Indigenous peoples and the Millennium Development Goals – ‘sacrificial lambs’ or equal beneficiaries?

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The author examines the interplay of the MDGs and indigenous peoples’ self determination rights in the context of the extractive industry and illustrates the tensions that arise between the realization of these rights and the approaches currently being proposed by states to achieve the MDGs. He argues that to effectively address indigenous poverty and well-being an MDG implementation approach, based on indigenous peoples’ self-determination rights, in particular their rights to full and effective participation in decision-making and to free prior informed consent, is required. The author concludes that the incorporation of the indigenous sensitive indicators, currently being developed by indigenous peoples themselves, is a necessary step towards achieving this goal.

**Keywords:** Millennium Development Goals (MDGs); human rights based approach; indigenous peoples rights; indigenous peoples; extractive industry; mining; Philippines; Subanon

Concerned that indigenous peoples have suffered from historic injustices as a result of, *inter-alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests... Solemnly proclaims... Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

United Nations Declaration on the Rights of Indigenous Peoples

Introduction

The United Nations Millennium Declaration adopted by the General Assembly in 2000, from which the Millennium Development Goals (MDGs) flow, aims to address the poverty situation of over one billion of the world’s poorest people. Indigenous peoples are disproportionately represented among this segment of humanity, indeed being indigenous has been described as synonymous with being poor. However, resulting from a lack of disaggregated data and insufficient participation, indigenous peoples have remained effectively invisible to the MDG project. They fear that the MDG project, by failing to incorporate their perspectives on poverty and address their specific needs, may, as mainstream development...
projects have in the past, impact negatively on their well-being rather than improve their poverty situation.

The UN Declaration on the Rights of Indigenous peoples (UNDRIP), adopted by the UN General Assembly in 2007, sets ‘the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’.\(^3\) It provides the framework for future engagements between indigenous peoples and states, the UN system or the private sector reflecting indigenous peoples’ rights and aspirations, including their right to self-determination. Implicit in their right to self-determination are their rights to full and effective participation at all levels in decision-making processes that directly or indirectly concern them, and to Free Prior Informed Consent (FPIC) in relation to all developmental projects or measures that may impact on them.

This paper addresses the potential for developing an MDG implementation approach which ensures that these two hugely important declarations are respected. It examines the complex interplay of national development, the MDGs and indigenous peoples’ self-determination rights in the context of the extractive industry and illustrates the tensions that arise between the realisation of indigenous peoples’ rights and the approaches being proposed by states to achieve the MDGs. Finally, the paper touches on the important work currently being undertaken by indigenous peoples to incorporate their perspectives on poverty, well-being and sustainability into the MDG project through the development of indigenous sensitive indicators that are grounded on their self-determination rights, including their rights to full and effective participation and FPIC.

**Who are indigenous peoples**

It is estimated that there are in the region of ‘370 million indigenous people spread across 70 countries worldwide’.\(^4\) The question of ‘who is indigenous’ has been the subject of much discussion over the years, resulting in a number of attempts to identify the defining characteristics of indigenous communities, peoples and nations. Special rapporteur for the UN Sub-Commission on the Promotion and Protection of Human Rights, Martinez Cobo, in his 1986 study identifies indigenous peoples as

> those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in 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 systems.\(^5\)

The realisation that no one definition was capable of capturing the diversity and changing nature of indigenous cultures, combined with the fear that rigid definitions could lead to the exclusion of certain groups, has led to the criterion of self-identification as a distinct cultural group being fundamental to any attempts to determine indigenousness.\(^6\) Groups classified as ethnic minorities, national minorities, tribal peoples or other denominations by states may choose to self-identify as indigenous peoples.\(^7\) The consensus with regard to this criterion of self-identification is reflected in the work of the Working Group on Indigenous Populations, the International Labour Organisation Convention 169 (ILO 169) and policies and directives of UN programmes and agencies such as the United Nations Development Programme (UNDP) and the World Bank.

Viewed from a human rights perspective the recognition of the presence of an indigenous people in a given state has an important bearing on the planning and monitoring of the
Millennium Development Goals project. As is pointed out by Professor Castellino, the human rights regime requires that the principles of non-discrimination and equal treatment apply to vulnerable groups such as indigenous peoples and minorities. These principles impose an obligation on states to ensure that benefits flowing from the MDGs in terms of improvements in economic, social and cultural rights, in the form of reductions in poverty or improved access to services, are targeted at these groups in a manner proportionate to, and in accordance with, their needs vis-à-vis the rest of the population. The availability of disaggregated data is fundamental for achieving this. In its absence indigenous peoples remain effectively invisible to, and excluded from, the MDG process. The result is a de-facto discriminatory implementation of the MDGs. This fact has been, and continues to be, emphasised by a range of commentators, including the ILO, the United Nations Permanent Forum on Indigenous Issues (UNPFII), academics, indigenous researchers and organisations, UN Special Procedures including the UN Independent Expert on Minority Issues and the UN Inter-Agency Support Group.

It has also been pointed out by indigenous peoples that in addition to ensuring their inclusion among those targeted by the MDG project it is essential to ensure the appropriateness of measures targeted at them. To ensure this it is necessary to start from the aspirations and perspectives of indigenous peoples themselves. These aspirations are best reflected in the rights of indigenous peoples.

The rights and aspirations of indigenous peoples

An extensive and growing corpus of international law has identified and elaborated on the rights of indigenous peoples. Included in this are ILO Conventions 169 and 107, which are dedicated to indigenous peoples’ rights; rights under international and regional human rights treaties, the specific context of which has been elaborated on by the respective committees in general comments, recommendations and observations to state parties; an expanding body of jurisprudence addressing the rights of indigenous peoples emanating from the international and regional human rights mechanisms responsible for treaty supervision and a range of other international and regional standard setting instruments. In addition, a number of the thematic UN Public Special Procedures have provided further clarification on the content of indigenous peoples’ rights.

Without doubt, however, the clearest and most comprehensive expression of the collective and individual rights of Indigenous Peoples, and by extension their aspirations, is to be found in the UN Declaration on the Rights of Indigenous Peoples (henceforth referred to as UNDRIP). The UNDRIP, drafted by the rights holders themselves, and adopted by the UN General Assembly in September 2007 following over two decades of negotiations, is viewed as setting the framework for future engagement between indigenous peoples and states. It also provides the basis for the activities of the UN system as they relate to indigenous peoples. Article 43 of the UNDRIP describes the rights recognised in it as constituting ‘the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’. The framework set out in the UNDRIP is seen by indigenous peoples as a means of reconciling past injustices by committing to a future of engagement with them that is based on respect for their human rights.

The right to self-determination recognised in Article 3 of the UNDRIP is the foundational principle upon which all other indigenous rights are based. It states that

Indigenous peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Flowing from this right to self-determination is a range of collective and individual rights. These include, *inter alia*, rights to autonomy or self-government, to lands territories and natural resources; to protect and develop cultural heritage, traditional knowledge and traditional cultural expressions; to maintain and develop their indigenous institutions; to practise cultural, spiritual and religious traditions; to determine and develop priorities and strategies for exercising their right to development; to participate in decision-making in matters which would affect their rights and to give or withhold their free prior informed consent in relation to decisions impacting on them or projects affecting their lands or territories and other resources.

These rights and aspirations of indigenous peoples have important implications for any projects or programmes which impact on them, such as the MDGs. Therefore, when ensuring that indigenous peoples are targeted by MDG programmes, it is also necessary to ensure these programmes are designed in accordance with their self-determination rights. Indigenous people argue that a human rights based approach to addressing indigenous poverty must start from indigenous peoples’ definitions and perspectives of poverty. With this in mind it is informative to look at some recent studies addressing these perspectives before critiquing the implications on indigenous peoples’ rights of approaches being adopted by states to achieve MDG 1, the eradication of extreme poverty and hunger.

**Indigenous peoples perspectives of poverty**

The input for this analysis of indigenous peoples’ perspectives on poverty is derived from three recently published sets of case studies. The first is a series of cases studies commissioned by the ILO and conducted with indigenous communities from Bolivia, Guatemala, Cameroon, Cambodia and Nepal to document their perception of the MDGs. The second is a series of studies on indigenous people and poverty, published by the comparative research programme on poverty of the international social science council (CROP) addressing indigenous communities’ experiences of poverty in 11 countries, including a number of developed countries. The third is a study conducted with the Ayta community of Kanawan, Morong, Batann, Philippines and published by the Tebtebba Foundation, an indigenous peoples’ international centre for policy research and education.

Despite the diversity of communities involved in the ILO case studies there are a number of common themes that emerged. In the context of addressing poverty the communities feel that the indicators being used to assess their poverty levels are inadequate, as they fail to capture their perception of poverty and address its structural causes. This perception holds that poverty is multidimensional and based on the ‘loss of land and resources, the loss of culture and collective identity, discrimination and racism, and social exclusion’. A combination of discriminatory laws that ignore their land tenure systems and allow appropriation of land by outsiders along with policies of cultural and religious assimilation are seen as some of the causes of poverty. They also feel that MDGs do not address what they perceive to be many of their main challenges, which revolved around the maintenance of their cultures and traditional food security in the context of the global market economy. In short, however, the communities view control over their land and resources as being ‘the priority that overshadows everything else’, forming a prerequisite for achieving all of the MDGs.

In the CROP cases study involving the Zenu and Mokana people of Columbia their unwillingness to trust the state anti-poverty programme was highlighted. Their perception is that state institutions, through systematic exclusion of indigenous peoples, are
responsible for imposing poverty on them. The state itself is seen as the problem. The cases illustrated that recognition of indigenous peoples’ existence has to be accompanied by their full participation in policies and programmes that impact on them. Failure to do this ‘alters the collective life and creates resistance’ leading to programme and policy failure. The case study involving the Tayal/Taroko of Taiwan focused on how imposed development can be instrumental in disempowering indigenous peoples and contributing to their impoverishment. A cement company operating without the community’s consent had destroyed their natural environment, caused serious divisions in the community and alienated them from their lands. The study points toward poverty as not being ‘the root illness itself’, but rather ‘a symptom of colonial loss’. A conclusion that emerged from a number of the CROP studies is that ‘for indigenous peoples poverty can be measured according to the degree of autonomy they have over their territories’. These findings are supported by the comparative study of Canada, the USA, New Zealand and Australia, which illustrates, based on the experiences of indigenous peoples, the potential for self-determination to act as an effective poverty-reduction strategy.

The Tebtebba case study, conducted with the Ayta community of Kanawan, Morong, Batan, Philippines, underscores the danger in the assumption that targeted, well-intentioned projects such as the MDGs, which are premised on national standardised indicators of poverty, will improve the well-being of indigenous communities. Given the inadequacy of using the Human Development Index (HDI), a modified socio-cultural development index including a cultural indicator was developed. The Kanawan Ayta gave a 40% weighting to this cultural integrity indicator, with education, livelihoods, income and health making up the remaining 60%. Within the category ‘cultural integrity’, the sub-category ‘communal ownership of land’ was attributed the highest weighting. The implications are that even significant improvements in health, income or education, if resulting in deterioration in perceived cultural integrity, could have a net effect of reducing the communities’ own perception of their overall well-being.

All three sets of case studies clearly illustrate that poverty, as seen through the eyes of indigenous peoples, is a legal and political issue as well as an economic, social and cultural one. It is an issue which finds its roots in colonialism but is perpetuated through discrimination and the denial of rights. Indigenous peoples’ definitions of poverty in all cases centred on this denial of rights, in particular the rights to self-determination, land and cultural integrity. Indigenous peoples view this denial of rights as a central element of the ‘process of impoverishment’. These ‘poverty-creating processes’ in turn emanate from social relations and existing power structures. These studies therefore illustrate that the denial of indigenous peoples’ collective and individual rights is something that poverty-reduction policies must address.

UNPFII, indigenous poverty and the MDGs

In recognition of the fact that indigenous peoples represent a disproportionate number of the world’s poor, and at the same time were being largely excluded from the MDG process, the UNPFII adopted as its specific focus, during its fourth and fifth sessions, the theme of Indigenous Peoples and the MDGs. This exclusion of indigenous peoples from the MDG process was recognised by the UN Inter-Agency Support Group, which suggested that ‘regional cooperation [between UN Agencies] . . . could . . . aim to ensure that . . . national reports on the Millennium Development Goals took into account the realisation of the rights of indigenous peoples’. However, subsequent assessments of the global and national
MDG reports point to little improvement in their focus on indigenous peoples and minimum indigenous participation in the MDG process.

The UNDRIP requires that UN Agencies ‘contribute to [its] full realisation’ and that the UN System ‘promote respect for [it] and [its] full application’. The United Nations Development Group’s (UNDG’s) Guidelines on Indigenous Peoples’ Issues published in February 2008 meet these requirements. They aim ‘to assist the UN system to mainstream and integrate indigenous peoples’ issues’ and recognise that ‘address[ing] inequalities and achiev[ing] positive outcomes that respect the diversity of indigenous peoples [is] a precondition for the successful implementation of the MDGs’. However, the global 2007 MDG report contains no reference to indigenous peoples.

At a national level the ILO case studies found that MDG processes gave minimal, if any, consideration to indigenous peoples’ issues; related to this were extremely low levels of indigenous participation or even awareness of the MDGs. This analysis is corroborated by the findings of the UNPFII annual reviews of national MDG reports. Over the three year period from 2005 to 2007 the reports of 39 states were reviewed to address the extent of indigenous peoples’ inclusion, participation and promotion in the MDG process. The following is a summary of the reviews’ conclusions.

- Approximately 20% of reports reviewed were considered to have sufficiently included indigenous peoples by consistently reporting on their situation. Another 50% address indigenous issues to varying degrees, with the remaining 30% not including any reference.
- Only two reports, those of Peru and Mexico, indicated any input from or participation of indigenous peoples’ organisations.
- With the exception of Nepal and Vietnam there was a consistent lack of disaggregated data in almost all reports for every goal.
- Many reports address regional disparities in development but did not explicitly state that these regions are often areas where indigenous peoples live.
- Only two countries, Mexico and Panama, addressed indigenous peoples under goal 8 (global partnership). Indigenous peoples are also mentioned infrequently in the context of goals 3 (gender equality), 5 (maternal health) and 7 (environmental sustainability).
- Only three examples of participation of indigenous peoples in the context of specific MDG-related interventions were mentioned as worthy of praise.

The reviews all emphasise the need for improvements in the collection and disaggregation of data and conclude by recommending that Governments should include indigenous peoples in the

- planning of the reports and of future interventions;
- context of meeting each goal;
- implementation, monitoring and evaluation of programmes and projects that will directly or indirectly affect them.

The reviews have also all consistently called for respect for indigenous peoples’ right to Free Prior Informed Consent in the context of all developments impacting on indigenous peoples, including the MDGs.
MDGs and development aggression

For indigenous peoples development projects implemented on their lands against their wishes constitute ‘development aggression’. In her comprehensive analysis of the issue of structural causes of indigenous poverty the Chair of the UNPFII described how development aggression, combined with unjust histories of external and internal colonisation and inadequate spending on basic social services, contributes to the structural causes of chronic poverty among indigenous people. Addressing the topic of the MDGs the Chair pointed out that whether or not indigenous peoples’ poverty is alleviated would be determined by the approach taken by each country to reach MDG 1. She argued that indigenous poverty alleviation will not happen if the path pursued involves ‘more aggressive extraction of mineral resources, oil, or gas in indigenous peoples’ territories, or further liberalising imports to the detriment of traditional livelihoods’. This would result in a situation whereby ‘indigenous peoples become the sacrificial lambs for the reduction of poverty through development projects that will displace them from their lands’ and hence the essential need to frame the MDGs as a human rights based agenda.

This issue of the impact of development activities on indigenous peoples was also addressed in submissions made to the UNPFII by the International Expert Group Meeting on the MDGs, Indigenous Peoples Participation and Good Governance. It noted that ‘globalization has increased the exploitation of natural resources on indigenous peoples’ lands’. Likewise the UN Food and Agriculture Organization in its input to the fifth session of the UNPFII stated that ‘indigenous peoples are disproportionately impacted by development activities that degrade or damage the environment and the ecosystems of which they are a part’.

The need for mechanisms to prevent development aggression was a concluding observation of all the case studies. In the case of the Ayta people it was suggested that ‘to sustain positive impacts of future development projects, Aytas should be empowered to resist encroachments on their culture and land’. Meanwhile the CROP case studies argued that fighting poverty requires the realignment of social relationships, and that from indigenous peoples’ perspectives this may equate to enacting legislation prohibiting external development on their lands. The ILO case studies also identified encroachment on indigenous lands as an underlying cause of poverty and recommended respect for the right of indigenous peoples to FPIC, which ‘implies that indigenous peoples have the right to say no if they consider a project or an activity inappropriate’.

Mining, indigenous peoples and the MDGs

The remainder of this paper will address some of the real-life implications to indigenous communities of the issues raised in the previous sections by examining the complex interplay of national development, the MDGs and indigenous peoples’ self-determination rights in the context of the extractive industry.

The paper first aims to outline the content of indigenous peoples’ right to FPIC and the recognition afforded to it by the human rights regime. It will then provide some information on the expansion of the extractive industry and how policy decisions relating to this expansion are being linked with the MDGs. The impact of these policies on indigenous peoples will be assessed by addressing a specific case of mining on indigenous lands in the Philippines, illustrating the tensions that arise between the realisation of indigenous peoples’ rights and the approaches currently being proposed by some states to achieve the MDGs. Finally, the paper will briefly review the efforts of the global indigenous peoples’
movement to ensure that they benefit from the MDG project rather than becoming ‘sacri-
ficial lambs’ in the achievement of the MDGs.

Much of the world’s richest mineral resources currently being targeted by the global extractive industry reside in indigenous peoples’ lands. The extractive industry has been recognised as having a unique social and environmental footprint, described as enormous and intrusive, particularly impacting on indigenous peoples. This footprint is most obvious in countries suffering from corruption, where mineral resources are located in conflict or post-conflict areas and the use of military or paramilitary groups to protect mining operations is common, and has resulted in serious human rights violations ‘up to and including complicity in crimes against humanity’. It is in this context that the Global Indigenous Caucus in its statement on the adoption of the UNDRIP emphasised that ‘Free, prior and informed consent’ is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.

Content and relevance of the right to Free Prior Informed Consent (FPIC)
The right to FPIC is directly linked with states’ obligations to uphold indigenous peoples’ rights in the context of pursuing national development. It is therefore instructive to briefly review some of the general guidance offered by the human rights regime to states in this regard before addressing the content of the right to FPIC. The Vienna Declaration and Programme of Action contextualises development within the human rights framework by stressing that,

while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

The UN Committee on the Elimination of Racial Discrimination (CERD) has addressed the issue in its concluding observations to states, emphasising that development, in particular in relation to natural resource extraction, ‘must be exercised consistently with the rights of indigenous and tribal peoples’. Similarly, the jurisprudence of the Human Rights Committee, in its ruling on the Lansman et al. v. Finland case, clarifies that there is no margin of appreciation with regard to development on indigenous peoples’ lands. Rather, the scope of a state’s freedom is in reference to its obligations under article 27 of the ICCPR, thus, measures whose impact amount to a denial of the right [to culture] will not be compatible with the obligations under article 27.

Indigenous peoples’ right to FPIC has been summarised as the consensus / consent of indigenous peoples determined in accordance with their customary laws and practices.

It is premised on and flows from their right to self-determination. In turn FPIC acts as a means for operationalising self-determination, providing ‘a substantive framework’ integral to indigenous peoples’ rights to lands and resources and central to the exercise of their right to self-determination with respect to developments affecting them.

FPIC requires that consultation processes with indigenous peoples must be free from any external manipulation, coercion or intimidation, that the affected indigenous peoples
must be notified that their consent will be sought adequately in advance of any approval or commencement of activities. It demands accurate information, pertaining to, *inter alia*, the scope of projects, and benefit-sharing arrangements and requires that the potential negative impacts be fully disclosed in a manner understandable to the indigenous people. Indigenous people can decide to approve or deny a project or activity based on the consensus of all indigenous people affected reached through their traditional decision-making processes. In order that these criteria are respected FPIC consultations must occur within a pre-existing framework that ensures the full, effective and meaningful participation of indigenous peoples in decision-making at all levels in relation to policies or measures that directly or indirectly impact on them.56

**Recognition of the importance of FPIC**

The UNDRIP refers to FPIC in six of its articles. FPIC is required in relation to relocation, taking of cultural, intellectual, religious or spiritual property, legislative or administrative measures that may affect indigenous peoples, storage or disposal of hazardous materials in their lands or territories and in connection with any projects affecting their lands, in particular exploitation of mineral resources.58 The right to FPIC is explicitly stated in ILO Convention 169 in the context of relocation of indigenous peoples. ILO Convention 169 also recognises indigenous peoples right to ‘decide their own priorities for the process of development’ and requires that states consult with them through their representative institution ‘with the objective of achieving agreement or consent to the proposed measures’.59 Both CERD and the Committee on Economic Social and Cultural Rights (CESCR) have instructed states to obtain indigenous peoples’ consent, in particular in relation to extractive industry projects.60 CERD, in addition to addressing the issue in its concluding observations to states, has made it clear in its General Recommendation 23, dedicated to indigenous peoples, that

‘no decisions directly relating to their rights and interests are taken without their informed consent’.61

The UNPFII and the Working Group on Indigenous Populations (WGIP) developed methodologies and legal frameworks to promote the principle of FPIC and aid with its implementation. Its importance as a basis of indigenous peoples’ self-determined sustainable development is reflected in the objectives of the Second International Decade of the World’s Indigenous Peoples, which require that FPIC be taken into account in the promotion of the ‘full and effective participation of indigenous peoples in decisions that directly or indirectly affect’ any aspects of their lives.62

At the regional level, the November 2007 ruling of the Inter-American Court in relation to the situation of the Saramaka of Suriname referenced the UNDRIP and reaffirmed the requirement to obtain the FPIC of indigenous peoples in relation to developments that impact on them. It stated that

the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.63

Likewise, at the national level a landmark ruling of the Supreme Court of Belize in October 2007 referenced, *inter alia*, the UNDRIP and CERD’s General Recommendation
23 on indigenous peoples’ rights. The Court ordered the state to cease and abstain from any acts, including granting of mining permits or issuing any regulations concerning resource use, impacting on the Mayan indigenous communities ‘unless such acts are pursuant to their informed consent’.64

In the context of its supervision of ILO Convention’s 169 and 107, the ILO states that the two themes concerning which it receives most representations are

the duty of states to consult with indigenous and tribal peoples when consideration is being given to legislative or administrative measures that affect them, and the same duty of consultation prior to the exploration or exploitation of natural resources on the lands they occupy or use.55

An increasing number of cases in relation to the failure to consult and obtain consent of indigenous peoples in the context of mining on their lands are also being addressed by UN treaty bodies, in particular CERD.66 The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, highlighted the ‘long-term devastating effects of mining operations on the livelihoods of indigenous peoples and their environment’, describing FPIC as being of ‘crucial concern’ in relation to decision-making concerning large-scale development projects.67 The Special Rapporteur on indigenous peoples and their relationship to land, Erica-Irene Daes, emphasised the ‘growing and severe’ problem of expropriation of indigenous lands and resources without indigenous peoples’ consent,68 echoing this concern.

The mining industry and international financial institutions

The global mining industry has failed to recognise the requirement to obtain indigenous peoples’ right to FPIC. This fact is reflected in the International Council for Minerals and Metals (ICMM) position statement on mining and indigenous peoples, which does not require FPIC.69 The ICMM70 argues that

practical implementation of FPIC presents significant challenges for government authorities as well as affected companies as the concept is not well defined and with very few exceptions, is not enshrined in local legislation.71

While it is true that many governments have yet to enshrine FPIC in local legislation the argument that this is a reason for not respecting the right does not hold water within the context of the human rights regime. The fact that many governments in developing countries have inadequate protections for indigenous peoples’ rights cannot provide an excuse for an industry, with such a disastrous track record in relation to indigenous peoples, to avoid its responsibilities. The signing of the UNDRIP by 143 governments demonstrates a global commitment to uphold these minimum standards necessary for the survival of indigenous peoples and places a clear obligation on the extractive sector and international financial institutions (IFIs) to recognise the right to FPIC. Furthermore, the fact that the right to FPIC is recognised under international human rights law and is guaranteed under national legislation in a number of countries, such as the Philippines, Australia and Venezuela, clearly belies the argument that the concept is not well defined.72 To date IFIs, in failing to keep with the recommendations of World Bank and independent international reviews, have adopted a similar stance to the mining industry, requiring the weaker standard of free prior informed consultation undertaken in good faith.73
Increased emphasis is currently being placed on the role of the private sector in helping to achieve the MDGs. While this increased participation is a welcome departure, it could afford the mining industry an opportunity to claim that it is contributing to the MDGs while continuing to ‘hide behind deficient national laws to evade respect for indigenous and tribal peoples’ rights’. Such a position is clearly contradictory and is unacceptable from the perspective of the indigenous peoples impacted. In his comments on the significance of the industry’s failure to recognise the right to FPIC, Roger Moody, a leading critic of current mining practices, suggests that there are few other issues that strike so directly to the heart of contemporary debates about self-empowerment, the implementation of democracy and ultimately the sustainability of our planet.

From the perspective of indigenous peoples it is arguable that there are few other issues that strike so directly to the heart of their cultural survival as peoples.

**FPIC and the MDGs**

The International Expert Group on the MDGs, Indigenous Peoples’ Participation and Good Governance noted that in achieving the MDGs ‘the principle of free, prior and informed consent is...essential for indigenous peoples’ participation’. Likewise the UNPFII has consistently called for the need to respect the right to FPIC in the context of achieving the MDGs. The UNDG guidelines published this year recognise the importance of respecting the rights of indigenous peoples, as articulated in the UNDRIP, in order to achieve MDGs. The central position the guidelines accord to the right to FPIC is reflected in 17 references to it and the acknowledgement that

Indigenous peoples’ lands have been disproportionately affected by development activities because they often contain valuable natural resources including timber, minerals, biodiversity resources, water and oil among others.

The UN Inter-Agency Support Group (IASG) on Indigenous Issues has hailed the adoption of the UNDRIP and pledged to ‘advance the spirit and letter of the Declaration within our agencies’ mandates’ and to ensure that it ‘becomes a living document throughout our work’. The IASG also recognised that efforts to meet the MDGs could have harmful effects on indigenous peoples

such as the acceleration of the loss of the lands and natural resources on which indigenous peoples’ livelihoods have traditionally depended or the displacement of indigenous peoples from those lands

and asserts the

need to take the situation of indigenous and tribal peoples fully into account in the efforts of the international system to achieve the MDGs and the other aspirations of the Millennium Declaration.

While yet to make its position clear with regard to FPIC, it is difficult to see how the IASG could justify the non-recognition of the right to FPIC in the light of these statements, the guidance offered by the UNDG and indigenous peoples’ position that the UNDRIP, their rights to self-determination and FPIC have to be viewed as a package.
Role of the extractive sector in MDGs

The UN Conference on Trade and Development (UNCTAD) is a member of both the UNDG and IASG. Its 2007 World Investment Report (WIR) was dedicated to the subject of foreign direct investment (FDI) in the extractive sector and addresses, as one of its themes, the link between the exploitation of mineral resources and the achievement of the MDGs. The report highlights that measures favourable to FDI, including lowering corporate income taxes and expanding promotional efforts, were increasingly common in developing countries. It also points out the serious social, environmental and human rights impacts of the extractive sector, providing examples of specific impacts on indigenous peoples, and the fact that despite significant FDI in the extractive sector in African countries, broader development gains have generally not resulted. While emphasising the need to balance social and environmental concerns against economic considerations the overall thrust of the report is that, with sufficient long-term planning and appropriately designed benefit-sharing policies, increased FDI and TNC involvement in the extractive sector in developing countries represents an opportunity to make progress towards meeting the Millennium Development Goals by reducing poverty and embarking on a path of broader based sustainable growth.

The UN Secretary General, Ban Ki-Moon, also emphasised this point in his foreword, which, while noting the ‘considerable economic, environmental and social challenges’, argues that

this commodity boom ... should open a window of opportunity for mineral-rich countries to accelerate their development. This is especially important as we reach the midpoint in our efforts to reach the Millennium Development Goals.

Given this emphasis on the extractive sector as a means towards achieving the MDGs and the recognition of the major potential impacts on indigenous peoples it is disappointing that this extensive UNCTAD report did not make any reference to the right to FPIC; a right which indigenous people consider of paramount importance in the context of the extractive industry. Recognition of the requirement to obtain indigenous peoples’ FPIC would have been in keeping with the recent guidance provided by the UNDG and the commitment of IASG to advance the spirit and letter of the Declaration.

Extractive sector and the MDGs – the Philippine context

The proposition put forward in the UNCTAD report that the mineral commodity boom, combined with increased FDI in the extractive sector, could act as a major contributor to poverty alleviation and the achievement of the MDGs is at the core of the Philippines proposed development model and its MDG strategy. The Philippines, which is currently implementing economic policies based on this proposition, therefore provides an interesting case study for assessing its effects on the realisation of indigenous peoples’ rights. The Philippines is among the world’s most mineral-rich countries in terms of estimated minerals per square kilometre. It is also a country with a sizeable indigenous population, estimated to be in the region of 12 million people, corresponding to 15% of the total population. It is reflective of the global situation with respect to highly mineralised indigenous territories. The fact that 18 of the Government’s 23 priority large-scale mining projects are located on indigenous territories is illustrative of this. As with many resource-rich developing
countries the Philippines suffers from corruption, described as ‘traditionally notorious’ in the context of the extractive sector. Rebel groups are active in many regions and the military is implicated in extra-judicial killings, including killings of indigenous peoples. The UN Special Rapporteur on extra-judicial, summary or arbitrary executions, Professor Philip Alston, views these extra-judicial killings as ‘severely undermining the [country’s] political discourse’.

The 1987 Constitution of the Philippines provides for recognition of indigenous peoples’ rights to their ancestral lands. The 1997 Indigenous Peoples’ Rights Act (IPRA) was enacted to give force to these constitutional protections. It provided for the registration and titling of ancestral domains ‘comprising lands, inland waters and natural resources therein’ and for the primacy of indigenous customary law within these domains. It reflects many of the provisions of the UNDRIP, and in the context of recognising indigenous peoples’ right to self-determination guarantees them the right to FPIC over decisions affecting them and developments on their lands. IPRA defines FPIC as

the consensus of all members of the ICCs/ IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference or coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

In addition to provisions recognising indigenous peoples’ rights, the 1987 Constitution also includes provisions preventing fully foreign-owned mining companies from acquiring mineral concessions. These protections stemmed from the historical experience of what indigenous peoples refer to as ‘development aggression’, whereby predominantly foreign companies, with the assistance from the Philippine elite, had encroached upon their lands in their quest for natural resources, impoverishing rather than benefiting indigenous people.

Therefore, when in 1995 a Mining Act was enacted which attempted to circumvent these protections, indigenous peoples reacted strongly against it. They severely criticised the drafting process, which they pointed out paid no attention to the impact of mining on them and a group consisting of indigenous peoples and farmers mounted a Supreme Court challenge to the Act’s constitutionality. The Court found in their favour, but in a controversial ruling it subsequently reversed its decision, stating that

the Constitution should be read in broad, life-giving strokes. It should not be used to strangulate economic growth or to serve narrow, parochial interests.

Towards the end of the 1990s the Government of the Philippines changed its role from regulator of mining to active promoter of mining. This change is reflected in its National Policy Agenda on Revitalizing Mining and the Philippine Mineral Action Plan (MAP), which target up to 30% of the country’s landmass for mining and offer generous incentives to foreign mining companies, including up to 8-year tax exemptions and 100% repatriation of profits. During the policy drafting process alternative mining policy proposals were made by indigenous peoples, however, a clear bias in favour of the mining industry eliminated the potential for any meaningful participation of indigenous peoples in policy formulation.

The resulting National Policy Agenda is incorporated into the Philippines Medium-Term Philippine Development Plan (MTPDP) 2004–2010, which identifies mining as
one of the priority sectors to be promoted and developed.\textsuperscript{108} This MTPDP is also the vehicle by which the Philippine Government proposes to reach its MDG targets. In her speech at the official launch of the second Philippine progress report on the MDGs, the President of the Philippines highlighted this link between mining and the MDGs, pointing out that among the economic reforms that the Philippines had put in place to enable the achievement of the MDGs was ‘the opening of the mining sector and the thousands of jobs that go with it’.\textsuperscript{109} The funds generated from these reforms, she explained, would allow the Philippines to ‘invest more in the vital social needs to achieve the Millennium Development Goals’.\textsuperscript{110}

The mining policy agenda, quoted in the MTPDP, states that the Government recognizes the critical role of investments in the minerals industry for national development and poverty alleviation and shall provide support mechanisms … including the streamlining of procedures of concerned government agencies.\textsuperscript{111}

The National Commission on Indigenous Peoples’ (NCIP) procedures on how FPIC should be obtained were one of those identified for streamlining as part of this policy. This streamlining, from the perspective of indigenous peoples, resulted in a discriminatory set of rules that impose restrictions on FPIC in terms of timeframes and processes that are inconsistent with their customs and practices and go against the spirit and intent of IPRA.\textsuperscript{112} Indigenous peoples’ organisations and supporting civil society groups raised their concerns at both national and international levels.\textsuperscript{113} CERD is currently examining the issue and it is also addressed in the input to the Philippines Universal Periodic Review before the Human Rights Council.\textsuperscript{114}

It is beyond the scope of this paper to address the contested macro-economic arguments pertaining to the benefits to developing countries of an FDI-reliant, export-oriented, extractive industry. It is nevertheless pertinent to point out that the claims of ‘hundreds of thousands of jobs’ made in the MTPDP are strongly contested by indigenous organisations and civil society groups. Some point to the widespread displacement of small-scale miners to make way for large-scale operations, and others to externalised costs such as the impacts on local livelihoods based on agriculture and fisheries, claiming that mining threatens indigenous peoples’ long-term food security.\textsuperscript{115} Many believe that in the absence of good governance and respect for rule of law, mining, on the scale promoted by the Government, would have serious long-term environmental costs and human rights impacts.\textsuperscript{116}

At a local level the conclusions of Dr Emil Salim, the Eminent Person of the World Bank commissioned Extractive Industry Review that

not only have oil, gas and mining industries not helped the poorest people in developing countries they have often made them worse off\textsuperscript{117}

are borne out by the experience of many indigenous communities in the Philippines. There is scant evidence of indigenous communities benefiting from mining and numerous cases that point to the contrary.\textsuperscript{118} Economic arguments aside, however, it is clear that mining as it is currently being pursued in the Philippines is resulting in serious violations of indigenous peoples’ rights. The case of the Subanon of Mount Canatuan, of Zamboanga del Norte, Mindanao, is illustrative of this.
The Subanon of Mount Canatuan

The island of Mindanao is home to 60% of the Philippines’ indigenous peoples. The Subanon, who reside on Mindanao’s Zamboanga peninsula, are estimated to number over 330,000 and are one of the largest groups. Their ancestral lands have long been subject to encroachment and development. The case of the Subanon of Mount Canatuan, members of the greater Subanon family, is perhaps one of the most-documented accounts of development aggression in the context of mining. The accounts describe a community that has, since the early 1990s, made use of all the legal avenues available to it to assert its rights over its ancestral lands. However, despite their constant resistance to mining on their lands, a mining project in their ancestral domain was designated as one of the government’s 23 priority mining projects included in its national mining policy.

Due to their persistent efforts to secure control over their ancestral domain, and specifically to protect it from imposed mining and logging operations, the Subanon of Mount Canatuan were one of the first communities to gain formal recognition of their ancestral domain under IPRA. They subsequently discovered that the government’s predetermined national mining agenda rendered this legal title ineffective in securing de facto control over their ancestral domain. As a result the peak of Mount Canatuan, the Subanon’s sacred ground since time immemorial, has been removed without their consent. The process that facilitated this non-consensual operation involved the violation not only of their rights to FPIC and religion, but of a range of rights including, inter alia, their rights to self-determination, to land and resources, to their cultural heritage and traditional practices, to justice, to health and a healthy environment, to livelihoods and to development.

The experience of the Subanon of Mount Canatuan and that of other communities, such as the Subaanen of Midsalip and the Mangyan-Alangans of Mindoro, serve to illustrate that, in the context of a predefined government mining agenda, when it becomes evident that communities will not voluntarily give their FPIC, alternative means are found to circumvent this requirement. The history of how this was achieved at Mount Canatuan is a long and complex one. This paper will briefly touch on some of the principle violations of the Subanon’s rights and in doing so address some of the implications of mining proceeding without the consent of the local impacted indigenous community. It will then look at how this relates to the MDGs and the implications for the MDG project.

In the case of the Subanon of Mount Canatuan, the realisation that the local community’s consent was not forthcoming initiated a process whereby their legitimate local tribal leaders were ignored and an alternative, government and mining company compliant, ‘representative structure’ was established. This was accomplished through the active participation of the NCIP, the government body mandated to uphold indigenous peoples’ rights. The process followed was in clear violation of Subanon customary law and practice as well as the NCIP’s own guidelines and mandate.

The Mount Canatuan mine is located in one of the many conflict areas in Mindanao. Moro and communist rebels operate in the region and there is a history of extortion associated with mining activities. In 2003, Moro rebels killed 20 people in a nearby town. A year prior to this a company truck carrying Subanon passengers was ambushed and 13 people were killed. The response of the Philippines Government to such attacks on mining operations is to increase army support to paramilitary guards. Over 160 heavily armed paramilitary forces have been deployed to secure the Mount Canatuan site. They stand accused by the Subanon of serious human rights violations, including blocking access to their ancestral domain and detaining people at checkpoints, intimidation, harassment, participation in evictions and destruction of subsistence farms and shooting incidents.
Mining a sacred mountain

A particularly sensitive issue for the Subanon is that despite their pleas to protect their sacred mountain, and legal protection afforded by IPRA to indigenous peoples’ sacred places, no action was taken to prevent it from irreparable harm. The traditional religion of the Subanon is practised in many regions, including the area around Mount Canatuan, a mountain recognised as a place of special spiritual significance in Subanon oral tradition by both local and neighbouring Subanon. Subanon belief holds that it was there that the Subanon’s ancestor, Apo Manglang, made a covenant with the immortal being residing in the mountain’s forests to protect the Subanon from harm. It has been the source of their medicinal plants and a place where their highest ritual has been performed ever since. Occupation or construction was not permitted on its peak. Nevertheless, a Canadian mining company, TVI Pacific Inc., with a clear vested interest, has assumed the authority to adjudicate on the sacredness of the mountain. It argues that based on archaeological assessments there was ‘no evidence found of any historic or prehistoric religious practice, ever, at Mt. Canatuan’, and in a recent letter to a national newspaper the company’s director of public affairs states that Mount Canatuan is not sacred. The only identifiable Subanons who seriously consider it sacred are members of anti-mining organizations who . . . began using the mountain’s “sacredness” as a rallying cry in international discourse.

Such statements have compounded the anger the Subanon feel at the destruction of their sacred place. The frustration is evident in the responses of their traditional leaders, who question the authority of the company to determine the sacredness of Mount Canatuan, stating that IT IS WE the descendants of Apo Manglang who are in the position to declare it, not him.

Avenues pursued by the Subanon to protect their sacred mountain

The Subanon’s efforts to assert their rights, and the continued inaction of government bodies to uphold them, are illustrative of the experience of indigenous communities in the context of government policies that implicitly discriminate against them. A series of legal cases were filed by the Subanon between 2000 and 2006 in the courts and with quasi-judicial bodies such as the NCIP; however, these were either not addressed or were dismissed on procedural grounds.

The Subanon made their complaints at the UN Working Group on Indigenous Populations in 2002 and 2005. The 2002 complaint triggered a Philippines Commission on Human Rights investigation. This concluded that the problems at Mount Canatuan stemmed from the granting of the mining permit without obtaining the consent of the Subanon as the law requires, and the use of paramilitary forces. The NCIP’s response was to facilitate the creation of a company-compliant leadership structure, referred to as the ‘Council of Elders’, from which to obtain ‘consent’.

In 2004, the Subanon convened their traditional judicial authority, the Gukom of the Seven Rivers. It ruled that 21 of the 30 ‘so called leaders’ in this newly formed ‘Council of Elders’ were illegitimate and that agreements entered into with the mining company were null and void. It instructed the NCIP to disband the Council. However, the NCIP, despite its prior recognition that any judgment arrived at by the Gukom could be referred to it for enforcement, took no action and continued to uphold the legitimacy of this ‘Council of Elders’.
In 2003, the UN Special Rapporteur on the rights and fundamental freedoms of indigenous peoples, Professor Rodolfo Stavenhagen, visited the Philippines. His request to visit Mount Canatuan was refused by the Government. In his report he made explicit reference to the ‘so-called paramilitaries’ that are employed at Canatuan and stated that ‘militarization of indigenous areas is a grave human rights problem’. In 2004, when open-pit mining operations were commencing, an urgent memo was sent from the Chairman of NCIP to the Secretary of the Department of the Environment and Natural Resources (DENR) recommending the halting of operations due to the sacred nature of Mount Canatuan to the Subanons. Once again no action was taken by the NCIP or the DENR.

In 2005, the Subanons went to Canada to present their case. A Standing Committee of the Canadian Parliament on Foreign Affairs and International Trade investigated their case and stated that it was deeply concerned about the possible impact of the activities of TVI Pacific Inc., a Canadian mining company, on the indigenous rights and the human rights of people in the area.

It recommended that legislative measures be adopted to regulate Canadian companies operating overseas and that an investigation into the situation at Mount Canatuan be conducted. The Subanons were disillusioned with the subsequent investigation, which did not involve them and has not resulted in any action to address their plight. They also feel that the Canadian government, through its direct support for the company, bears some responsibility for the violations of their rights.

The company is now planning to expand its operations at Mount Canatuan. Against the wishes of the traditional leadership it is financing the development of the Subanon’s Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). IPRA requires that ADSDPPs be developed ‘in accordance with [indigenous peoples’] customary practices, laws and traditions’. The Subanons view the NCIP, in failing to uphold this requirement, as effectively legitimising the expansion of mining operations under the guise of self-determined development.

The overall effect of the mining operations on the Subanon community has been divisive. The imposition of new leadership structures compliant with company and governmental wishes has served to undermine traditional leadership structures and customary decision-making processes. A culturally and spiritually significant site has been damaged and the Subano traditional practices impacted. The failure to address the violations of their rights, the continued recognition of the newly created leadership structures and their recent involvement in charting the Subanon’s future, together with the imminent prospect of expanded mining operations, are all cause for serious concern among the Subanon of Mount Canatuan.

Given these circumstances and the failure to obtain redress either in the Philippines or in Canada the Subanons decided to engage international human rights mechanisms. In their submission to the CERD committee at its 71st session in August 2007 the Subanons stated their belief that the Mount Canatuan case is in effect acting as a test case for the Government of the Philippines in their efforts to develop a ‘model’ for dealing with indigenous communities that enables mining developments to proceed even where communities have not granted their consent.

They added that they believed that urgent action was necessary if their rights were not to be rendered useless as a result of ‘discriminatory economic policies of their governments
and the vested interests of multinational corporations’ and highlighted that ‘the impact of this lack of respect and protection of indigenous peoples’ rights is particularly acute in the context of extractive industries’. In excess of 100 indigenous community organisations, institutions and tribal leaders from throughout the Philippines have subsequently endorsed the Subanon submission. Their endorsements and the information they provided on similar violations of their rights highlight the seriousness of the threat indigenous peoples see themselves facing as a result of the government mining policy. CERD has invoked its Early Warning Urgent Action procedures in relation to the Mount Canatuan situation and has notified the government of its concern that it is not an isolated case but that it is rather indicative of similar situations faced by other indigenous communities in the state party.

A recent Human Rights Impact Assessment conducted by Rights and Democracy describes how the mining project has impacted negatively on the realisation of a range of the local Subanon’s individual and collective rights. Meanwhile, the mining company presents itself as having improved access to these same rights. Ironically it even claims to have ‘allowed the IPs [indigenous peoples] to break from their past’ and to have improved their rights to life and security, culture and self-determination.

Relevance of Subanon case to the MDGs

As further justification of its mining operations the company also claims that it has increased the presence of government services ‘in a location where the state was previously absent’. This reflects a national pattern whereby the absence of services is being used as a bargaining tool in exchange for indigenous communities’ ‘consent’ or as a justification for developments that proceed against their wishes. The experience of indigenous peoples in the Philippines mirrors what the 2004 UN Human Development Report described as a common systematic discrimination against indigenous peoples in public spending on basic social services. The President’s stated rationale for promoting and facilitating mining operations, most of which occur on indigenous peoples’ lands, is to be able to ‘invest more in the vital social needs to achieve the MDGs’. It seems highly ironic that the wishes of many of those the President claims to be helping through the achievement of the MDGs are being ignored in the process. In effect the MDGs are being misused to justify the denial of indigenous peoples’ rights. The equation under this distorted logic appears to be ‘rights for services’ instead of ‘rights and services’. The Asian Indigenous Peoples Caucus raised this issue at the UNPFII in 2007. They explained that, despite the good intentions of the MDGs, the well-being of indigenous peoples would worsen if ‘the prevailing development paradigm of resource extraction . . . continues’ to ignore [their] rights and welfare’, adding that ‘of particular concern is that delivery of basic services . . . is dependent on the approval of destructive projects’, a practice which they deplored and equated to ‘trading rights for services’.

Indigenous sensitive MDG indicators

As is clear from the Subanon case, the MDGs, if used to justify what indigenous peoples view as discriminatory policies, could effectively act to their detriment and contribute to the violation of their rights. However, it is equally apparent that the MDGs, if implemented
in accordance with indigenous peoples’ rights and perspectives of their own well-being, have the potential to significantly benefit them by assisting in strategically addressing their economic needs. To enable the latter the UNPFII proposed that poverty indicators based on indigenous peoples’ own perception of their situation and experiences should be developed jointly with indigenous peoples.146

To this end the UNPFII secretariat and the International Indigenous Forum on Biodiversity Working Group on Indicators have conducted a series of national, regional and international workshops.147 The objective of these workshops is to develop indigenous peoples’ indicators of well-being, poverty and sustainability148 which will enable the collection of relevant disaggregated data on indigenous peoples’ situations. Before focusing on specific MDG indicators it was deemed necessary to first clarify ‘the broader policy framework and targets’.149 A list of global core themes and issues were developed to serve as a basis for a strategic set of indicators relevant to indigenous peoples’ well-being ... and a framework for long-term monitoring of the state of indigenous peoples.150

These core themes capture the collective nature of indigenous rights, their non-market and subsistence livelihoods, their control over lands and natural resources and the importance of their cultural heritage to their long-term survival. Two of the global core themes identified are fate control/self-determination and full, informed and effective participation. FPIC is identified as a sub-core theme of both. Work is currently under way, in close collaboration with indigenous peoples, to develop indicators for these core and sub-core themes. These indicators once developed will then be mapped to the MDG targets.

The following are the author’s own reflections on potential FPIC indicators in the context of fate control/self-determination and full and effective participation.151 Viewed from the perspective of fate control/self-determination, FPIC indicators could aim to capture information pertaining to: (1) national legislation, including the degree of recognition of the right to FPIC and other self-determination rights and the existence of conflicting laws; and (2) the effectiveness of FPIC implementation in terms of (a) appropriateness of administrative guidelines, including respect for customary law and decision-making in terms of process and timeframes and adherence to the principle of self-determination; (b) extent of conduct of good-faith FPIC processes and satisfaction of communities with processes conducted; (c) respect for output of FPIC processes and quality of negotiated agreements; and (d) effectiveness of monitoring, enforcement and redress mechanisms. Likewise indicators for full and effective participation could address areas which impact on FPIC processes such as: the existence of a national framework for indigenous participation; the degree of indigenous participation in the development of policy and the recognition and implementation of the right to FPIC in relation to legislation and administrative measures that impact on indigenous peoples. If the private sector’s role in the MDG project increases, thought may need to be given to how best to monitor and control its impact on the realisation of indigenous peoples’ rights. In the context of the extractive sector such FPIC indicators would appear to be particularly relevant to MDGs: 1 (poverty); 7 (environment sustainability); and 8 (global partnership).

Mechanisms will also be required to ensure effective monitoring and reporting against these indicators. A number of proposals have been made in this regard, including supporting indigenous organisations in carrying out their own monitoring and reporting of their poverty situation152 and establishing independence mechanisms specifically to monitor FPIC
processes. Solutions appropriate to the particular contexts and situations of indigenous peoples will be required but it is probable that a combination of both proposals may be desirable in many circumstances. Of fundamental importance is that any body established to uphold indigenous peoples’ rights is fully accountable to indigenous peoples.

The incorporation of the results of indigenous peoples’ own monitoring of indigenous sensitive MDG indicators into the National MDG reports would be a welcome development. Increased involvement of indigenous organisations in the MDG monitoring process, in addition to adding to its credibility, would also assist in the provision of disaggregated data allowing more focused and targeted interventions. The inclusion of MDG reports containing this information in state core reporting documents submitted to UN treaty bodies could serve as a means of furthering states’ adherence to their human rights obligations.

Conclusion

The achievement of the MDGs contingent on the denial of indigenous peoples’ rights is clearly not compatible with the MDG Declaration under which governments committed to respecting all internationally recognized human rights and fundamental freedoms, including the right to development [and]… minority rights. However, the Subanon case demonstrates that this is effectively what is being attempted in the Philippines. It is illustrative of the experience of a growing number of indigenous communities there and elsewhere. A number of lessons can be drawn from these experiences.

First, they illustrate the fundamental importance of respecting the consensus opinion of indigenous communities determined in accordance with their customary laws and practices as embodied in the right to FPIC. The alternative is a continuation of the ‘divide and rule’ strategies that have been, and continue to be, detrimental to the cultural survival of indigenous peoples. The right to FPIC means an indigenous community can say no to mining operations on their lands if they so decide. Community decisions must be respected and repeated attempts to ‘convince’ communities to change their minds must be prevented.

Second, they illustrate that, if FPIC is to be operationalised at the local level, indigenous peoples’ full and effective participation in policy formulation at all levels is of particular importance in areas such as the extractive sector. In contexts where governance structures are weak, powerful government bodies and mining companies that share a predetermined common agenda render relatively weak bodies such as the NCIP incapable of upholding indigenous peoples’ rights. This applies even where legal frameworks for the protection of these rights exist. The end result is that bodies mandated to uphold indigenous rights end up serving the interests of the companies instead.

Third, they demonstrate the need for mechanisms that are accountable to and controlled by indigenous peoples, to assess and monitor the realisation of their rights and their well-being to ensure that they do not become what the Chair of the UNPFII referred to as the ‘sacrificial lambs’ for the achievement of the MDGs.

A human rights based approach to the MDG would assist indigenous people in realising a self-determined development. It would help them to address their economic insecurity and provide them with an opportunity to strengthen the capacity of their institutions to uphold their rights, thereby reducing their vulnerability if engaging with external actors in the future.
The adoption of the UNDRIP by the General Assembly in 2007 should act as the catalyst for ensuring respect for indigenous peoples’ rights in all aspects of the MDG project. It is premised on indigenous peoples’ right to self-determination and their related rights to FPIC and full and effective participation. To be compatible with these rights, the MDG project should ensure that indigenous peoples’ participation, based on the right to FPIC, is ensured at all levels in the planning, design and implementation of the MDGs strategies and in associated policies, programmes and projects impacting on indigenous peoples.

The incorporation of indigenous sensitive indicators of well-being, poverty and sustainability into the MDG project provides the mechanism for ensuring respect for indigenous peoples’ rights. These indicators would act as the foundation for the collection of meaningful disaggregated data, with the involvement of indigenous peoples’ own institutions in MDG planning, monitoring and reporting improving data availability and quality. This data could also be used as input to human rights mechanisms, thereby assisting in the monitoring of state obligations in relation to indigenous peoples’ rights.

Respect for indigenous peoples’ right to FPIC and incorporating indigenous sensitive indicators into MDG planning, implementation and monitoring are necessary elements of a human rights based approach to the MDGs. They are also effective strategies for tackling indigenous impoverishment. On the one hand, they play an important role in halting poverty-creating processes by contributing to the realignment of unequal social relations and on the other they facilitate the exercise of the right to self-determination and increase indigenous peoples’ ability to control their own fate, allowing them to pursue culturally appropriate development models. They are therefore of fundamental importance for all development strategies, including the MDG, aimed at addressing indigenous poverty, well-being and sustainability.

All of the conflicts that indigenous peoples currently have with the nation-state are also conflicts in which the past lies before us. They grow out of the ongoing culture of colonization and therefore demand unique strategies and unique approaches. If the causes lie in the systemic oppression of colonization, then the answers must lie within the values which colonization sought to destroy and not in the values it still seeks to impose.

Moana Jackson

Notes

3. UNDRIP, Article 43.
7. General considerations on the situation of human rights and fundamental freedoms of indigenous peoples in Asia Presented by the United Nations Special Rapporteur on the


12. UNDG Guidelines (note 6), 10.

13. The Special Rapporteurs on the rights of indigenous peoples, right to food, right to health and adequate housing have all provided such clarification.


15. Ibid., 3.


18. The case studies reviewed cover 16 countries and were published in 2005 and 2006.


20. Ibid., 13.


28. It is estimated that indigenous peoples represent 5% of the world’s population but 15% of the world’s poor: see Lennart Båge, IFAD President (2007), Development Policies and Lessons for


30. UNDRIP, Articles 41 and 42.

31. UNDG Guidelines (note 6), 27.


33. ILO Case Studies (note 18), 2.


35. Countries referenced were Nepal, Vietnam, Mexico, Ecuador, Panama and Lao.

36. Countries referenced were Namibia, the Philippines and Lao.


38. Ibid., para. 19.

39. Ibid., para. 1.


41. Food and Agriculture Organization of the United Nations World Food Programme submission to the UNPFII 5th session E/C.19/2006/6/Add.14, para. 7.

42. Ayta Case Study (note 24), 62.

43. McNeish and Eversole, ‘Conclusion’ (note 26), 293.

44. ILO Case Studies (note 18), 31.


47. Ibid., paras 25, 29.


50. CERD Concluding observations CERD/C/62/CO/2; see also CERD Concluding Observations Ecuador 2003 CERD/C/62/CO/2; see also CERD Concluding Observations

61. CERD General Recommendation 23, para. 4(d).


64. The Supreme Court Of Belize, A.D. 2007 Consolidated Claims Claim Nos. 171 and 172 of 2007, para. 136d.


66. For CERD Early Warning Urgent Actions Procedures see <http://www2.ohchr.org/english/bodies/cerd/EarlyWarning.htm>.


75. Four of the 21 companies currently signed up to the private sector MDG Declaration are involved in the mining sector: Anglo American plc, De Beers Group, The Tata Group and The Bechtel Corporation.

76. Forest Peoples Programme (note 70).


78. For observations on extent of the impact of extractive industry on indigenous peoples see Ruggie, Interim Report (note 45), paras 29, 25; see also Indigenous peoples and their relationship to land, Final working paper prepared by Special Rapporteur, Erica-Irene A. Daes (E/CN.4/Sub.2/2001/21), para. 66; see also Extractive Industry Review (note 72), 17.

80. UNPFII, MDG Desk Reports (note 33).
81. UNDG Guidelines (note 6), 14.
86. Ibid., xvii.
87. Ibid., 82.
88. Ibid., 184.
89. Ibid., 182.
90. Ibid., Preface, iii.
93. Review of Environmental Actions Funded by the European Commission and the EU Member States in the Philippines (June 2005), xi; see also Transparency International Annual Report 2004, 8–9 classifying the Philippines as suffering from ‘rampant corruption’.
95. Extra-judicial killings have a corrosive effect on civil society and political discourse in the Philippines, says UN independent expert at the end of visit, Press Statement Manila, 21 February 2007 available at <www.ohchr.org>.
96. Indigenous Peoples Rights Act, Republic Act 8371, Sec 3 (a).
97. Ibid., Sec 3 (f).
98. Ibid., Sec 3 (g).
99. Constitution of the Philippines, Section II Article XII.
105. Ibid., slides 5 and 8, see also Malacañang Manila by the President of the Philippines Executive Order No. 270 National Policy Agenda on Revitalizing Mining in the Philippines, <http://www.mgb.gov.ph/policies_eo270.htm> (henceforth EO No 270).


110. LRC-KSK / Friends of the Earth-Philippines, A critique on the Philippines Free Prior Informed Consent Guidelines of 2006 (Manila: LRC-KSK 2007). The 2006 revised FPIC guidelines represent the second time that the FPIC guidelines were streamlined in the interests of promoting the mining industry.


112. The MTPDP (note 110), 45.


undermining.pdf>; Rovilloa et al. ‘When Isles of Gold Turn to Isles of Dissent’ (note 100), 198–9.

120. The Subaanen of Midsalip, members of the greater Subanon family, are also facing the commencement of mining exploration activities in their sacred Mount Pinukis mountain range. Despite their long history of resisting mining and logging operations in their ancestral domains, a flawed FPIC process has denied them their right to refuse entry to the mining company on their ancestral lands. See Submission to the Committee on the Elimination of all forms of Racial Discrimination regarding Discrimination against the Subaanen of Midsalip, Zamboanga del Sur, Mindanao, Philippines in the context of applications for large-scale mining on their ancestral domain. Additional Information in relation to Early Warning and Urgent Action procedure initiated in relation to the Philippines. CERD 72nd Session, 18 February–8 March 2008, submitted by: Tumaned Pusaka Subaanen dig Midsalip (TUPUSUMI) Subaanen Organization, Legal Rights and Natural Resources Centre/Kasama sa Kalikasan/Friends of the Earth Philippines (LRC-KsK/FOE Phils.), Indigenous Peoples Links, Irish Centre for Human Rights.

121. The Mangyan-Alangans of Mindoro face a similar fate. Despite the failure to obtain their FPIC, their sustained resistance to mining on their lands and recognition of the impact to their sacred places, the mining in their ancestral domain is also included in the Government’s priority list of 23 mining operations. Their case has gained international attention, leading to an investigation by the Norwegian Ambassador recognising the resistance of the Mangyan. The sacredness of their ancestral domain is the one primary reason for the Mangyan peoples’ resistance to the mining project. The Mangyan, like the Subanon of Mt Canatuan and the Subaanen of Midsalip, are adamant that, based on their beliefs, these sacred places should not be disturbed and that doing so will have far-reaching consequences from the failure of harvests to death and destruction; see The Alangans: Forest Tribe on the Verge of Mining (Publisert 14.10.2007) available at <http://www.norwatch.no/index.php?back=2&artikkelid=1649>; see also E.A. Gariguez, Articulating Mangyan-Alangans’ Indigenous Ecological Spirituality as Paradigm for Sustainable Development and Well-Being, A Dissertation Submitted to the Faculty of the Graduate School Asian Social Institute, March 2008; Report of the Royal Norwegian Embassy Manila Executive Officer: Risa Ståle Torstein [Norwegian ambassador to Manila] 11 October 2007 (unofficial translation) and Dames and Moore, ‘Formal Scoping Summary Matrix’, Mindoro Nickel Project, Summary Matrix 5, 1999.


124. IPRA Sections 3, 4, 7, 33.

125. Sanz, ‘The Politics of Consent’ (note 118), 112; see also Mining a Sacred Mountain (note 118), 4.

126. Mining a Sacred Mountain (note 118), 4.


130. A case was also filed with the Panel of Arbitrators at the Mines and Geo-sciences Bureau of the DENR in 2006; see Subanon CERD Submission (note 118).

131. Resolution of the Philippines Commission on Human Rights in the matter of investigation conducted on the Subanon Case at Tabayo, Siocon, Zamboanga de Norte, May 2005; see Subanon CERD Submission (note 118).

133. Subanon CERD Submission (note 118), para. 29.
136. The Canadian government rejected the proposal to regulate its companies’ overseas activities and instead conducted a series of roundtable discussions; see National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries Advisory Group Report, 29 March 2007.
138. Subanon CERD Submission (note 118), para. 11.
139. Ibid., paras 5 and 12.
141. Mining a Sacred Mountain (note 118), 18.
150. Ibid., 5.
151. These reflections build on the suggestions made at the Ottawa Indicator meeting (note 147) for indicators to capture the recognition of the existence and rights of indigenous peoples [including FPIC] in state laws and the number and effectiveness of consultations implementing FPIC with indigenous community members and representatives.
154. UN Millennium Declaration paras 24, 25 A/RES/55/2.
156. Leonen. ‘Seeking the Norm’ (note 118), 38.