

# ASI Indigenous Peoples Advisory Forum (IPAF)

## **FACT SHEET 1**

# Criteria for the Identification of Indigenous Peoples<sup>1</sup>

September 2015 – Excerpted from Indigenous Peoples Rights and the Aluminium Industry (2015) <a href="http://aluminium-stewardship.org/wp-content/uploads/2017/04/Mining-the-Aluminium-Industry-and-Indigenous-Peoples-Nov2015.pdf">http://aluminium-stewardship.org/wp-content/uploads/2017/04/Mining-the-Aluminium-Industry-and-Indigenous-Peoples-Nov2015.pdf</a>

#### Introduction

According to the UN Permanent Forum on Indigenous Issues (UNPFII) there are approximately 370 million people worldwide, comprising of around 5000 distinct indigenous peoples. The current position of the UN and of the international indigenous peoples' movement is that no single definition of indigenous peoples is possible or desirable, as any definition would either fail to cater to the diversity of indigenous peoples or be so broad as to be unworkable. This position has been accepted by States and is reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which has no specific provision defining who indigenous peoples are.

However, there are certain definitional criteria under customary international law which assist in identifying "indigenous peoples". This factsheet will outline these criteria as they have been elaborated on under international human rights law and other international standards, including those identified by international and regional human rights bodies, global and regional international financial institutions, and international multi-stakeholder initiatives in the mining, hydro-electric and other resource intensive sectors. In so doing it will summarize the guidance which has been provided to States and corporations in relation to the identification of indigenous peoples, in particular regions where the term is contentious or has been challenged by national governments, while also addressing some related project level considerations.<sup>3</sup>

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<sup>&</sup>lt;sup>2</sup> For a more in-depth discussion of the concept of indigenous peoples under customary international law see Castellino J & C Doyle 'Who are Indigenous Peoples? An Examination of Concepts Concerning Group Membership in the United Nations Declaration on the Rights of Indigenous Peoples' in M. Weller and J. Hohmann (eds) The UN Declaration on the Rights of Indigenous Peoples: A Commentary (OUP: Oxford, forthcoming 2015)

<sup>&</sup>lt;sup>3</sup> The focus of this factsheet is on those regions where there are operating bauxite mines and associated infrastructure exist, or where there are known bauxite reserves <a href="http://minerals.usgs.gov/minerals/pubs/commodity/bauxite/mcs-2012-bauxi.pdf">http://minerals.usgs.gov/minerals/pubs/commodity/bauxite/mcs-2012-bauxi.pdf</a> countries include: Latin America and Caribbean: Brazil, Guyana, Jamaica, Suriname, Venezuela; Asia: China, India, Vietnam; Africa: Guinea, Sierra Leone; Australia & Russia

## The concept of "peoples", "indigenous peoples" and "minorities"

As with the concept of "indigenous peoples", there is no consensus on how the category "peoples" should be defined. Historically, many international law instruments and processes have conflated peoplehood with pre-defined territorial units, generally corresponding to post-colonial States. This is despite the de-facto reality that the concept of "peoples" is not necessarily - and indeed arguably rarely is - synonymous with State territorial boundaries, as demonstrated by the diversity of peoples within some modern States and those peoples who have seceded from post-colonial States, as well as peoples' traditional territories are found across several modern nation-state territorial boundaries.

The claim to an inherent right to self-determination, by virtue of which they are free to determine their own social, cultural and economic development, is common to all peoples, including indigenous peoples. However, due to their numerical composition, historical marginalization and reduced traditional territorial bases, extremely few indigenous peoples seek secession from the States of which they are a part.

Indigenous peoples also share certain characteristics with the category "minorities". They are in general numerically inferior to other groups in the societies/states in which they reside, and frequently have a vulnerable status vis-à-vis dominant groups. They aspire to maintain and develop their cultures on the basis of non-discrimination and respect for and protection of cultural diversity. However, indigenous peoples' claims to peoplehood, based on their distinct cultures and ways of life which are directly linked to their lands, territories and resources and self-governance generally distinguish them from the claims of groups classified as minorities.

A core distinguishing feature of "indigenous peoples" from the international law categories of "peoples" or "minorities" is therefore the distinctive relationships with their lands, territories and resources, which commonly underpin the peoples' cultural strength and survival, and are generally governed under customary tenure regimes and associated with traditional livelihoods and ways of life.

#### Martinez Cobo UN Working Definition of Indigenous Peoples

Some of the key characteristics of indigenous peoples were identified in the landmark UN study on the prevention of discrimination against indigenous peoples for the UN Sub-Commission on the Prevention of Discrimination of Minorities. The study conducted by Martinez Cobo between 1972 and 1986 includes a "working definition" of indigenous peoples, which reads as follows:

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

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence in certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.<sup>4</sup>

This "working definition" — when interpreted in light of subsequent developments in international law - is largely been accepted as a basis for identifying indigenous peoples under customary international law. It is buttressed and enhanced by the criteria for identification of indigenous peoples outlined in ILO Convention 169 (1989), in the guidance of UN Treaty and Charter bodies and in the jurisprudence of regional human rights bodies, and in the standards of International Financial Institutions such as the World Bank. The core elements for the identification of indigenous peoples addressed in the "working definition" also emerge from the provisions of the UNDRIP. The following sections briefly outline them.

#### The Working Group on Indigenous Populations

In 1983 the UN Working Group on Indigenous Populations (WGIP), the body responsible for the initial drafting of the UNDRIP, identified the following characteristics of indigenous peoples:

- descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;
- isolate[d] from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; and
- even if only formally, [they have been] placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.

The characteristics were drawn from the work of Martinez Cobo, but excluded his focus on prior occupation by foreign colonial powers. However, given the difficulty of arriving at a common definition, and the fact that indigenous peoples had historically suffered as a result of definitions imposed by others, <sup>5</sup> the UNDRIP text proposed by the WGIP chairperson Erica-Irene Daes in 1993 was premised on the principle of self-identification and did not include a definition of indigenous peoples. This approach has been echoed by the UNPFII.

#### ILO Convention 169 – a renewed focus on self-identification as a fundamental criterion

Article 1(2) of ILO Convention concerning Indigenous and tribal peoples in independent countries, which served to revise the 1957 ILO Convention 107, states that "Self-identification as indigenous or tribal

<sup>&</sup>lt;sup>4</sup> J Martínez Cobo [Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination & Protection of Minorities] *Study on the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/Add.4.

<sup>&</sup>lt;sup>5</sup> UN Doc E/CN.4/Sub.2/AC.4/1995/3 21 June 1996, para 6

shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." Article 1(1) of the Convention establishes its scope as applying to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their **descent from the populations** which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, **retain some or all of their own social, economic, cultural and political institutions**. (emphasis added)

It is worth noting that the requirement for historical continuity applies from the formation of the present State and is less stringent than that in the Cobo "working definition". In addition, the ILO Convention 169's key provisions relate to the unique relationship which indigenous peoples have with their lands, territories and resources and the need to guarantee their right to a permanent and enduring way of life. It recognizes that land rights are derived from customary tenure and the associated requirement that any activities impacting on their land rights, or on their way of life, must be subject to good faith consultations which have the objective of obtaining indigenous peoples' consent.

### Characteristics of indigenous peoples emerging from the UNDRIP

The UNDRIP is premised on the principle of self-identification and does not include a definition of indigenous peoples. However, the key characteristics of indigenous peoples, as outlined in the aforementioned sources, are all implicit in its provisions and preamble. Notable among these are the distinctive collective identity of indigenous peoples as diverse peoples vested with the right to self-determination (preamble and article 3) with the associated right to determine their own plans and priorities for development and the need for their Free Prior and Informed Consent (FPIC) (preamble and articles 19, 23 & 32); the economic and spiritual relationship they have with their lands, territories and resources (preamble and articles 25 & 26); their histories of discrimination and marginalization (preamble & articles 2, 15), and their autonomous self-governance institutions and legal regimes (articles 18 & 40).

The preamble of the UNDRIP also welcomes the fact that "indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur." In so doing it points to the collective role which indigenous peoples play, from the local to the international level, in the recognition of other indigenous peoples. The UNDRIP provisions reflect the increased emphasis which international law places on the notion of self-identification and on the right of indigenous peoples to self-determination as well as the reduction in focus on demonstrating historical continuity with pre-colonial societies in order to cater to a broader spectrum of indigenous peoples beyond those indigenous peoples in settler societies such as Australia, the United States, Canada and New Zealand.

### Approach of UN treaty and charter bodies of identifying indigenous peoples

The practice of all the major UN treaty bodies in relation to the identification of indigenous peoples is aligned with, and has served to reinforce, the guidance provided in the UNDRIP and other international standards. The Committee for the Elimination of Racial Discrimination (CERD), responsible for overseeing the implementation of the International Convention on the Elimination of all forms of Racial Discrimination, 6 is the treaty body which has been to the fore in addressing indigenous peoples' issues. In 1997, CERD issued a General Recommendation (no. 23) to all State parties clarifying that failure to respect indigenous peoples constituted discrimination under the Convention.<sup>7</sup> Through its recommendations to state parties, it has repeatedly addressed the need for States to respect the rights of those groups who self-identify as indigenous peoples, and which to varying degrees meet the aforementioned generally accepted characteristics, irrespective of the nomenclature used by the State to refer to them. Along with other treaty bodies, CERD has called on States to use the UNDRIP as the interpretative guide in relation to identification and treatment of indigenous peoples. The same treaty bodies have also highlighted that these indigenous peoples suffer disproportionately in the name of national development which requires them to sacrifice their resource-rich territories without adequate safeguards in place to protect the rights recognized in UNDRIP or processes in place to guarantee fair and equitable benefit sharing arrangements.8

The UN Special Rapporteur on the rights of indigenous peoples has also provided guidance in relation to the identification of indigenous peoples and has recommended that corporations make use of the characteristics outlined in ILO Convention 169 as the basis for their due diligence processes.<sup>9</sup>

#### Identification of Indigenous Peoples in Latin America

Most Latin American states have ratified ILO Convention 169, or its predecessor ILO Convention 107, and many of them were active in the negotiation of the UNDRIP. In recent years many of these States have enacted legislation recognizing indigenous peoples and their rights, and in some cases constitutional recognition has been afforded to indigenous peoples. At a regional level, the Inter-American Commission and Court on Human Rights have developed an important body of jurisprudence around indigenous peoples' rights. The scope of ILO Convention 169, which covers both indigenous and tribal peoples, extends to groups such as Afro-descendants who do not self-identify as indigenous, but share many characteristics in common with them. In this regard the Inter-American Court on Human Rights has clarified that the rights recognized under the international framework of indigenous peoples' rights, including the requirement to obtain FPIC for mining and energy projects, also applies to these tribal groups which share similar characteristics with indigenous peoples, such as social, cultural and economic traditions different from other sections of the national community, identifying themselves

<sup>&</sup>lt;sup>6</sup> The *International Convention on the Elimination of All Forms of Racial Discrimination* opened for signature 7 Mar March 1966, 660 UNTS 195.

<sup>&</sup>lt;sup>7</sup> CERD General Recommendation No. 23: Indigenous Peoples 18/08/97

<sup>&</sup>lt;sup>8</sup> For an overview of this treaty body jurisprudence see: Doyle C & A Whitmore (2014) "Indigenous Peoples and the Extractive Industries: Towards a Rights Respecting Engagement" (Manila, London: Tebtebba, Middlesex University, PIPLinks) A/HRC/15/37, 2010 para 49-52, for an account of the responsibilities in relation to consultation and consent seeking processes in the context of dam construction see Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, S. James Anaya Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá) 12 de mayo de 2009

with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions. <sup>10</sup>

Nevertheless, governments in the region continue to resist full compliance with international standards related to the recognition and protection of indigenous peoples' rights. From the perspective of the corporate obligation to respect human rights, a thorough due diligence process should go beyond national nomenclature issues and respect the inherent collective and individual rights of peoples and groups based on their historical and contemporary realities, identities and necessities. A number of factsheets have been developed in conjunction with the UN International Fund for Agricultural Development (IFAD) on the characteristics and situation of indigenous peoples in Latin America countries such as Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela. 11

#### Identification of indigenous peoples in Africa

The question of who are the "indigenous peoples" of Africa has been the subject of significant discussion, with resistance to the concept resting on the fact that a significant majority of Africans are indigenous to their countries, and most others are indigenous to the continent. As a result, unlike in settler colonies, the notion of indigenous peoples as 'first inhabitants that were invaded by foreigners' has little traction. The African Commission on Human and Peoples Rights has attempted to dispel misunderstandings around the concept stating that:

Rather than aboriginality, the principle of self-identification is a key criterion for identifying indigenous peoples. This principle requires that peoples identify themselves as indigenous, and as distinctly different from other groups within the state. <sup>12</sup>

The Commission also recognises three main characteristics for indigenous peoples in Africa

The focus should be on the more recent approaches focussing on *self-definition* as indigenous and distinctly different from other groups within a state; on a *special attachment to and use of their traditional land* whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of *subjugation, marginalization, dispossession, exclusion or discrimination* because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.<sup>13</sup> (original emphasis)

This experience of subjugation was elaborated on by the Commission noting that

Domination and colonisation has not exclusively been practised by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address." <sup>14</sup>

<sup>&</sup>lt;sup>10</sup> Doyle C & J Carino footnote 48

<sup>&</sup>lt;sup>11</sup> http://ifad.org/english/indigenous/pub/index.htm

<sup>&</sup>lt;sup>12</sup> African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 11

<sup>&</sup>lt;sup>13</sup> Report of the African Commission's Work on Indigenous Peoples in Africa (Eks/Skolens Trykkeri, Copenhagen: ACHPR, IWGIA, 2005), 92-3 available at <a href="http://www.iwgia.org/iwgia\_files\_publications\_files/African\_Commission\_book.pdf">http://www.iwgia.org/iwgia\_files\_publications\_files/African\_Commission\_book.pdf</a>

<sup>&</sup>lt;sup>14</sup> African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 92

The Commission has also identified some of the groups which fall under the rubric of indigenous peoples in Africa. Among these are:

the Pygmies of the Great Lakes Region, the San of South Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples. Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hinda of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa. <sup>15</sup>

As noted by the Commission the diverse ways of life and cultures of these groups are distinct from those of mainstream African society and their livelihoods are highly land and natural resource dependant and frequently subsistence in nature. They include hunter-gather communities, nomadic pastoralists, and, to a lesser degree, small-scale farmers and their survival is increasing threatened from territorial encroachment, in particular by actors in the energy, extractive and tourism sectors. The African Court on Human and Peoples Rights has also recognized the applicability of the concept of indigenous peoples to these groups and the need to ensure protection of their rights. A number of factsheets have also been developed in conjunction with IFAD on the characteristics and situation of indigenous peoples in African countries such as Congo, Kenya, Niger and Tanzania. <sup>16</sup>

#### Identification of indigenous peoples in Asia

In Asia, as in Africa, a number of governments resist the use of the term indigenous peoples and, with a few exceptions, such as the Philippines, Japan and Nepal, Asian States generally do not afford constitutional or legislative recognition to indigenous peoples as distinct peoples with collective rights. As in Africa, the argument put forward by States is that all the people of Asia are indigenous to their countries. However, this argument has been soundly refuted by Asian indigenous groups, academics and UN human rights bodies on grounds similar to those raised by the African Commission in Africa.<sup>17</sup>

Unlike Africa and Latin America, Asia lacks a region-wide human rights mechanism to address the issue. <sup>18</sup> At the sub-regional level, the Association of South East Asian Nations (ASEAN) has established a human rights mechanism, but its mandate is limited to the promotion of the ASEAN Declaration on Human Rights (ADHR) which does not explicitly address the rights of indigenous peoples. <sup>19</sup> Region wide guidance has, however, been provided by the UN Special Rapporteur on the rights of indigenous peoples following a 2013 consultation held with representatives of indigenous peoples in Asia.

The Rapporteur's report on the situation of indigenous peoples in Asia explains that there are particular groups, such as those referred to as "tribal peoples", "hill tribes", "scheduled tribes" or "adivasis", which "distinguish themselves from the broader populations of the Asian countries and fall within the

Kenya: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/Kenya.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/Kenya.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/Kenya.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf">http://ifad.org/english/indigenous/pub/documents/niger.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/niger.pdf">http://ifad.org/english/indigenous/pub/documents/niger.pdf</a>; Niger: <a href="http://ifad.org/english/indigenous/pub/doc

Tanzania: http://ifad.org/english/indigenous/pub/documents/tnotes/tanzania.pdf.

<sup>&</sup>lt;sup>15</sup> African Commission on Human and Peoples' Rights, *Indigenous Peoples in Africa: the forgotten peoples? The African Commission's Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2006), 10

<sup>&</sup>lt;sup>16</sup> Congo: http://ifad.org/english/indigenous/pub/documents/tnotes/congo dr.pdf;

<sup>&</sup>lt;sup>17</sup> Erni C (ed) The Concept of Indigenous Peoples in Asia: A resource Book (Chiang Mai, Copenhagen: AIPP, IWGIA, 2008)

<sup>&</sup>lt;sup>18</sup> Sub-regional groups, such as the Association of South East Asian Nations (ASEAN), have formed sub-regional human rights mechanisms but these do not address the rights of indigenous peoples

<sup>&</sup>lt;sup>19</sup> The ASEAN Declaration on the Elimination of Violence Against Women and Violence Against Children does however include a reference to "women and children belonging to ethnic and/or indigenous groups"

scope of the international concern for indigenous peoples". <sup>20</sup> These groups have "distinct identities and ways of life, and face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression". <sup>21</sup> They continue to be "among the most discriminated against, socially and economically marginalized, and politically subordinated parts of the societies of the countries in which they live". <sup>22</sup> A non-exhaustive list of groups from the various Asian countries represented in the consultation, were listed by the Rapporteur to illustrate this reality. <sup>23</sup>

A book addressing the concept of indigenous peoples in Asia has been produced by Asia Indigenous Peoples Pact and the International Work Group on Indigenous Affairs, and factsheets have been developed in conjunction with International Fund for Agricultural Development (IFAD) on the characteristics and situation of indigenous peoples in Asia and the Pacific in countries such as Bangladesh, Cambodia, India, Indonesia, Laos, Nepal, the Philippines, and Vietnam.<sup>24</sup>

<sup>23</sup> The non-exhaustive list included the following groups:

- Bangladesh: Chakma, Marma and Tripura (collectively known as Jumma), and Santal, and Mandi, commonly referred to as Adivasi and officially referred to as tribes (upajati), minor races (khudro jatishaotta), ethnic sects and communities (nrigoshthi o shomprodai);
- Cambodia: Broa, Bunong, Chhong, Jarai, Kachak, Kavet, officially referred to as ethnic minority groups, indigenous minority peoples and Khmer-Loeu (hill tribes);
- India: Gond, Oraon, Khond, Bhil, Mina, Onge, Jarawa, Nagas, officially referred to as Scheduled Tribes or Adivasi (original inhabitants);
- Indonesia: Masyarakat adat communities, including groups such as the Dayak Benuaq, the Orang Tengger and the Orang Badui, a subset of whom are officially referred to as komunitas adat terpencil;
- Japan: Ainu, officially referred to as indigenous peoples, and the Ryukyuans or Okinawans, who have sought similar recognition as indigenous peoples;
- Lao People's Democratic Republic: The majority of the Mon-Khmer, Sino-Tibetan and Hmong-Mien grouping, officially referred to as ethnic minorities and non-ethnic Lao;
- Malaysia: Orang Asli (original peoples) of peninsular Malaysia, the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks groups of Sarawak, and the natives of Sabah, officially referred to as aborigines and natives;
- Myanmar: Shan, Kayin (Karen), Rakhine, Kayah (Karenni), Chin, Kachin and Mon, commonly known as ethnic nationalities and officially referred to as national races;
- Nepal: Magar, Tharu, Tamang, Newar, Rai, Gurung and Limbu, commonly known as Adivasi Janajati and officially referred to as indigenous nationalities;
- The Philippines: Aeta, Ati, Ibaloi, Kankanaey, Mangyan, Subanen, officially referred to as indigenous peoples and indigenous cultural communities;
- Thailand: Karen, Hmong, Lahu, Mien, commonly known as ethnic minorities and officially referred to as "chao khao" or "hill tribes", and the nomadic sea gypsies or "Chao Lay"; and
- Viet Nam: Tay, Thai, Hmong, Muong and Khmer, officially referred to as ethnic minorities (dan toc thieu so, dan toc it nguoi).

<sup>24</sup> Erni C (ed) The Concept of Indigenous Peoples in Asia: A resource Book (Chiang Mai, Copenhagen: AIPP, IWGIA, 2008);

Philippines: http://www.ifad.org/english/indigenous/pub/documents/tnotes/philippines.pdf;

Bangladesh: http://ifad.org/english/indigenous/pub/documents/tnotes/bangladesh.pdf;

Cambodia: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/cambodia.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/cambodia.pdf</a>;

India: http://ifad.org/english/indigenous/pub/documents/tnotes/india.pdf (IFAD Country Note);

https://www.dropbox.com/home/India%20IPs%20Rights?preview=AIPP+report Reduced withcover.pdf (ILO Legal Study);

Indonesia: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/indonesia.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/indonesia.pdf</a>;

Laos: <a href="http://ifad.org/english/indigenous/pub/documents/tnotes/laos.pdf">http://ifad.org/english/indigenous/pub/documents/tnotes/laos.pdf</a>;

Vietnam: http://ifad.org/english/indigenous/pub/documents/tnotes/vietnam.pdf.

<sup>&</sup>lt;sup>20</sup> Anaya Asia Consultation A/HRC/24/41/Add.3 para 6

<sup>&</sup>lt;sup>21</sup> Ibid para 7

<sup>&</sup>lt;sup>22</sup> Ibid

## Identification of Indigenous Peoples in Russia

The Russian legislative framework affords recognition to some of those groups who meet the characteristics of indigenous peoples under international law, including the Sami people and groups referred to as "indigenous small numbered peoples of the north". However, it arbitrarily excludes those peoples who share similar histories and ways of life, but whose populations exceed 50,000 people.<sup>25</sup>

All of these officially unrecognized indigenous peoples in Asia, Africa and Russia share similar characteristics with, and face similar issues to, groups in other regions that are recognized as falling under the category of indigenous peoples, being: a) indigenous to a territory b) in non-dominant positions, c) "have suffered and continue to suffer threats to their distinct identities and basic human rights in ways not felt by dominant sectors of society". 26 Indeed, the need to address their disadvantaged situation in accordance with human rights principles has been recognized by their governments at the international level, as reflected in their support for the UNDRIP. Irrespective of the contradictory positions which the governments of some of these countries have adopted at the national level around the use of the term indigenous peoples to describe these distinct peoples, they are equally vested with the inherent rights recognized in the UNDRIP by virtue of their existence, characteristics and needs.

### Indigenous Peoples in the United States, Canada, Australia, New Zealand and Europe

In the settler societies of Australia, Canada, New Zealand, and the United States demonstrating descent from the populations which inhabited the country at the time of the establishment of state is less of an obstacle than in other regions. However, issues in relation to State recognition of indigenous peoples exist, and legislative and policy frameworks and judicial rulings continue to fall short of international standards in terms of indigenous rights' recognition and protection.

In the United States, certain Native American tribes are recognized by the Federal government, with a degree of recognition afforded to inherent indigenous sovereignty under United States' jurisprudence. As a result tribes are free to determine their membership. However, while self-identification as a tribe is necessary for recognition, it is not considered sufficient under the law. As a result some tribes remain unrecognized and consequently lack legal protection. Likewise, the rights of tribes, or members of tribes, who reside outside of reservation lands are afforded lesser protections under the law. Furthermore, federally recognized tribal governments exist in parallel with traditional governance structures, a reality which should be addressed during corporate human rights due diligence and has implications for inclusive consultations and consent seeking processes.

In Canada, indigenous peoples' existing rights are afforded Constitutional protection since 1982 and a complex, and often slow and inefficient, land claims system exists to ensure recognition and protection of those rights. First Nations' reserves tend to be smaller and more numerous than Native American reservations, and issues also exist around the non-recognition of First Nations that are not registered under the 1951 Indian Act, with the Inuit and Metis' rights only recently recognized. Legal rulings continue to play a significant role in shaping government policy in relation to indigenous self-governance, land rights and the requirement for consultations and consent. In both the United States

<sup>&</sup>lt;sup>25</sup> A/HRC/15/37/Add.5 para 8

<sup>&</sup>lt;sup>26</sup> Ibid para 9

and Canada historical treaties also exist, and they continue to have an important role to play in regulating the relationship of the State with indigenous peoples.

In New Zealand, the Treaty of Waitangi governs the relationship between the Crown and the Maori. A tribunal was established to address the claims of the Maori people. While some progress has been made in processing claims the Waitangi tribunal is under resourced leading to significant delays. The State is also failing to fully comply with its duty to consult the Maori, as "consultation procedures appear to be applied inconsistently, and are not always in accordance with traditional Maori decision-making procedures, which tend to involve extensive discussion focused on consensus-building." <sup>27</sup>

Australia's indigenous peoples, referred to as Aboriginals and Torres Strait Islanders, lacked citizenship under the Constitution until 1967. The first recognition of their native title rights at the national level was in 1982 in the landmark Mabo case. In 1993, the Native Title Act was enacted to give effect to the ruling. Indigenous rights are also recognized to varying degrees in legislation at the federal and state level. A variety of institutions exist to represent Aboriginal peoples, ranging from a national representative body to large land councils, such as those established under land rights acts, to corporate like native title representative bodies. The relationship between these representative bodies and traditional land owners can be complex at times, and indigenous groups have pointed to the need for an improved institutional framework that ensures the voice of Traditional Owners are heard and respected.

In Europe, the Sami of Norway, Sweden and Finland are recognized as indigenous peoples. Each country has its own legislation affording recognition to the Sami, with Sami Parliaments existing in Norway, Sweden and Finland. The parliaments are generally focused on issue of cultural heritage, and lack the power or authority to represent Sami communities in negotiations in relation to land and resource access and usage. Norway has ratified ILO Convention 169 and as a result affords the greatest level of legal protection of the four countries to indigenous peoples' rights. The European Court of Human Rights has recognized the Sami status as an indigenous people, but has not to date developed a body of jurisprudence in relation to the implementation of their land and resource rights.

## Approach of International Financial Institutions

# (i) World Bank Operational Policy (2005) & IFC Performance Standard 7 (2012)

The World Bank and its private sector arm the International Financial Corporation (IFC) have adopted a functional approach towards identifying indigenous peoples. The Bank's 2005 Operational Policy on Indigenous Peoples (OP 4.10) and the IFC's 2012 Performance Standard 7 note "the varied and changing contexts in which Indigenous Peoples live" and the absence of a universally accepted definition of "Indigenous Peoples," and as a result do not attempt to define the term. They also note that different countries refer to those groups who fall under the category indigenous peoples "by such terms as 'indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'minority nationalities,' 'scheduled tribes,' 'first nations' or 'tribal groups.'" Having addressed these definitional ambiguities and inconsistencies in labelling at the national level, they proceed to explain that the term "Indigenous Peoples" is used

in a generic sense to refer to a **distinct, vulnerable, social and cultural groups** possessing the following [four] characteristics in varying degrees:

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<sup>&</sup>lt;sup>27</sup> A/HRC/18/35/Add.4 para 21

- a) **self-identification** as members of a distinct indigenous cultural group and **recognition of this identity** by others;
- b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- c) **customary cultural, economic, social, or political institutions** that are separate from those of the dominant society and culture; or
- d) an indigenous language, often different from the official language of the country or region.

Consistent with the World Bank's OP 4.10, the IFC Performance Standard 7 clarifies that in addition to applying "to communities or groups of Indigenous Peoples who maintain a collective attachment ... to distinct habitats or ancestral territories and the natural resources therein" that it also potentially applies to communities or groups who for reasons beyond their control "have lost collective attachment to distinct habitats or ancestral territories in the project area...". 28 The July 1 2015 draft of the revised World Bank policy clarifies that the indigenous peoples' policy applies to forest dwellers, hunter gathers, pastoralists and other nomadic groups. 29 The policy also notes the "exceptional vulnerability of remote groups with limited external contact, also known as peoples "in voluntary isolation" or "in initial contact" and that measures are required "to avoid all undesired contact with them as a consequence of the project." 30

Emphasis is placed on vulnerability as a criterion for identification along with self-identification and the nature of the peoples' attachments to their territories. There is no mention of historical continuity. The reference to the criteria of recognition by others has to be read in light of the fact that the policy applies irrespective of State recognition of indigenous peoples. As such recognition by other indigenous peoples is of particular significance. It is of critical importance that the policies explicitly acknowledge that terms used on a national level – by national governments – may differ, and that the requirements of the policy apply irrespective of such national ambiguities or government refusal to use the term 'indigenous peoples'. Another important feature of the policies is that they recognize that the four characteristics are not possessed by all indigenous peoples in a uniform way. Both IFC Performance Standard 7 and the July 1 2015 draft of the revised World Bank policy include Free Prior and Informed Consent (FPIC) as a core safeguard for indigenous peoples' rights.

### (ii) Asian Development Bank (ADB) (2009)

The ADB 2009 Safeguard Policy Statement echoes the 2005 World Bank OP 4.10 and recognizes that

within Asia and the Pacific, individual indigenous communities reflect tremendous diversity in their cultures, histories, and current circumstances. The contexts in which such peoples live are varied and changing and no universally accepted definition of Indigenous Peoples exists. Indigenous Peoples may be referred to in different countries by such terms as indigenous ethnic minorities, indigenous cultural communities, aboriginals, hill tribes, minority nationalities, scheduled tribes, or tribal groups.<sup>31</sup>

<sup>&</sup>lt;sup>28</sup> Unlike OP 4.10 (para 4(b)), however, the IFC Performance Standard 7 (para 4-6); limits this to severance that occurred "within the concerned group members' lifetime"

<sup>&</sup>lt;sup>29</sup> World Bank Environmental and Social Framework Second Draft For Consultation JULY 1 2015 ESS7 Para 7

<sup>&</sup>lt;sup>30</sup> World Bank Environmental and Social Framework Second Draft For Consultation JULY 1 2015 ESS7 Para 15

<sup>&</sup>lt;sup>31</sup> ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES para 6 http://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf.

In light of this the policy uses the term Indigenous Peoples in precisely the same way as OP 4.10, listing the same four characteristics, which can apply to indigenous peoples in varying degrees.

As with OP 4.10 it also notes that loss of collective attachment to land as a result of forced severance does not impact on the applicability of the policy and also clarifies that the State's obligation under customary law or conventions to which they are a party must also be taken into account.<sup>32</sup> In this regard the policy explains that:

The broad definition of Indigenous Peoples in the policy follows the international consensus that has been emerging in recent decades, the general classification of Indigenous Peoples by international institutions such as the United Nations and the International Labour Organization, and the status of Indigenous Peoples as recognized by international law.

The trigger mechanisms for the policy are where "a project directly or indirectly affects the dignity, human rights, livelihood systems, or culture of Indigenous Peoples or affects the territories or natural or cultural resources that Indigenous Peoples own, use, occupy, or claim as their ancestral domain." Finally, the policy followed an informative 2007 review of the ADB 1998 policy, and notes that "[c]ountries' national legislation and definitions of Indigenous Peoples, if any, are seldom fully aligned with ADB's policy" and that challenges arise in its application in the region "because of the huge variation in countries' history, cultures, ideologies, economic resources, demography, and politico-institutional frameworks". 35

### (iii) Inter-American Development Bank (IDB) (2006)

The 2006 IDB Operational Policy on Indigenous Peoples applies to "Peoples who meet the following three criteria":

- "they are descendants from populations inhabiting Latin America and the Caribbean at the time of the conquest or colonization";
- "irrespective of their legal status or current residence, they retain some or all of their own social, economic, political, linguistic and cultural institutions and practices"; and
- "they recognize themselves as belonging to indigenous or pre-colonial cultures or peoples." 36

Importantly the policy recognizes the rights of indigenous peoples in voluntary isolation or initial contact "to remain in said isolated condition and to live freely according to their culture".<sup>37</sup>

It also requires compliance with "applicable legal norms" which include "national legislation", "international norms" (such as the jurisprudence of the Inter-American system and international treaties) and "indigenous juridical systems".<sup>38</sup> While indigenous judicial systems are to be "taken into

<sup>32</sup> ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES paras 7 & 8

<sup>33</sup> ADB June 2009 Safeguard Policy Statement SAFEGUARD REQUIREMENTS 3: INDIGENOUS PEOPLES para 9

<sup>34</sup> ADB February 2007 Indigenous Peoples Safeguards http://www.adb.org/documents/indigenous-peoples-safeguards

<sup>&</sup>lt;sup>35</sup> ADB June 2009 Safeguard Policy Statement para 23

<sup>&</sup>lt;sup>36</sup> ADB Operational Policy on Indigenous Peoples page 5

<sup>&</sup>lt;sup>37</sup> The policy refers to "uncontacted" people and equates them with "peoples in voluntary isolation" ADB Operational Policy on Indigenous Peoples page 9

<sup>38</sup> ADB Operational Policy on Indigenous Peoples page 8

account according to the rules for their recognition established in the legislation of each country", the relevant international norms addressing the status of indigenous judicial systems would also have to be respected.<sup>39</sup>

## (iv) African Development Bank (AfDB) (2013)

The AfDB is the only multilateral development bank without a standalone safeguard policy on indigenous peoples. Its 2013 environmental and social safeguard policy does make reference to indigenous peoples however it does not include a definition or any criteria for their identification.<sup>40</sup>

The policy does however commit the AfDB to "strengthen the dialogue initiated with continental institutions during the forum on Indigenous Peoples in Development it organised in February 2013 to explore opportunities to increase knowledge and understanding of what is an indigenous peoples group in Africa and how to better support the inclusion and economic development of such groups".<sup>41</sup>

The AfDB has in the past expressed the view that indigenous peoples in Africa are mostly "vulnerable groups". It also stated that it will give "due consideration to the social issues [by] develop[ing] detailed and specific guidance as necessary, and in line with UN General Assembly's Declaration on the Rights of Indigenous Peoples (2007) which calls for international finance institutions "to apply safeguards and strengthen the states' own domestic policies on indigenous people[s]".<sup>42</sup>

### Identification of Indigenous Peoples in Multi-Stakeholder Guidelines

A growing number of industry standards include criteria for recognizing indigenous peoples. In the hydro sector the 2010 Hydropower Sustainability Assessment Protocol identifies indigenous peoples as

distinct social and cultural group[s] possessing the following characteristics in varying degrees: self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; customary cultural, economic, social or political institutions that are separate from those of the dominant society or culture; an indigenous language, often different from the official language of the country or region. 43

Under the standard it is assumed that indigenous peoples are present in a proposed project area unless "credible evidence" is provided to the contrary. The World Commission on Dams re-iterates the criteria outlined in ILO Convention 169 and notes that indigenous peoples include "long-resident peoples, with

<sup>&</sup>lt;sup>39</sup> ADB Operational Policy on Indigenous Peoples page 5

<sup>&</sup>lt;sup>40</sup> African Development Bank Group's Integrated Safeguards System Policy statement and operational safeguard (December 2013)

<sup>&</sup>lt;sup>41</sup> African Development Bank Group's Integrated Safeguards System Policy statement and operational safeguard (December 2013) page 17

<sup>&</sup>lt;sup>42</sup> African Development Bank's Response to Professor Michael Cernea's article: "Safeguard Social Policies in Africa: A Continent-Wide Public Debate", March 31, 2012 available at

http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-

Documents/Response % 20 to % 20 Cernea % 20 Brookings % 20 on % 20 safeguard % 20 policies % 20 - % 20 DS % 20 reviewed. pdf to % 20 policies % 20 - % 20 DS % 20 reviewed. pdf for the first policies % 20 polici

<sup>&</sup>lt;sup>43</sup> International Hydropower Association "Hydropower Sustainability Assessment Protocol" (2010)

http://www.hydrosustainability.org/getattachment/7e212656-9d26-4ebc-96b8-1f27eaebc2ed/The-Hydropower-Sustainability-Assessment-Protocol.aspx at 27 and 81-83;

strong customary ties to their lands, who are dominated by other elements of the national society." <sup>44</sup> It also notes that "many of the so-called 'tribal peoples' of Africa, Asia and the Pacific are indistinguishable from indigenous peoples as far as international law and standards are concerned". <sup>45</sup>

The International Council on Mining and Metals (ICMM) 2013 position statement on Indigenous Peoples and Mining does not define indigenous peoples but instead refers to the characteristics for identification of indigenous peoples specified in ILO Convention 169 and the rights recognized in it and in the UNDRIP.<sup>46</sup> Likewise the Round Table Sustainable Palm Oil does not include a definition of indigenous peoples but refers to the UNDRIP and ILO Convention 169.<sup>47</sup> The 2014 draft standard of the Initiative for Responsible Mining Assurance notes that

There is no universally accepted definition of "indigenous peoples" and the prevailing view is that no formal universal definition is necessary for the recognition and protection of their rights. Generally, however, a fundamental criterion for identifying indigenous peoples is their self-identification as such. Therefore, indigenous peoples may include those not explicitly recognized by national governments.

It draws from the factsheet of the UN Permanent Forum on Indigenous Issues noting that "a modern and inclusive understanding of "indigenous" has been developed and includes peoples who:

- identify themselves and are recognized and accepted by their community as indigenous
- demonstrate historical continuity with pre-colonial and/or pre-settler societies
- have strong links to territories and surrounding natural resources
- have distinct social, economic or political systems
- maintain distinct languages, cultures and beliefs
- form non-dominant groups of society
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities

[and that] [i]n some regions, there may be a preference to use other terms such as: tribes, first peoples/nations, aboriginals, ethnic groups, adivasi and janajati. All such terms fall within this modern understanding of 'indigenous'.<sup>48</sup>

### Project level considerations - addressing all impacted communities

For all mining or dam projects, the presumption in the conduct of corporate human rights due diligence should be that groups exist in the proposed project area which have customary tenure rights over the territories and that prior engagement with them is required.

 $<sup>^{44}</sup>$  World Commission on Dams "Dams and Development: A New Framework for Decision-Making" at 218

<sup>&</sup>lt;sup>45</sup> Ibid at 219

<sup>&</sup>lt;sup>46</sup> ICMM 2013 Position statement on Indigenous Peoples and Mining <a href="http://www.icmm.com/document/5433">http://www.icmm.com/document/5433</a> at 1

<sup>&</sup>lt;sup>47</sup> Principles and Criteria for the Production of Sustainable Palm Oil (2013)

<sup>&</sup>lt;sup>48</sup> Draft IRMA Standard July 2014

During due diligence all potentially affected indigenous peoples must be identified. The identification process has to be carried out in a manner that is respectful of local procedures, customs and perspectives. Any groups that either own, occupy or otherwise make use of the lands, territories or resources, or whose self-governance or cultural rights may be affected, must be identified and consulted. This involves applying international standards irrespective of the position of the State with regard to the recognition of indigenous peoples. Due diligence should therefore identify a) groups recognized by the State as indigenous b) groups that self-identify as indigenous peoples but are not recognized by the State as such, and c) groups which share similar characteristics to indigenous peoples but do not necessarily self-identify as indigenous.

Where multiple peoples or communities are potentially affected, any conflicting claims over lands should be identified. Where due diligence indicates that indigenous peoples would be potentially affected by the project, these peoples' existing governance structures and representative institutions should be identified and verified with them. To this end communities should be asked who their representatives are, how they are to be engaged within the context of seeking their FPIC. Indigenous communities have the right to choose their own leaders and to designate their representatives, free from interference by the State or corporate actors. These may be traditional elders or representatives selected by the community for the specific purpose of engaging in FPIC processes with the company.

In cases where different bodies claim to be representative of indigenous communities, corporations should engage in broad-based consultations with indigenous authorities, in particular traditional authorities and those mandated by the affected people to represent them, in and around the areas in which they seek to operate, and to be guided by them in relation to the bodies with which they should dialogue. In practice open and inclusive dialogue and extensive cooperation with all indigenous authorities will generally result in the identification by indigenous peoples themselves of their own representatives and representative bodies. The participation of senior corporate representatives in initial open, inclusive and public dialogue with the indigenous authorities and concerned communities is one potentially effective tool towards addressing any perceived problems around representation.

If indigenous peoples are identified in the project area, or their territorial, self-governance or cultural rights would be impacted by the project, then due diligence process should require that their FPIC be obtained. In cases where due diligence indicates that indigenous peoples have not had the opportunity to develop and strengthen their representative structures to the point where they feel fully equipped to enter into FPIC-based dialogue and negotiations, then the granting of consent will not be possible and projects should not proceed. Research should also determine if there are groups in initial contact or voluntary isolation and any projects which impact on them or their rights should be abandoned.

The criteria for self-identification together with recognition by other indigenous peoples, implies that where there is doubt as to the categorization of a particular group as indigenous peoples, or in relation to the presence of indigenous peoples in a particular area, consultations with the broader community of indigenous peoples can play an important role in providing guidance. This applies at the local level where contestation may arise, for example, in relation to the identification of representatives and where neighbouring indigenous communities may be able to offer guidance. It could also apply at national or regional levels, where guidance may be sought from indigenous federations or networks to assist in the identification process. Engaging civil society, academia and government actors which work closely with, or have expertise on, indigenous peoples in the area may also be appropriate, but cannot act as a substitute for direct consultations with indigenous peoples. Seeking engagement with indigenous representatives outside of project contexts through participation at international

mechanisms, such as the UN Permanent Forum on Indigenous Issues and the UN Working Forum on Business and Human Rights, and maintaining dialogue with indigenous peoples at such fora, may also help to address any future potential identification related challenges.