by the Government that no indigenous peoples exist in Thailand and previous assertions by the Government that the Hmong that were present at Wat Tham Krabok were originally refugees from Laos, the Special Rapporteur notes the longstanding presence of Hmong people throughout southeast Asia, including Thailand, and observes that in many respects the Hmong share characteristics similar to indigenous peoples worldwide, including their maintenance of cultural and religious traditions that are distinct from those of the majority. Therefore, the concerns expressed by members of the affected Hmong people are of relevance to the Special Rapporteur's mandate and fall within the ambit of concern of the principles contained in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.

9. The Special Rapporteur would like to reiterate his recommendation that the Government of Thailand engage in a dialogue with the affected Hmong in order to resolve the situation, and takes note of the Government's information that it has held meetings with the National Hmong Grave Desecration towards this end. He again urges the Government to consider the proposals set out by the Hmong people, mindful of their cultural and spiritual views regarding their deceased with the view to restore a positive relationship with the Hmong. The Special Rapporteur will continue to monitor this situation as appropriate.

Annex X

United States of America: Situation of the Native Americans in relation to artificial snowmaking from recycled wastewater in the San Francisco Peaks

USA 1/2011

1. In a communication of 10 January 2011, the Special Rapporteur on the rights of indigenous peoples, James Anaya, called the attention of the Government of the United States of America to information received relating to the proposed use of recycled wastewater for a commercial ski operation the San Francisco Peaks (or the "Peaks"), a mountainous area that is sacred to several Native American tribes. The full text of this communication can be accessed from the electronic version of the joint communications report (A/HRC/18/51), which is available on the web site of the Human Rights Council. In his communication the Special Rapporteur requested a response within 60 days. He regrets that there is no record of a response in the files of the Office of the High Commissioner for Human Rights at the time of finalization of this report. In the absence of a response, the Special Rapporteur developed the observations below, which include an evaluation of the situation and recommendations to the Government of the United States. These observations were transmitted to the Government on 6 July 2011.

Background

2. The San Francisco Peaks are located north of the city of Flagstaff, Arizona within land that is administered by the United States Forest Service as part of the Coconino National Forest. According to information received, the Arizona Snowbowl Resort Limited Partnership ("Snowbowl") owns and operates a commercial ski operation in the western flank of the San Francisco Peaks, under a 777-acre special use permit issued by the Forest Service. In 2002 Snowbowl filed an application for expansion of its facilities, including a request for approval to make snow from treated sewage effluent. In February 2005, the Forest Service issued its Final Environmental Impact Statement and Record of Decision approving the proposed artificial snowmaking from recycled waste wastewater, the construction of a pipeline from Flagstaff to carry the treated effluent from Flagstaff and improvement of guest service facilities. Several Native American tribes and organizations have vigorously opposed the Forest Service's decision. To them, according to sources, the sacredness of the San Francisco Peaks depends on the purity of the water and plant life in the area, which allegedly will be contaminated if wastewater is introduced into the Peaks through the planned artificial snowmaking. However, their federal court lawsuit to challenge the approval of artificial snowmaking on, inter alia, religious freedom grounds was unsuccessful.[1]

Observations of the Special Rapporteur

3. On the basis of information he has received and gathered on this situation, which he considers to be in material respects undisputed, the Special Rapporteur offers the following

[1] See *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008), cert. denied, 129 S.Ct. 2763 (2009).

observations, in the hope that they will serve to promote appropriate action by the United States to address the human rights matters raised.

4. The extensive documentation by the Government and federal courts in relevant proceedings makes clear that the San Francisco Peaks are sacred to several Native American tribes, and that the presence of the ski operation and now the initiative to make artificial snow from recycled wastewater on the Peaks offend the religious beliefs and practices of members of these tribes. Apart from the provisions of domestic law that have been applied by the courts to examine this situation, international standards, including those based on human rights treaties to which the United States is a party to and the Declaration on the Rights of Indigenous Peoples, require adequate consultation and close scrutiny for any action that affects the sacred sites and religious practices of indigenous peoples. The United States should engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with these international standards in relation to the San Francisco Peaks and other sacred sites of Native Americans, and should take appropriate remedial action. In the paragraphs below, the Special Rapporteur elaborates upon these points.

The effects of the planned snowmaking on Native American religion

5. The Special Rapporteur is aware that the development of the Snowbowl ski area and the recent plans for expanding its facilities, including for artificial snowmaking with recycled wastewater, have proceeded with extensive examination and documentation by the Government and federal courts of the impacts on Native American culture and religion. Required environmental impact studies and the legal challenges to the federal permits for Snowbowl's expansion on the San Francisco Peaks have prompted this examination and documentation, which make abundantly clear the sacred character of the Peaks to the tribes, the affront on their religious beliefs and the tribes' opposition to the planned snowmaking.

6. The Final Environmental Impact Statement compiled by the U.S. Forest Service to assess the proposal for artificial snowmaking and other additions to Snowbowl's operations on the Peaks included the following observations:

> The San Francisco Peaks are sacred to at least 13 formally recognized tribes that are still actively using the Peaks in cultural, historic, and religious contexts. A central underlying concept to all tribes for whom the Peaks are especially important is the recognition that the San Francisco Peaks are a source of water in the form of rain, springs, and snow. It is believed that the Peaks were put there for the people and it is therefore the peoples' duty to protect it for the benefit of the world… [N]ine significant qualities… characterize the Peaks for the tribes. These qualities include:
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> - They are the abode of deities and other spirit beings.
> - They are the focus of prayers and songs whereby humans communicate with the supernatural.
> - They contain shrines and other places where ceremonies and prayers are performed.
> - They are the source of water.
> - They are the source of soil, plant, and animal resources that are used for ceremonial and traditional purposes.
> - They mark the boundaries of traditional or ancestral lands.
> - They form a calendar that is used to delineate and recognize the ceremonial season.

- They contain places that relate to legends and stories concerning the origins, clans, traditions, and ceremonies of various Southwestern tribes.
- They contain sites and places that are significant in the history and culture of various tribes.

Two examples of the cultural significance of the San Francisco Peaks are the Hopi and Navajo peoples' religious and spiritual connections to the Peaks, as discussed below.

Hopi

Hopi clans migrated through the San Francisco Peaks (called *Nuvatukyaovi*, "High Place of Snow"), made settlements nearby, and placed shrines on the Peaks. All of the religious ceremonies focus on *Nuvatukyaovi* and demonstrate the sacred relationship of the Peaks to the Hopi people. The history of clan migrations through the area continue to be related, discussed, and passed on from generation to generation. The Peaks contain clan and society shrines, and gathering areas for medicinal and religious use. Hopi religious leaders visit the Peaks annually. The San Francisco Peaks are the spiritual essence of what Hopis consider the most sacred landscapes in Hopi religion. They are the spiritual home of the *Katsinam*, significant religious beings that all Hopis believe in, and are therefore, sacred. The ceremonies associated with the Peaks, the plants and herbs gathered on the Peaks, and the shrines and ancestral dwellings located in the vicinity of the Peaks are of central importance to the religious beliefs and traditions that are the core of Hopi culture....

Navajo

The Navajo people believe that the Creator placed them on land between four sacred mountains: Blanca Peak in Colorado, Mount Taylor in New Mexico, the San Francisco Peaks in Arizona, and Hesperus Peak in Colorado. According to their own history, the Navajos have always lived between these mountains. Each of the four mountains is associated with a cardinal direction, symbolizing the boundaries of the Navajo homeland. For the Navajo, the Peaks are the sacred mountain of the west, *Doko'oo'sliid*, "Shining on Top," a key boundary marker and a place where medicine men collect soil for their medicine bundles and herbs for healing ceremonies. Navajo traditions tell that San Francisco Peak was adorned with *Diichilí*, Abalone Shell, Black Clouds, Male Rain, and all animals, besides being the home of *Haashch'éélt'i'í* (Talking God), *Naada'algaii 'Ashkii* (White Corn Boy), and *Naadá 'Altsoii 'At'ééd* (Yellow Corn Girl). The sacred name of the Peaks is *Diichilí Dzil* – (Abalone Shell Mountain). The Navajo people have been instructed by the Creator never to leave their sacred homeland. *Dook'o'osliid* and the other three sacred mountains are the source of curing powers. They are perceived as a single unit, such as the wall of a hogan, or as a particular time of a single day. *Dook'o'osliid* is seen as a wall made of abalone shell and stone, with mixed yellow and white bands....

Environmental Consequences

The 1975 Hopi Tribal Resolution noted that there are numerous medicinal herbs and other plants at several levels of the Peaks that are used to treat the ailments of the Hopi people. The Forest Service is unaware of any plants or other natural resource material used by the Hopi within the Snowbowl … area; however, the addition of new trails, increased parking, and the potential for additional annual visitation within the … area and the San Francisco Peak themselves causes concern among the Hopi and other tribes that their areas of traditional use would be impacted. Specifically,

> the Hopi make pilgrimages to shrines and use the Peaks for religious reasons such as gathering evergreens and herbs and delivering prayer feathers.
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> Although the reclaimed water proposed for use in snowmaking fully meets both the Federal and Arizona state water quality standards, it is believed that trace levels of unregulated residual constituents within reclaimed water (e.g., pathogens, pharmaceuticals, hormones, etc.) could negatively impact the spiritual and medicinal purity of resident flora on the Peaks. Several specific concerns have been raised about the impact of snowmaking on the spiritual values of the Peaks.
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> An additional concern is that some of the reclaimed water once passed through hospitals or mortuaries could carry the spirits of the dead with it. Those spirits, as part of the water draining from the Peaks, would then infiltrate plants, thus affecting their ritual purity.
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> From both a Hopi and Navajo perspective, any plants that would come into contact with reclaimed water would be contaminated for medicinal purposes, as well as for use in ceremonies needed to perpetuate their cultural values….
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> The Hopi believe that the *Katsinam* are responsible for moisture and that the installation of snowmaking technology within the SUP [special use permit] area would alter the natural processes of the San Francisco Peaks and the responsibilities of the *Katsinam*.
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> The Hopi, Navajo, and other tribes have existed in the region of the San Francisco Peaks for thousands of years and have developed their cultures and religious institutions around the natural and cultural landscape of the San Francisco Peaks. Traditions, responsibilities, and beliefs that delineate who they are as a people, and as a culture, are based on conducting ritual ceremonies they are obligated to perform as keepers of the land. These obligatory activities focus on the Peaks, which are a physical and spiritual microcosm of their cultures, beliefs, and values. Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes.[2]

7. The records of the proceedings in federal court litigation concerning Snowbowl's ski operations on the San Francisco Peaks reinforce the above assessment of the sacred character of the Peaks, and of the effects on Native American religion of the planned snowmaking and other modifications, on top of the effects of the existing ski facilities.[3] Even while holding that the Government's approval of the Snowbowl modifications did not violate federal law, the Ninth Circuit Court of Appeals, sitting en banc, acknowledged the sacred character of the San Francisco Peaks and that "[t]o the [tribes], the [presence of recycled wastewater] will desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain".[4]

8. Despite such acknowledgment, the federal appellate court held that this impact on religion is not of the kind that could lead to finding a violation of the federal Religious

[2] USDA Forest Service, Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement, Vol. 1 (2005), pp. 3-7 to 3-11, 3-16 to 3-18 (hereinafter "FEIS").

[3] See *Navajo Nation v. United States Forest Service*, 408 F. Supp. 2d 866 (D. Ariz., 2006), aff'd in part and rev'd in part, 479 F.3 1024 (9th Cir. 2008); aff'd on rehearing, 535 F.3d 1058 (9th Cir. 2008), cert. denied, 129 S.Ct. 2763 (2009); *Wilson v. Block*, 708 F.2d 735 (D.C. Court of Appeals, 1983), cert. denied 463 U.S. 958 (1983).

[4] *Navajo Nation v. United States Forest Service*, 535 F. 3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 129 S.Ct. 2763 (2009).

Freedom Restoration Act (RFRA). For the Ninth Circuit Court of Appeals, RFRA only protects against government action that actively coerces Native American religious practitioners into violating their religious beliefs or that penalizes their religious activity with loss or threat loss of government benefits. Along with finding the absence of such conditions, the court pointed to the lower court determination that in fact no plants or religious shrines would be physically affected by the snowmaking and that practitioners would continue to have access to the mountain, including the ski area, to conduct religious activities.[5] Neither the appellate nor lower court questioned, however, that for Native American religious practitioners from several tribes, snowmaking with recycled wastewater in Snowbowl would be a desecration of a sacred mountain, even if federal and state environmental standards are met and they continue to have access to the mountain along with skiers.

9. It is not the purpose of the Special Rapporteur to review or challenge the application of domestic law by the United States judicial system. Rather, the Special Rapporteur means to draw attention to the relevant international standards that bind the United States and that should guide action by Government actors, even when certain decisions may be permissible under domestic law. The Special Rapporteur respectfully reminds the United States that the judicial applications and interpretations of the legal protections for Native American religion available under domestic law do not pose any legal barrier to Government action in accordance with a higher standard.

The lack of indigenous agreement or consent to artificial snowmaking on a sacred mountain

10. In its Record of Decision to permit snowmaking from recycled wastewater and other modifications to the ski operation on the San Francisco Peaks, the United States Forest Service acknowledged that "[o]ver the years the tribes have continued to state their opposition to development at Snowbowl", as they did in 1979 when the Forest Service was considering the option of closing down the ski operation but decided instead to allow it to expand.[6] The Forest Service reported extensive consultations with the tribes about the most recent plans for Snowbowl enhancements. "In all 200 phone calls were made, 41 meetings were held, and 245 letters were sent to Tribal officials, tribal historic preservation offices, traditional tribal leaders/practitioners, and the general tribal public".[7]

11. The Forest Service confirms that "[a]s with the decision in 1979, the proposal to improve the facilities at the Snowbowl has been met with adamant opposition from the tribes, even though there have been changes in laws, improvements in working relationships and successes in working together on other projects …".[8] Despite this adamant opposition by the tribes based on their religious practices and beliefs, the Forest Service decided to approve the artificial snowmaking and other ski area modifications, bringing into question the United States' adherence to international standards to which it has expressed its commitment.

Article 19 of the Declaration on the Rights of Indigenous Peoples provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free

[5] See Ibid., pp. 1063, 1070.

[6] USDA Forest Service, Record of Decision – Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement and Forest Management Plan #21 (February 2005), p.3 (hereinafter "FEIS-Record of Decision").

[7] Ibid., p. 9.

[8] Ibid., p. 3.

prior and informed consent before adopting and implementing any legislative measure that affects them.

12. This standard of consultation and consent is a corollary of the right to self-determination and the cultural rights of minorities that are affirmed, respectively, in articles 1 and 27 of the International Covenant on Civil and Political Rights, as manifested by the jurisprudence of the Human Rights Committee.[9] Additionally, it is instrumental to implementing the principles of non-discrimination found in the International Convention on the Elimination of All Forms of Racial Discrimination, as instructed by the Committee on the Elimination of Racial Discrimination (CERD).[10] In its General Recommendation 23, CERD calls upon State parties to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent ...".[11]

13. Under the cited human rights treaties, to which the United States is a party, and the Declaration on the Rights of Indigenous Peoples, which the United States has endorsed, consultations should take place with the objective of achieving agreement or consent by indigenous peoples to decisions that may directly affect them in significant ways, such as decisions affecting their sacred sites. Simply providing indigenous peoples with information about a proposed decision and gathering and taking into account their points of view is not sufficient in this context. Consultation must occur through procedures of dialogue aimed at arriving at a consensus.[12]

14. It is far from clear that the consultations with the tribes about the artificial snowmaking and other ski area modifications were undertaken through procedures involving negotiations toward an agreed-upon outcome. It appears instead that the consultations were more in the nature of dissemination of information about the Snowbowl development plans and gathering of views about those plans, within a process of government decision making that did not depend on agreement or consent on the part of the tribes.[13] In any case, it is beyond question that the tribes have not agreed or consented to the Snowbowl modifications; indeed they have actively opposed them.

15. In the absence of consent by indigenous peoples to decisions that affect them, States should act with great caution. At a minimum, States should ensure that any such decision does not infringe indigenous peoples' internationally-protected collective or individual rights, including the right to maintain and practice religion in relation to sacred sites. It is

[9] See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34 (15 July 2009), paras. 40- 41 (hereinafter "2009 annual report of the Special Rapporteur").

[10] Ibid., para. 40.

[11] A/52/18, annex V at para. 4(d).

[12] For a discussion of the duty of States to consult with indigenous peoples affecting them, see 2009 annual report of the Special Rapporteur, supra, paras. 36-74.

[13] The Forest Service did develop a Memorandum of Agreement (MOA) related to adverse effects of the proposed ski area modifications, as a result of the nomination of the San Francisco Peaks for inclusion in the National Register of Historic Places, and it invited the tribes to sign the MOA as concurring parties. The Forest Service reported that four of the affected tribes did sign, while the others (including Navajo and Hopi) declined to do so or did not respond. FEIS-Record of Decision, pp. 26-27. The MOA does not embody or propose agreement to the ski area modifications but rather provides for a series of measures calculated to mitigate adverse effects of the development of the ski area and to protect the cultural values associated with the San Francisco Peaks. See FEIS, Appendix D. While most of the affected tribes did not sign the MOA, it is not clear that any of them were involved in developing its terms, other than indirectly through the consultations reported by the Forest Service.

therefore necessary in this case to assess the nature of the right of Native Americans to practice their religious traditions under international human rights standards and the scope of permissible restriction of the right.

International standards protecting the right of Native Americans to maintain and practice their religious traditions

16. Under relevant sources of international law, the United States has a duty to respect and protect Native American religion, a duty that goes beyond not coercing or penalizing Native American religious practitioners. The right of indigenous peoples to maintain and practice their distinctive religions, including in relation to sacred areas, is protected by the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Further, it is recognized specifically by the United Nations Declaration on the Rights of Indigenous Peoples, which provides an authoritative statement of standards that States should follow in keeping with their obligations under these and other human rights treaties, as well as under the human rights clauses of the United Nations Charter. Any restriction on the right of indigenous peoples to maintain and practice their religious traditions, not just those involving active coercion or penalties, is subject to the most exacting scrutiny under these international instruments.

17. The right to practice or manifest religion or belief is protected under Article 18(1) of the International Covenant on Civil and Political Rights, which states that "[e]veryone shall have the right to freedom of thought, conscience and religion [which includes] freedom … either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." State parties have a duty to take the measures necessary to ensure the effective enjoyment of this and other rights recognized the Covenant (Art. 2(2)). In its Article 27, which is also of relevance to indigenous peoples, the Covenant gives special consideration to the rights of minorities whose cultural and religious traditions differ from those of the majority. Article 27 states, "Persons belonging to minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion …". In its interpretation of State parties' obligations under Article 27, the Human Rights Committee, in its General Comment 23 affirmed that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group".[14]

18. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that State parties are to "guarantee the right of everyone … to equality before the law, notably in the enjoyment of …[t]he right to freedom of thought, conscience and religion." In interpreting and applying this Convention, CERD has observed the need to take into account the particular characteristics of groups in order to achieving effective equality in the enjoyment of their human rights. Otherwise, "[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same."[15] Accordingly, in its General Recommendation 23, CERD has noted the distinctive characteristics of indigenous peoples in light of their histories and cultures, and has called upon States to take particular measures to protect their rights, including

[14] CCPR/C/21/Rev.1/Add.5, para. 6(2).

[15] CERD General Recommendation 32: Special Measures, para. 8.

measures to "[e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs …".[16]

19. The Declaration on the Rights of Indigenous Peoples, which reinforces the call to ensure for indigenous peoples the enjoyment of fundamental human rights historically denied to them, for its part affirms that "[i]ndigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the rights to maintain, protect, and have access in privacy to their religious and cultural sites" (Art. 12). Additionally, Article 25 of the Declaration provides that indigenous peoples' right to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories … and to uphold their responsibilities to future generations in this regard." The Declaration thus recognizes that, for indigenous peoples, the ability to effectively practice and manifest their religion and beliefs depends many times on the protection of and access to sites of particular religious and cultural significance. Consequently, the duty of States to ensure on an equal basis the right to the free exercise of religion includes that duty to adopt safeguards for the exercise of indigenous religious traditions in connection with sacred sites.

Permissible limitations on the right to maintain and practice religion

20. The international law duty of States to ensure the exercise by indigenous peoples of their religious traditions extends to safeguarding against any meaningful limitations to that exercise, not just limitations that entail coercion to act against one's religious beliefs or penalties for doing so. Under Article 18(3) of the Covenant on Civil and Political Rights, "Freedom to manifest one's religion or beliefs may be subject only to such limitations as prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." With this standard there is no qualification on the kind of limitation or restriction that must undergo examination for justification on the basis of the stated purposes. Under the plain language of Article 18 of the Covenant, *any* clearly observable limitation that makes for a meaningful restriction on the exercise of religion is subject to scrutiny.

21. The process of snowmaking from reclaimed sewage water on the San Francisco Peaks undoubtedly constitutes a palpable limitation on religious freedom and belief, as clearly indicated by the U.S. Forest Service's Final Environmental Impact Statement. This limitation exists even assuming minimal physical environmental degradation as a result of the snowmaking. It bears remembering that the Ninth Circuit Court of Appeals acknowledged that the effect of the proposed use of reclaimed wastewater would constitute a desecration of the affected indigenous peoples' religion.[17] The religious freedom at stake is not simply about maintaining ceremonial or medicinal plants free from adverse physical environmental conditions or about physical access to shrines within the Peaks. More comprehensively, it is about the integrity of entire religious belief systems and the critical place of the Peaks and its myriad qualities within those belief systems.

Is the limitation on Native American religion necessary to achieve a valid public purpose or protect the human rights of others?

22. It may be concluded without much difficulty that the limitation on Native American religion resulting from the decision of the U.S. Forest Service to permit the artificial snowmaking is "prescribed by law", in the sense that it is pursuant to the Forest Service's authority and legally prescribed procedures for managing the lands around the San

[16] CERD/C/51/Misc.13/Rev.4, para. 4(d)(e)).

[17] See *Navajo Nation*, 535 F. 3d at 1070.

Francisco Peaks. The question remains, however, whether the limitation from that decision is "necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others", as stipulated by Article 18(3) of the International Covenant on Civil and Political Rights. This question in turn entails two inquires: first, whether an adequate purpose is being pursued and, second, whether the limitation on Native American religion is necessary to achieve that purpose.

23. As to the first question, whether there is a sufficient purpose within the terms of article 18(3) of the Covenant, the Human Rights Committee in its General Recommendation 22 has explained that this provision "is to be strictly interpreted: restrictions are not allowed on grounds not specified there... Limitations may be applied only for those purposes for which they were prescribed".[18] It is far from apparent how the decision to permit snowmaking by a private recreational ski facility is in furtherance of one of the specified public purposes – public safety, order, health or morals – or the human rights of others. In its Record of Decision on the artificial snowmaking and other modifications to the ski area, the Forest Service explained that "[d]ownhill skiing is an important component of the recreation opportunities offered by National Forests, and the Forest Service and the ski industry have forged a partnership to provide recreational opportunities on [National Forest Service] lands."[19] In the view of the Forest Service, "the overall benefits of providing stable winter recreational opportunities for the public and the community… merits [the] selection" of the proposed use of recycled wastewater for snowmaking operations.[20] In this connection, the Forest Service considered the financial viability of Snowbowl to be a factor: "Snowbowl's ability to maintain or improve its current level of service and endure the business conditions caused by unreliable snowfall is questionable… [Therefore] the installation and operation of snowmaking infrastructure… will enable a reliable and consistent operating season, thereby helping to stabilize the Snowbowl's viability". [21]

24. Even assuming that a sufficient purpose could be discerned, it is left to be determined whether the limitation on religion arising from the artificial snowmaking is necessary for that purpose, necessity being in significant part a function of proportionality. As stated by the Human Rights Committee, "[l]imitations … must be directly related and proportionate to the specific need on which they are predicated".[22] An assessment of necessity and proportionality requires examination of the nature and severity of the limitation on religion, in relation to the identified valid purpose and the manner in which the purpose is being pursued. In this respect as well, it is far from readily apparent how the limitation on Native American religion imposed by the planned snowmaking can be justified.

25. In determining necessity and proportionality, there must be due regard for the significance of the San Francisco Peaks in the religious traditions of the tribes, the desecration that the artificial snowmaking signifies, and the cumulative effect of that desecration. The artificial snowmaking simply builds on what already was an affront to religious sensibilities: the installation of the ski area in the first place and its gradual expansion. In its Final Environmental Impact Statement, the Forest Service noted the past, present and potential future cumulative effects of the ski operation, with its expansion and upgrades, on the cultural resources in the area.[23] The cumulative effects on Native

[18] CCPR/C/21/Rev.1/Add.4, para. 8.
[19] FEIS-Record of Decision, p. 23.
[20] Ibid.
[21] Ibid., p. 24.
[22] CCPR/C/21/Rev.1/Add.4, para. 8.
[23] FEIS, supra, at 3-25.

American religion of the expansions and upgrades of the ski operation, and not just the added effects of the snowmaking, must be found necessary and proportionate in relation to some sufficient purpose. It is highly questionable that the effects on Native American religion can be justified under a reasonable assessment of necessity and proportionality, if the purpose behind the Government decision to permit the enhancements to the ski operation is none other than to promote recreation.

Recommendations

26. On the basis of the foregoing, the Special Rapporteur respectfully recommends that the United States Government engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with international standards in relation to the San Francisco Peaks and other Native American sacred sites, and that it take appropriate remedial action.

27. In this connection, the Government should reinitiate or continue consultations with the tribes whose religions practices are affected by the ski operations on the San Francisco Peaks and endeavor to reach agreement with them on the development of the ski area. The Government should give serious consideration to suspending the permit for the modifications of Snowbowl until such agreement can be achieved or until, in the absence of such an agreement, a written determination is made by a competent government authority that the final decision about the ski area modifications is in accordance with the United States' international human rights obligations.

28. The Special Rapporteur wishes to stress the need to ensure that actions or decisions by Government agencies are in accordance with, not just domestic law, but also international standards that protect the right of Native American to practice and maintain their religious traditions. The Special Rapporteur is aware of existing government programs and policies to consult with indigenous peoples and take account their religious traditions in government decision-making with respect to sacred sites. The Special Rapporteur urges the Government to build on these programs and policies to conform to international standards and by doing so to establish a good practice and become a world leader that it can in protecting the rights of indigenous peoples.