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Free, Prior And Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead

Mauro Barelli

The City Law School, City University, London

1. Introduction

Indigenous peoples have a distinctive and profound relationship with their lands, territories and resources. This relationship, which is at the core of indigenous societies,[1] has social, cultural, spiritual, economic and political dimensions.[2] Furthermore, for indigenous peoples the land 'is not a commodity which can be acquired, [3] but, rather, something that should be enjoyed freely and collectively. It is clear, therefore, that indigenous peoples have a unique understanding of how 'human beings should live on the earth',[4] and that respect for their lands, territories and resources becomes key for their continued survival and vitality. Understandably, this alternative approach to existence is at odds with the modern global market which fully endorses the concept of 'never-ending exponential growth.'[5] Exploiting natural resources and expanding the relevant supportive infrastructures are crucial to achieving permanent growth. Since many of these natural resources are found on lands traditionally owned and controlled by indigenous peoples, an inevitable conflict between competing claims and interests erupts.[6] Given the disparity of power of the parties to the dispute, economic and

[1] As one indigenous representative put it: 'the issue for indigenous peoples is the land; indigenous peoples are one with the land.' Statement by William Means, in *Voices of Indigenous Peoples: Native People Address the United Nations,* ed. A. Ewen (Santa Fe New Mexico: Clear Light, 1994) 60.

[2] 'Indigenous Peoples and their Relationship to Land', Final Working Paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para. 12.

[3] Study of the Problem of Discrimination against Indigenous Populations, Volume V Conclusions, Proposals and Recommendations, by Jose' R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 196 and 197.

[4] J. Mander and V. Tauli-Corpus (ed.), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization*', (San Francisco: Sierra Club Books, 2006) 3.

[5] Ibid.

[6] This conflict is well captured by the words of the former President of the UN Permanent Forum on Indigenous Issues, Victoria Tauli-Corpuz: 'Let's face it: the survival of authentic indigenous tradition is diametrically opposed to economic globalization. One is based on true sustainability through a nuanced harmony with Nature's cycles; the other values nothing other than how natural resources

industrial development has traditionally taken place without recognition of and respect for indigenous peoples' cultural attachment to their lands.[7] As a consequence, an increasing number of indigenous communities around the world have found themselves 'in a state of rapid deterioration.'[8]

International human rights law has acknowledged and addressed this problem. In recent decades a growing number of international human rights bodies have elaborated legal principles and standards designed particularly to protect indigenous peoples. At the same time, various international instruments have recognized, either incidentally or specifically, a vast range of rights to indigenous groups. As a result of these two conjunct processes, a strong and effective regime of indigenous peoples' rights has gradually emerged at the international level.[9] Within this regime, two rights are key to the protection of the special relationship that indigenous peoples have with their lands, namely the right to self-determination and the right to collectively own ancestral lands. Considering the far-reaching implications of these two rights, it is not surprising that a number of controversies as to their actual meaning and methods of implementation have remained partially unresolved.

One nebulous area, in particular, refers to the legal regime that should govern the implementation of development projects on indigenous peoples' lands. Central to this debate is the concept of Free, Prior and Informed Consent (FPIC), which is currently invoked by virtually all bodies dealing with indigenous peoples' rights. According to the 'common practical understanding' of FPIC elaborated by the UN Permanent Forum on Indigenous Issues,[10] the concept of FPIC can be explained as follows.[11]

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translate to the bottom line. One benefits the community and stretched far into the future; the other benefits only a few, and only until resources are depleted.' Victoria Tauli-Corpuz, Our Right to Remain Separate and Distinct, in *Paradigm Wars: Indigenous Peoples' Resistance to Globalization*, supra note 5, 20.

[7] 'The expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation.' 'Indigenous Peoples and their Relationship to Land', supra note 3, para. 132.

[8] Ibid., para, 123. As observed by one indigenous representative: 'there is a race between "profits now" and the survival of our grandchildren. There is a race between common sense and the world market. The race is in progress; this generation and the next will determine the outcome. Who will write that epilogue?' O. Lyons, Epilogue, in *Voices of Indigenous Peoples*, supra note 2, 124.

[9] See, among others, P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester: MUP, 2002), J. Anaya, *Indigenous Peoples in International Law* (Oxford: OUP, 2004); A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (Cambridge: CUP, 2007); A. Eide, 'Rights of Indigenous Peoples: Achievement in International Law During the Last Quarter of a Century' *Netherlands Yearbook of International Law*, 37 (2006), 155.

[10] The Forum is an advisory body to the UN Economic and Social Council (Council). It provides expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations (through the Council). It also prepares and disseminates information on indigenous issues related to economic and social development, culture, the environment, education, health and human rights, and promotes the integration and coordination of

Firstly, 'free' should imply no coercion, intimidation or manipulation. Secondly, 'prior' should imply that consent must be sought sufficiently in advance of any authorization or commencement of activities, and that the relevant agents should guarantee enough time for the indigenous consultation/consensus processes to take place. Thirdly, 'informed' implies that indigenous peoples should receive satisfactory information in relation to certain key areas, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration, and a preliminary assessment of its economic, social, cultural and environmental impact. Crucially, this information should be accurate and in a form that is accessible, meaning that indigenous peoples should fully understand the language used. Finally, 'consent' should be intended as a process of which consultation and participation represent the central pillars. While consultation should be undertaken in good faith, full and equitable participation of indigenous peoples should be guaranteed. Indigenous peoples should also have equal access to financial, human and material resources in order to engage constructively in this discussion. Moreover, they should be able to participate through their own freely chosen representatives and according to their customs.

The above description clearly identifies the various phases and components of FPIC intended as a process of consultation and participation. However, it is silent as to the outcome of this very process.[12] What remains to be established, therefore, is whether the concept of FPIC imposes on States an obligation to obtain the consent of indigenous peoples before initiating, or authorizing, development projects on their lands.[13] The majority of States would understandably answer this question in the

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activities related to indigenous issues within the UN system. See http://www.un.org/esa/socdev/unpfii/en/about_us.html. [last visited 9 March 2011]

[11] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005), UN Doc. E/C.19/2005/3, para. 45.

[12] The report rather elusively notes that FIPC 'may include the option of withholding consent'. However, it does not further elaborate on this point. Ibid., para. 47.

[13] It has been correctly observed that discussions over FPIC should not be 'framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects.' Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya (15 July 2009), UN Doc. A/HRC/12/34, para. 48. That said, the question as to whether indigenous peoples may enjoy such a right must be specifically addressed, for the potential recognition of this right has important implications with respect to the manner in which the broader process of consultation is conducted. In particular, taking part in consultations knowing that one will hardly be able to oppose the outcome of the process is one thing; doing so with the awareness that the final decision might be successfully affected, or even rejected, is quite another. By virtue of a right 'to say no', indigenous peoples could exercise a more effective control over the various stages of the consultation process. For a discussion, see L. Laplante and S. Spears, Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector, *Yale Human*

negative. In their view, the recognition of indigenous peoples' rights 'must [necessarily] be balanced by the need for Governments to own or regulate resources in the interests of all their citizens.'[14] This means that indigenous peoples should not have the power to block projects that are considered of strategic importance for the development of the entire country. Having said that, to deny indigenous peoples the right to oppose decisions related to their lands that could have a negative impact on their cultures and lives would be illogical and incoherent in the light of the existing regime of indigenous rights. As explained above, indigenous peoples are primarily characterized by the special attachment to their lands. This means that protecting this cultural element becomes necessary in order to protect their very existence. It follows that to allow development projects on indigenous lands regardless of the consequences that they might have on indigenous cultures and lives risks to undermine the very purpose of the indigenous rights regime that has recently emerged at the international level.

This article seeks to shed some light on this specific question by considering the status of FPIC under the indigenous rights regime, particularly after the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[15] The next section will offer an overview of international legal standards on FPIC. Special attention will be paid to environmental law instruments, the policies of the World Bank[16] concerning indigenous peoples, and the relevant provisions of International Labour Organization (ILO) Convention No. 169, namely the only international legally binding instrument concerning indigenous rights still open to ratification. Section three will consider how human rights treaty bodies have dealt with FPIC within the limits of their respective normative frameworks. Following on that, section four will focus on the key instrument of the indigenous rights regime, that is, the UNDRIP, analysing the content of its specific provision on FPIC and development

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Rights & Development Law Journal, 11 (2008), 69. See also Report of the Working Group on Indigenous Populations in its 7th Session, UN Doc. E/CN.4/Sub.2/1989/36, para 62.

[14] This point was highlighted by the representative of New Zealand during the negotiations on the text of the declaration. Report of the Working Group on the Draft Declaration on its 5th session, UN Doc. E/CN.4/2000/84, para 93.

[15] FPIC relates to several areas, including cultural heritage, traditional knowledge, genetic resources, displacement, and legislative measures in general. However, this article will focus exclusively on the issue of development projects taking place on indigenous lands.

[16] Formally, the International Bank for Reconstruction and Development, established as a result of the Bretton Woods Conference in 1944. The World Bank Group is composed of four additional institutions that work together towards the transfer of resources and promotion of investment for development countries. See, G. Loibl, International Economic Law, in *International Law* (2nd ed, Oxford: OUP, 2006) ed. M. Evans, 694-698.

projects. Subsequently, section five will discuss the contribution of the Inter-American Court of Human Rights to the elaboration and clarification of the concept of FPIC developed by the UNDRIP. Finally, section six will seek to draw some general conclusions.

2. An Overview of International Legal Standards

As explained in the introductory section, the manner in which consultation and participation should be conducted in order for the consent of indigenous peoples to be free, prior and informed is relatively clear. By contrast, doubts remain as to whether States must obtain the consent of indigenous peoples before launching development projects on their lands. An analysis of international legal standards related to FPIC fully confirms the difficulty of providing a decisive answer to this crucial question.

2.1 International Environmental Law

The importance of public participation has been increasingly recognized in the sphere of international environmental law. As observed by Pring and Noe, 'public participation promises to define and redefine the major economic development projects of the Twenty-first century - and few sectors will be more impacted on by this than the mining, energy, and resources-development industries.'[17]

This trend has become even more significant in respect of indigenous peoples in view of their special cultural attachment to ancestral lands. Key instruments in the sphere of international environmental law do not refer directly to FPIC. However, they demand that the spiritual relationship existing between indigenous peoples and their lands be respected. In particular, these instruments recognise indigenous peoples' important contribution to sustainable development,[18] and call for the

[17] G. Pring and S. Noe, The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development, in *Human Rights in Natural Resources Development, Public Participation in the Sustainable Development of Mining and Energy Resources,* ed. D.N. Zillman, A. R. Lucas and G. Pring (Oxford: OUP 2002) 11-12.

[18] The concept of sustainable development is based on three pillars: economic development, social development and environmental protection. It posits that environmental protection constitutes an integral part of the development process and, therefore, should not be considered in isolation from it. In addition, it requires that economic welfare be assessed also on the basis of non-financial components including, for example, the quality of the environment and the health conditions of the people concerned. For an overview, see D. McGoldrick, Sustainable Development and Human Rights:

protection of their traditional cultures and lifestyles. With this in mind, a purposive interpretation of their provisions would suggest that States should obtain the consent of indigenous peoples before initiating development projects on their lands.

Principle 22 of the Rio Declaration, for example, emphasizes that indigenous people 'have a vital role in environmental management and development because of their knowledge and traditional practices.'[19] Accordingly, it demands that States 'recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.' If sustainable development is the final goal, and indigenous peoples play a crucial role in achieving it by virtue of their traditional cultures and practices, to allow development projects which do not have the support of the indigenous peoples concerned would seem to defeat the spirit of the instrument.

Similarly, Chapter 26 of Agenda 21 affirms that the lands of indigenous peoples 'should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate', and that the cultural, economic and physical well-being of indigenous peoples depend on their 'traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting.'[20] Agenda 21 also expressly recognizes that traditional knowledge and resource management practices are key to promoting environmentally sound and sustainable development. As in the case of the Rio Declaration, to give States the green light in relation to development projects that fail to obtain the consent and support of indigenous peoples would seem to contravene the purposes of the document.

Contrary to the Rio Declaration and Agenda 21, the 1992 Biodiversity Convention imposes legal obligations on States parties.[21] This convention recognizes that indigenous peoples' knowledge and practices embody 'traditional lifestyles relevant for the conservation and sustainable use of biological diversity.'[22]

An Integrated Conception, *International and Comparative Law Quarterly* 45 (1996), 796-818, and A. Boyle, C. Redgwell and P. Birnie, *International Law and the Environment* (Oxford: OUP, 2009) 56.

[19] The Rio Declaration on Environment and Development (14 June 1992), 31 I.L.M. 874 (1992).

[20] Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment. It was adopted at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992. http://www.un.org/esa/dsd/agenda21/ [last visited 9 March 2011].

[21] 1992 Convention on Biological Diversity, Article 8(j), 31 I.L.M. 818 (1992).

[22] Ibid., Article 8(j).

Accordingly, it requests that States, subject to their national legislation, respect, preserve and maintain such knowledge and practices, and promote their wider application with the approval and involvement of the holders. In addition, without directly mentioning indigenous peoples, Article 10(c) establishes that each contracting party shall 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.' Once again, such an emphasis on the importance of traditional knowledge and practices would seem hardly reconcilable with a legal regime that allows States to impose unwanted and destabilizing development projects on indigenous lands without the consent of the indigenous peoples concerned.

All the above interpretations are in line with the spirit and purpose of the concerned instruments, and can hardly be regarded as unsound. At the same time, the fact that none of these instruments expressly refers to FPIC cannot be overlooked. For this reason, while any attempt to shed light on the controversies related to the FPIC should take into account the abovementioned provisions, general environment law instruments cannot be expected to provide decisive answers to the complex questions concerning FPIC.

2.2 The World Bank[23]

The World Bank (WB or Bank) is one of the most important international economic institutions. Its activity is importantly related to the issues of indigenous peoples' land rights and FPIC in that the Bank provides various forms of financial support to major development projects that may take place on indigenous lands. The WB has been the first multilateral financial institution to establish a safeguards policy on indigenous issues.[24] Its first engagement with indigenous peoples was in 1982, when the Bank adopted a brief operational policy based on the premise that 'tribal peoples are more likely to be harmed than helped by development projects that are intended for beneficiaries other than themselves.'[25] A process of revision of this policy was launched in 1987, leading to the adoption, in 1991, of Operational Directive 4.20.

[23] For a more detailed discussion of the World Bank's approach to FPIC, see S. Errico, The World Bank and Indigenous Peoples: the Operational Policy on Indigenous Peoples (O.P.4.10.) Between Indigenous Peoples' Rights to Traditional Lands and to Free, Prior, and Informed Consent, *International Journal on Minority and Group Rights*, 13 (2006), 367–390

[24] S. Errico, supra note, 368.

[25] Tribal Peoples in Bank-Financed Projects, Operational Manual Statement 2.34.

Contrary to its predecessor, which was partially informed by an assimilationistic approach typical of the time, the new policy recognized the centrality of the principle of participation in order to safeguard indigenous peoples' cultures and lives. In particular, it stressed that 'identifying local preferences through direct consultation, incorporation of indigenous knowledge into projects approaches, and appropriate early use of experienced specialists are core activities for any project that affect rights to natural and economic resources.'[26]

Even this new policy, however, would soon be revised. After embracing the principle of sustainable development in the late 1980s, the WB became gradually more concerned with the idea of social and environmental protection. As a result, and within a context of a broader process of adaptation, the WB issued a new policy on indigenous peoples, namely Operational Policy 4.10, which entered into force in July 2005.[27] The new policy is meant to contribute to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of indigenous peoples. More precisely, the policy recognizes 'that the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend'. It also acknowledges that 'these distinct circumstances expose indigenous peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.'[28]

Following on these premises, the core principle underlying Operational Policy 4.10 is that, before financing a project that affects indigenous peoples, the bank will require the borrower to engage in a process of free, prior, and informed *consultation* with them. More precisely, the aim of the policy is to promote 'a process of free, prior and informed consultation with [the] affected communities that [will lead to] broad support for the project.'[29] In theory, such a requirement could be quite stringent, for it could mean that the WB 'will not proceed further with project processing if it is unable to ascertain that [broad support exists among the affected

[26] Operational Directive 4.20 on Indigenous Peoples, para. 8.
[27] Operational Policy 4.10 on Indigenous Peoples.
[28] Ibid., para. 2.
[29] Striking a Better Balance – The World Bank and Extractive Industries: The Final Report of the Extractive Industries Review, World Bank Group Management Response (17 September 2004), available at http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/FinalMgtResponseExecSum/$FILE/finaleirmanagementresponseexecsum.pdf [last visited 9 March 2011].

communities].'[30] The effectiveness of such provisions, however, remains inevitably impaired by the use of ambiguous terms such as 'consultation' and 'support'. Indeed the very decision to replace the commonly used and more rigorous expression 'free, prior and informed *consent*' with 'free, prior and informed *consultation*' speaks volumes of the intention of the drafters.

In conclusion, while one may speculate on the actual level of protection that this policy guarantees to indigenous peoples, it is fairly clear that the World Bank does not recognize that indigenous peoples have the right to decline unwanted projects taking place on their lands.

2.3 ILO Convention No. 169[31]

ILO Convention No. 169 (ILO 169 or Convention) is the only international instrument concerning the rights of indigenous peoples that produces legally binding obligations and is still open to ratification.[32] Only twenty-two States have thus far ratified this document, a circumstance that raises some doubt as to the legal relevance of the convention on a global scale. However, it has been rightly noted that ILO 169's contribution goes beyond the limited number of ratifications,[33] for the convention has been particularly influential in the process of construction of the indigenous rights regime and continues to play a crucial role within it.[34] Thus its provisions must be

[30] Operational Policy 4.10 on Indigenous Peoples (July 2005) para. 11.

[31] ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries, text available at <http://www.ilo.org/public/english/indigenous/> [last visited 9 March 2011]. For a detailed analysis of ILO's contribution to the construction of the indigenous rights regime, see L. Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism, and International Law: the ILO Regime,* supra note 10.

[32] There exists another ILO convention concerning indigenous peoples' rights, namely ILO Convention No. 107 of 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO 107). ILO 107 remains valid for those States which, having previously ratified it, decided not to become parties to ILO 169 in 1989. However, after the establishment of ILO 169, ILO 107 was declared closed for ratification. Besides the limited number of ratifications, the deplorable assimilationistic approach of the ILO 107 makes the instrument ill suited to accommodate fairly the rights of indigenous peoples. See, for one, J. Anaya, *Indigenous Peoples in International Law* supra note 10, 54-56.

[33] The ILO Guide on the Convention correctly acknowledges that ILO No. 169 'may be used as a tool to stimulate dialogue between governments and indigenous and tribal peoples, and in this way, to improve their situation.' Thus if one intends to appreciate the importance of the instrument, she should not focus on its legal dimension, but rather consider the promotional role it has exercised. See 'ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual' (International Labour Office, Geneva 2003) Foreword.

[34] In Anaya's words, ILO 169 represents 'a central feature of international law's contemporary treatment of indigenous peoples' demands.' J. Anaya, *Indigenous Peoples in International Law*, supra note 10, 58.

carefully examined for they may provide important indications on how FPIC is to be interpreted in the context of the indigenous rights regime.

ILO 169 fully acknowledges and protects the special relationship between indigenous peoples and their lands. Article 13, in particular, establishes that governments shall respect the special importance for the cultures and spiritual values of indigenous peoples of their relationship with their lands. Accordingly, the convention recognizes the right of indigenous peoples to own their lands,[35] and to 'exercise control, to the extent possible, over their own economic, social and cultural development.'[36]

One of the key provisions of ILO 169 is found in Article 6, which introduces the right of indigenous peoples to be consulted and to freely participate at all levels of decision-making when policies and programmes might affect them.[37] The importance of this article is confirmed by the fact that the rights to consultation and participation have been described as the cornerstone of ILO 169 by the monitoring body of the convention.[38] In order to appreciate the significance of this provision in relation to FPIC one has to read it in combination with Article 15. This provision establishes that indigenous peoples' rights to the natural resources pertaining to their lands shall be specially safeguarded, and that these rights include the right to participate in the use, management and conservation of these resources. However, Article 15 also recognizes that States may retain the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands. In such cases, the Convention requests that governments consult indigenous peoples 'with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.'[39]

This passage could be read as introducing a link between the level of protection to be accorded to indigenous peoples and the seriousness of the impact of a

[35] Article 14.
[36] Article 7.
[37] Article 6(1).
[38] 'The spirit of consultation and participation constitutes the cornerstone of Convention ILO No. 169 on which all its provisions are based.' Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.
[39] Article 15(2). The same provision adds that indigenous peoples 'shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.'

particular programme. However, the ILO Governing Body has put a clear limit to the relevant degree of protection, excluding that States should obtain the consent of indigenous peoples prior to the implementation of a development project.[40] Consultations should nevertheless be conducted with a view to finding 'appropriate solutions in an atmosphere of mutual respect and full participation,'[41] and indigenous peoples should have 'a realistic chance of affecting the outcome'[42] of the relevant process. Thus, it could be argued that ILO 169 takes a pragmatic approach to FPIC, seeking to empower indigenous peoples without, however, going as far as granting them a veto power.

3. United Nations Human Rights Treaty Bodies

International human rights treaties do not refer expressly to FPIC. Crucially, they also lack any express reference to indigenous peoples' rights. However, the bodies entrusted to monitor and promote their implementation have gradually developed extensive interpretations of their generic provisions in order to protect, *inter alia*, the special cultural attachment of indigenous peoples to their lands. This is particularly true with regard to the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee. The following analysis will offer an overview of the practice of these three bodies in relation to FPIC.

3.1 The Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD), that is, the organ created to monitor and promote compliance with the International Convention

[40] See ILO Governing Body, 282nd Session, November 2001, representation under Article 24 of the ILO Constitution, GB.282/14/2, para. 39. On this point, see also the Contribution of the ILO to the Workshop on Free, Prior and Informed Consent organized by the UN Permanent Forum on Indigenous Issues, New York, 17-19 January 2005, para. 12, where it is stressed that ILO 169 does not require that the consent of indigenous peoples to the proposed measures is necessary. Available at http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html [last visited 9 March 2011]

[41] GB.282/14/2, supra note 52, para. 36.

[42] '[ILO 169] requires that procedures be in place whereby indigenous and tribal peoples have a realistic chance of affecting the outcome.' Contribution of the ILO, supra note 42.

on the Elimination of All Forms of Racial Discrimination (ICERD),[43] has traditionally played an active role in promoting the rights of indigenous peoples, especially in relation to their ancestral lands.[44] With regard to the issue of participation and consultation, CERD has stressed that no decisions directly relating to the rights and interests of indigenous peoples should be taken without their informed consent.[45] Obviously, this principle applies also in relation to the implementation of development projects on indigenous lands. On occasions CERD has taken a mild approach to FPIC, recommending State parties to 'endeavor to obtain', [46] or 'seek',[47] the consent of indigenous peoples, or simply referring to a 'right to prior consultation' of indigenous peoples.[48] However, the tendency, particularly after the adoption of the UNDRIP, has been to promote a more rigorous understanding of FPIC. Accordingly, in numerous concluding observations on States' reports CERD has stressed that States should *obtain* the consent of indigenous peoples before a project can take place on their lands.[49]

[43] International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195

[44] CERD has called upon States parties 'to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.' It has also demanded that, where indigenous peoples have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, States should take steps to return those lands and territories. CERD General Recommendation N. 23 on Indigenous Peoples (18 August 1997), para. 5, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument>. [last visited 9 March 2011]. For an overview of the practice of CERD in relation to indigenous rights see P. Thornberry, *Indigenous Peoples and Human Rights*, supra note 10.

[45] States parties should 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent. CERD General Recommendation N. 23, supra note, para. 4(d).

[46] CERD/C/GTM/CO/11 (15 May 2006) Guatemala, para. 19.

[47] CERD/C/GUY/CO/14 (4 April 2006) Guyana, para. 14.

[48] CERD/C/COL/CO/14 (28 August 2009) Colombia, para. 20.

[49] For example, CERD demanded that Chile 'hold effective consultations with indigenous peoples on all projects related to their ancestral lands' and 'obtain their consent prior to implementation of projects for the extraction of natural resources, in accordance with international standards.' CERD/C/CHL/CO/15-18 (7 September 2009) para. 22. Similarly, it urged Guatemala to 'consult the indigenous population groups concerned at each stage of the process' and 'to obtain their consent before executing projects involving the extraction of natural resources.' CERD/C/GTM/CO/12-13, (19 May 2010) para. 11. On another occasion, CERD condemned the fact that the 'right of indigenous peoples to be consulted and to give their informed consent prior to the exploitation of natural resources in their territories is not fully respected.' CERD/C/PER/CO/14-17 (3 September 2009) para. 14.

3.2 The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) is the body that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[50] CESCR has been less proactive than CERD in promoting indigenous rights and elaborating new legal standards related to indigenous peoples.[51] For the purposes of this article, however, it is relevant that the CESCR has regularly dealt with the issue of FPIC. In doing so, the CESCR has refrained from expressly demanding that States obtain the consent of indigenous peoples prior to the implementation of development projects on their lands. More cautiously, it has noted on a number occasions that States should merely consult and seek such consent.[52]

That said, CESCR seems to have revisited its approach to FPIC following the adoption of the UNDRIP. In 2009 it issued a general comment on the right to take part in cultural life enshrined in Article 15(a) of the ICESCR. [53] In listing the core obligations that States parties have to respect in order to ensure the satisfaction of this right, the CESCR noted that they should 'allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them.'[54] More importantly, it also specified that:

> 'States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.'[55]

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[50] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3

[51] For an overview of the practice of the CESCR in relation to indigenous rights see P. Thornberry, *Indigenous Peoples and Human Rights*, supra note 10.

[52] For example, in 2001 it urged Colombia 'to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them.' E/C.12/1/Add.74, para. 33. Likewise, in 2004, it requested Ecuador 'to consult and seek the consent of the indigenous people concerned prior to the implementation of natural resources-extracting projects and on public policy affecting them.' E/C.12/1/Add.100, para. 35. In 2006, it asked Mexico to ensure that the indigenous peoples 'are duly consulted, and their prior informed consent is sought.' E/C.12/MEX/CO/4, para. 28.

[53] General Comment No. 21, Right of Everyone to take Part in Cultural Life, E/C.12/GC/21 (21 December 2009).

[54] Ibid., para. 55(e).

[55] My emphasis. Ibid. In another passage, the Committee stressed that 'States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.' Ibid., para. 37.

In other words, the CESCR requests a stronger level of protection in respect of those measures that might have serious negative effects on the way of life of indigenous peoples. Crucially, such measures should only be taken with the consent of the communities concerned. Following this general comment, the Committee has recommended States to obtain the consent of indigenous peoples,[56] but has also requested them to conduct consultations in accordance with ILO 169, which, as discussed in section 2.3, excludes that indigenous peoples may enjoy a right to veto.[57] Since the Committee has not further elaborated on the important principle introduced by the above general comment, it is not totally clear under what circumstances it will demand a more rigorous degree of protection.

3.3 The Human Rights Committee

The Human Rights Committee (HRC) is entrusted to monitor compliance with the International Convention on Civil and Political Rights (ICCPR).[58] It was the first human rights treaty body to deal regularly and substantially with indigenous issues, contributing to a considerable extent to the elaboration of new legal principles and standards related to indigenous peoples. The HRC did so by promoting a progressive interpretation of the right to culture included in Article 27 of the ICCPR so to secure, among others, the right of indigenous peoples to conduct traditional economic activities and to live in harmony with their lands and resources.[59]

The practice of the HRC in respect of FPIC is indicative of the uncertainties that surround the meaning and scope of this controversial principle. A survey of its concluding observations on States' reports suggests that the HRC takes a rather prudent approach to FPIC. The committee has called upon States parties to pay primary attention to the participation of indigenous peoples in decisions that affect

[56] E/C.12/LKA/CO/2-4, (2010, Sri Lanka) para. 11.
[57] E/C.12/COL/CO/5, para. 9, where the CESCR recommended Colombia to promote FPIC in accordance with the normative framework of ILO Convention No. 169.
[58] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.
[59] Article 27 protects, among others, the right of persons belonging to ethnic, religious or linguistic minorities to enjoy, in community with the other members of their group, their own culture. The HRC has promoted an extensive reading of 'culture', noting that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.' See HRC General Comment No. 23, The Rights of Minorities (Art. 27), available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> [last visited 9 March 2011]

them,[60] and to consult indigenous peoples before granting licenses for the economic exploitation of their lands.[61] On a number of occasions the HRC has sharpened its position, noting that States should ensure that this consultation is effective, [62] and that it should be conducted with a view to guaranteeing the free, prior and informed consent of the indigenous peoples concerned.[63] However, it has thus far refrained from affirming that States should obtain the consent of indigenous peoples prior to the implementation of any such project.

That said, an analysis of the HRC's pronouncements in relation to individual communications offers a different picture. The case of *Ilmari Länsman et al.* v. *Finland* is particularly instructive.[64] This case dealt with the decision of the Finnish Central Forestry Board to pass a contract with a private company to allow stone quarrying in a reindeer herding area, home to a Sami community. The applicant claimed that this agreement violated the Sami right to enjoy their own culture, traditionally based on reindeer husbandry, as established by Article 27 of the ICCPR. Importantly, the HRC found that Finland had not violated this provision. In coming to this conclusion, the HRC noted that the authors of the communication were consulted and their interests were considered during the proceedings leading to the delivery of the quarrying permit by the State. This seems to confirm the HRC's view discussed above according to which States should merely seek to consult and seek the consent of indigenous of peoples. However, the main reason behind the HRC's finding that no violation of Article 27 had occurred was that quarrying, in the amount that had taken place at the time, had only a limited impact on the way of life of the concerned communities, and thus did not amount to a denial of their rights. Accordingly, in the eventuality of a more substantial impact on the way of life of the indigenous communities concerned, it is plausible that the HRC would have demanded more than

[60] Commenting on Chile's report in 1999, the HRC noted that 'when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them.' CCPR/C/79/Add.104, para. 22.
[61] In 2008 the HRC requested Nicaragua to 'conduct consultations with indigenous peoples before granting licences for the economic exploitation of the lands where they live.' CCPR/C/NIC/CO/3, para. 21(c).
[62] In 2010, the HRC urged Mexico to 'take necessary steps to ensure the effective consultation of indigenous peoples for decision- making in all areas that have an impact on their rights.' CCPR/C/MEX/CO/5, para. 22.
[63] In 2010, the HRC urged Colombia to 'adopt the pertinent legislation for holding prior consultations with a view to guaranteeing the free, prior and informed consent of community members.' CCPR/C/COL/CO/6, para. 25.
[64] Communication No. 511/1992, CCPR/C/52/D/511/1992 (8 November 1994).

mere consultation before deciding in favour of the State.[65] These considerations suggest that the HRC privileges a dynamic approach to FPIC, whose meaning may vary in accordance with the impact that a particular project or activity will have on indigenous peoples. This perception is confirmed by a recent pronouncement, in which the HRC noted that when measures substantially compromise or interfere with the rights of indigenous peoples, States must guarantee their effective participation in the decision-making process. Crucially, the HRC emphasized that this would require not only mere consultation but, also, their free, prior and informed consent.[66]

4. The UN Declaration on the Rights of Indigenous Peoples

Albeit not exhaustive, the above overview of international legal standards concerning FPIC clearly highlighted the uncertainties that continue to surround the actual meaning and scope of this principle. The World Bank's policy on indigenous peoples simply promotes a process of free, prior and informed *consultation* with the indigenous communities concerned. Similarly, ILO 169 recognizes the right of indigenous peoples to be consulted and to freely participate at all levels of decision-making when policies and programmes might affect them. Although this imposes significant obligations on States parties, it cannot be read as requiring them to obtain the consent of indigenous peoples before implementing development projects affecting their lands. Important environmental law instruments such as the Rio Declaration and the Biodiversity Convention suggest, by contrast, that development projects which do not have the support of the indigenous peoples concerned should not be allowed, for disrespecting this principle would have negative implications for the promotion of sustainable development. Human rights treaty bodies have dealt with FPIC in a different fashion. To different degrees, they have all accepted that FPIC cannot be understood in strict terms. The endorsement of a flexible approach to FPIC has been particularly evident in the jurisprudence of the Human Rights

[65] In a similar vein, in a follow-up of a previous individual communication, the HRC first recommended that Canada 'consult with the [Lubicon Lake] Band before granting licenses for economic exploitation of the disputed land.' However, by further noting that 'in no case such exploitation [should] jeopardize the rights recognized under the Covenant,' the HRC was suggesting that, under the above circumstances, mere consultation would not suffice to guarantee the legality of the exploitation. CCPR/C/CAN/CO/5 (20 April 2006) para. 9.

[66] My emphasis. Communication No.1457/2006, CCPR/C/95/D/1457/2006 (24 April 2009) para. 7.4.

Committee, although this has not been fully confirmed in its concluding observations on States' reports.

Against this background, the UN Declaration on the Rights of Indigenous Peoples had the crucial task of clarifying a confused legal framework. The UNDRIP was adopted by the UN General Assembly in 2007, after a period of gestation of more than 20 years in which States' and indigenous peoples' representatives strenuously negotiated its content.[67] Contrary to ILO 169, it does not produce legally binding obligations.[68] However, it represents the culmination of a complex legal and political process that led to the affirmation of a number of key rights and principles related to indigenous peoples. This, coupled with its authoritativeness and legitimacy,[69] has guaranteed its prominence among the instruments concerning indigenous rights.

The UNDRIP fully recognizes the special attachment of indigenous peoples with their lands. In particular, Article 25 establishes that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their ancestral lands. Additional provisions are particularly relevant in the context of FPIC, including Article 18 on the right of indigenous peoples to participate in decision-making in matters which would affect their rights, [70] and Article 26 on the right to own, use, develop and control their lands, territories and resources.[71] However, the most important provision is contained in Article 3, which establishes that:

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[67] Declaration on the Rights of Indigenous Peoples, adopted 13 Sept. 2007, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007). For an overview of the content of the UNDRIP see S. Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' and 'The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview', *Human Rights Law Review* 7 (2007) 741-759.

[68] On the legal value and overall significance of the UNDRIP see M. Barelli, The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples, 58 (2009) *International and Comparative Law Quarterly*, 957 – 983.

[69] J. Anaya, *Indigenous Peoples in International Law*, supra note 10, 53.

[70] 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.'

[71] '(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

> 'Indigenous peoples have the right to self-determination. By virtue of this right, they have the right to freely determine their political status and freely pursue their economic, social and cultural development.'

The recognition of the right to self-determination has crucial implications in relation to FPIC. In particular, it would seem difficult to reconcile the right of indigenous peoples to pursue freely their economic, social and cultural development with the fact that development projects could take place on their lands without their consent and regardless of the consequences that the concerned activities could have on their cultures and lives. Similarly, the right to own, use, develop and control their lands, territories and resources included in Article 26 would be deprived of its essence were indigenous peoples indistinctively denied the right to oppose unwanted projects on their lands.

Having said that, it should also be recalled that the rights claimed by indigenous peoples can hardly be absolute. Firstly, in many countries subsurface resources are declared by law to be the property of the State.[72] This is also recognized by Article 15 of ILO 169 and was considered of fundamental importance by various governmental representatives during the negotiations on the UNDRIP.[73] Secondly, and more generally, States strongly oppose the fact that groups within their populations (be they indigenous or non-indigenous) may have the power to veto development projects thought to benefit the entire country, for this would critically impair their ability to control natural resources for the purpose of national development.

As will be discussed below, this apparent tension is well reflected in the provision of the UNDRIP which deals specifically with FPIC and development projects. In order to better appreciate the content of this provision it is important to consider the drafting history of the declaration. As noted above, the UNDRIP was adopted by the General Assembly in 2007. Previously, in 1993, a draft declaration was completed by the Working Group on Indigenous Populations (WGIP), a subsidiary body of the UN Sub-Commission on Prevention of Discrimination and

[72] 'Indigenous Peoples and their Relationship to Land', supra note 3, para. 43.
[73] Several governmental representatives noted that in their countries 'subsoil resources were owned by the State and could not be included within the provisions guaranteeing ownership of land and territories.' Report of the Working Group on Indigenous Populations in its 8th session, E/CN.4/Sub.2/1990/42, para 115.

Protection of Minorities (Sub-Commission).[74] The important point is that States chose not to actively participate in the sessions of the WGIP. Thus the text of the draft declaration was essentially the product of indigenous peoples' representatives and the five experts of the WGIP. A year later, the Sub-Commission adopted the document and sent it to the (then) Commission on Human Rights.[75] It was only at that time that States began to play an active role in the drafting process. In the light of their strong opposition to various provisions of the draft declaration, the Commission on Human Rights decided to set up a subsidiary organ, namely the Working Group on the Draft Declaration (WGDD), with the sole purpose of further elaborating the text of the draft declaration.[76] Not surprisingly, this body took more than ten years before agreeing on a final text of the draft and sending it to the newly created Human Rights Council. After the adoption by the Human Rights Council on its first session in June 2006,[77] the text reached the General Assembly, where it was ultimately adopted in September 2007. With this in mind, it is particularly instructive to compare the original and final versions of the declaration, as this will highlight the areas of major conflict between States and indigenous peoples.

With regard to FPIC, special attention should be paid to the original and final versions of (current) Article 32. The original version of Article 32 included in the draft declaration established that:

> 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including *the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources*, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'[78]

This provision clearly provided that no project affecting the lands of indigenous peoples could take place without their free, prior and informed consent. In fact this amounted to recognizing a wide right to veto to indigenous peoples. Not surprisingly, during the sessions of the WGDD States expressed their concern about this provision and proposed alternative versions thereof. The language used in these proposals is

[74] UN Economic and Social Council Resolution 1982/34 of 7 May 1982.
[75] E/CN.4/1994/2.Add.1.
[76] Established in 1995 in accordance with Commission on Human Rights Resolution 1995/32 and Economic and Social Council Resolution 1995/32.
[77] Human Rights Council Resolution 2006/2 of 29 June 2006.
[78] My emphasis.

indicative of their more cautious approach to FPIC.[79] In essence, States maintained that they should not 'obtain' but, rather, 'seek' the consent of indigenous peoples.[80]
At this point, a brief discussion of the dynamics which characterized the drafting process of the UNDRIP is needed in order to better appreciate the outcome of this conflict. One of the distinguishing features of the UNDRIP's drafting process was the direct and large participation of indigenous peoples' representatives. In particular, indigenous organisations were allowed to participate to the sessions of both the WGIP and WGDD regardless of their consultative status with the Economic and Social Council (ECOSOC),[81] notably an uncommon circumstance for UN standards. In addition, as the indigenous movement was gaining increasing recognition at the international level, the indigenous representatives negotiating the provisions of the UNDRIP had enough political clout to compel States to constructively consider their views. Indeed, States themselves repeatedly acknowledged that indigenous peoples' participation was not only vital but also necessary to the production of the UNDRIP.[82] This point is crucial to understand the inclusion in the final text of the UNDRIP of contentious provisions such as those on the right to self-determination and land rights. Obviously, the same dynamics characterized the discussions on FPIC. As neither indigenous peoples nor States were prepared to give up their claims fully, the natural solution consisted in compromising the respective positions. The final version of Article 32, therefore, represents an attempt to bridge the gap between two conflicting views.

The first part of the article simply recognizes that 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources,' and, thus, is not particularly controversial. The second part, instead, is significantly more problematic. It establishes that States:

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[79] For example, the representative of Brazil suggested that governments should simply 'take account of the free and informed opinion [of indigenous peoples] in the approval of any project affecting their lands and their resources.' Report of the Working Group on the Draft Declaration in its 2nd session, E/CN.4/1997/102, para 280.
[80] E/CN.4/2005/89/Add.2
[81] In the latter case, indigenous organisations had to apply to the Coordinator of the International Decade of the World's Indigenous People. Although States had to be consulted before accrediting the participation of indigenous organisations, their consent was not required, and ultimately a large number of indigenous organisations attended the relevant sessions.
[82] See, for example, the statements of the representatives of Denmark, Canada, Norway, Chile, Sweden, USA, Colombia and the Russian Federation at the Second Session of the WGDD. 'Report of the Working Group on the Draft Declaration on its Second Session', E/CN.4/1997/102 (10 December 1996) paras. 23-34.

> 'shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain* their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.'[83]

At the centre of the controversy lies the interpretation of the expression 'consult in order to obtain their FPIC'. It seems fairly evident that this expression should not be interpreted as requesting States to obtain the consent of indigenous peoples before implementing any project on their lands. Had this been the case, the original version of the article, which *de facto* recognized them a general right to veto, would have been preserved.[84] That Article 32 should be interpreted restrictively is further supported by various declarations made by States' representatives following the adoption of the UNDRIP by the General Assembly. All these statements expressly excluded that indigenous peoples could enjoy an unqualified right to veto.[85]

That said, it would be wrong to conclude that the UNDRIP has recognized a mere right of participation and consultation to indigenous peoples. Representatives of indigenous peoples sat at the negotiating tables on an equal footing with States.[86] This means that States could hardly impose their uncompromised views on any provision of the UNDRIP. This *per se* calls for a balanced interpretation of each Article of the document. Two additional points importantly reinforce this presumption with respect to Article 32. First, the expression 'consult in order to obtain' nevertheless imposes a stringent obligation on States. In this respect, it is telling that the expression supported by numerous States, that is, 'States shall (merely) seek consent', was ultimately abandoned. This suggests that excessively restrictive interpretations of FPIC cannot be validly upheld. Secondly, FPIC should be read in conjunction with the recognition, in Article 3, of the right of indigenous peoples to self-determination, and particularly to freely pursue their economic, social and cultural development, and with Article 26 on the right of indigenous peoples to own and control their lands and resources. More generally, Article 32 should be read in accordance with the spirit of

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[83] My emphasis.

[84] In this respect, it should be noted that indigenous peoples successfully defended particularly controversial provisions from the attack of States, *in primis* the one on self-determination. The fact that they could not preserve the original version of Article 32 suggests that States were strongly opposed to a radical interpretation of FPIC.

[85] At http://www.un.org/News/Press/docs/2007/ga10612.doc.htm. [last visited 9 March 2011]

[86] Statement of the representative of Austria speaking on behalf of the EU. Human Rights Council, Geneva, 27 June 2006. Available at http://old.docip.org/Human%20Rights%20Council/Session1/cddh1_7.pdf [last visited 9 March 2011]

the UNDRIP, which fully recognizes the centrality of the relationship with ancestral lands for indigenous peoples' cultures and lives. Allowing development projects on indigenous lands regardless of the consequences that they might have on the cultures, lives, and, ultimately, existence of indigenous peoples would be plainly incompatible with the normative framework of the UNDRIP. Since no provision of an instrument can be interpreted in a way that defeats the very purpose of the instrument it is part of, Article 32 must be necessarily approached with a certain degree of flexibility. In particular, it would seem difficult to argue that this provision categorically excludes that at least under exceptional circumstances indigenous peoples might be entitled to oppose a development project. Intuitively, the problem with such a reading of Article 32 is that it does not specify under what circumstances indigenous peoples should be entitled to veto a project. It follows that the provision needed further elaboration in order to be practically and efficiently implemented. Against this background, the jurisprudence of the Inter-American Court of Human Rights, which will be discussed in the next section, has proved particularly useful.[87]

4. The Jurisprudence of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACtHR or Court) has developed a significant jurisprudence in relation to indigenous rights since the early 2000s.[88] For the purpose of this article, it is particularly significant that this jurisprudence has so far focused on land rights, providing the Court with the possibility to fully and extensively engage with this key issue. The IACtHR has approached indigenous land rights in the context of Article 21 of the Inter-American Convention on Human Rights (Inter-American Convention) on the right to property.[89] Taking into account

[87] In this respect, the judicial activity of the Inter-American Court of Human Rights can be regarded as being part of a wider 'judicial discourse' on minority and indigenous rights that is contributing to clarifying the contours of various aspects of the international legal protection of minority groups. See G. Pentassuglia, Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence, *International Community Law Review* 11 (2009) 185-218.

[88] See J. Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System', *Human Rights Law Review* 6 (2008) 281-322.

[89] Article 21 reads as follow: (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; (3) Usury and any other form of exploitation of man by man shall be prohibited by law. Text available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> [last visited 9 March 2011]

the most recent international normative developments in the sphere of indigenous peoples' rights, the IACtHR has established that Article 21 also protects the right of the members of indigenous groups to collectively own their ancestral lands. This groundbreaking interpretation, introduced for the first time in the 2001 *Mayagna (Sumo) Awas Tingni Community* v *Nicaragua* case[90] and later confirmed in a number of equally significant cases,[91] essentially stems from the preliminary recognition of the special relationship existing between indigenous peoples and their land. On this basis, the IACtHR held that members of those groups who are characterized by, *inter alia*, a traditional collective form of organization, a spiritual relationship with their ancestral lands, and a communal system of ownership of the said lands, are entitled to the protection provided by Article 21.[92]

The IACtHR has also affirmed that the protection of indigenous land rights provided by Article 21 of the Inter-American Convention must be read in combination with a contextual right to restitution. More precisely, it noted that 'the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith.'[93] Having said that, the IACtHR also stressed that under the latter circumstance indigenous peoples would not be left without protection altogether. Despite lacking property rights as such, they would still enjoy a right to restitution with regard to those lands. At this point the Court did not ignore the complex question of competing claims, for it is obvious that Article 21 protects not only communal properties of

[90] *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Series C 79 (2001).
[91] *Comunidad Indigena Yakye Axa v Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005), paras. 124 and 137; *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Series C 146 (2006), paras. 118-121; *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C 172 (2007), paras. 87-96;
[92] In the words of the IACtHR, 'among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.' *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, para. 149.
[93] *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Series C 146 (2006), para. 128.

indigenous communities but also private properties of individuals.[94] As a general rule, the IACtHR established that restrictions to the right to property, whether they affect indigenous peoples or individuals, must meet a number of specific requirements: first, they must be established by law; secondly, they must be necessary and proportional; and thirdly, they must be aimed to attain a legitimate goal in a democratic society.[95] That said, the Court recognized that special consideration should be given to the needs of indigenous peoples. In particular, it emphasized that 'states must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations.'[96] It follows, the IACtHR continued, that 'disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.'[97]

Importantly, the IACtHR introduced a time-restriction on the exercise of the right to restitution, which will be enforceable as long as the special relationship between an indigenous community and its land continues to exist.[98] According to the IACtHR, this 'relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.'[99]

[94] *Comunidad Indigena Yakye Axa* v *Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005), para. 143.
[95] Ibid, para. 144
[96] Ibid, para. 146.
[97] Ibid, para. 147. However, the Court also emphasised that the recognition of the special relationship between indigenous peoples and their lands does not demand that 'every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former.' Ibid, para. 149.
[98] *Sawhoyamaxa Indigenous Community* v *Paraguay*, para. 131.
[99] Ibid.

4.1 Free, Prior, and Informed Consent

Having highlighted the key findings of the IACtHR in relation to indigenous land rights, it is now possible to better appreciate how the Court has elaborated on the concept of FPIC. As of today, the IACtHR has dealt with FPIC in one case only, that is, the 2007 *Saramaka People* v. *Suriname* case.[100] In this case the Court had to determine, among other things, whether logging and mining concessions awarded by Suriname to third parties on ancestral lands of the Saramaka people amounted to a violation of their property rights under Article 21 of the Inter-American Convention.

The Court first acknowledged that Article 21 also protects the rights of indigenous peoples to own and enjoy the natural resources found within their ancestral lands.[101] After establishing this general principle, it specified that the resources protected under Article 21 are only those *necessary* for the survival of indigenous peoples, that is to say, resources associated to agricultural, hunting and fishing activities. Having said that, the Court crucially observed that exploiting natural resources that are *not* necessary for the survival of indigenous peoples, e.g. subsoil resources, may nevertheless have important consequences on the cultures and lives of these peoples, for they may impact on the resources necessary for their survival. It follows that Article 21 may impose certain limits on what States can and cannot do also in relation to the exploitation of these (unnecessary) resources. This, however, must not be read as an affirmation of absolute protection of indigenous peoples' rights. As the IACtHR noted, Article 21 'should not be interpreted in a way that prevents the state from granting any type of concession for the exploration and extraction of natural recourses' within a territory owned by an indigenous community.[102] Instead, limitations and restrictions to the rights of indigenous peoples to their natural resources are possible, but only under specific circumstances. Following the same principles elaborated in the context of land rights generally, the Court found that restrictions are possible only if they are established by law, are necessary and proportional, and have the aim of achieving a legitimate objective in a democratic

[100] *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C 172 (2007). For an overview of the case see M. A. Orellana, Saramaka People v. Suriname, *American Journal of International Law*, 102 (2008) 841-847.

[101] The IACtHR noted that the indigenous peoples' right 'to use and enjoy their territory would be meaningless … if said right were not connected to the natural resources that lie on and within the land.' *Saramaka People v Suriname*, para. 122.

[102] Ibid, para. 126.

society.[103] In contrast with the case of land rights, however, further safeguards need to be put in place. These safeguards are necessary because they seek 'to preserve, protect and guarantee the special relationship that [indigenous peoples] have with their territory, which in turn ensures their survival.'[104] Accordingly, a State which intends to launch or authorize a project affecting the natural resources found within indigenous ancestral lands, will have to respect the following obligations: *first, ensure the effective participation of the members of the community in any development, or investment, plan;*[105] second, ensure that the concerned people have a reasonable share of the benefits; third, perform or supervise prior environmental and social impact assessments; and, fourth, implement adequate safeguards and mechanism so as to avoid that the concerned activities significantly affect the conditions of the traditional lands and natural resources at stake.[106]

For the purpose of this article, special attention should be paid to the first obligation listed above, namely the obligation to ensure the effective participation of indigenous peoples. As a general rule the Court noted that States have a duty to consult with the indigenous peoples concerned. In doing so, the Court held, they must act in good faith, provide sufficient information, and respect the indigenous customs and traditions. According to the IACtHR, the objective of this process of consultation should be the reaching of an agreement among the parties. This clearly means that States must not necessarily obtain the consent of indigenous peoples before a project may take place on their lands. After establishing this general principle, however, the Court introduced a crucial distinction between small-scale and large-scale development projects, endorsing the view that under certain circumstances indigenous peoples should be entitled to a more rigorous protection. More precisely, it held that in the case of large-scale development projects that would have a major impact within indigenous peoples' territories, States have a duty not only to consult with indigenous peoples, but also to obtain their free, prior, and informed consent.'[107]

The creation of two different regimes in respect of FPIC is in line with the interpretation of Article 32 of the UNDRIP offered in the previous section. Indeed it is noteworthy that the IACtHR made an express reference to this provision in a

[103] Ibid., para. 127.
[104] Ibid., para. 129
[105] My emphasis.
[106] Ibid., para. 158.
[107] Ibid., para. 134

passage of its judgment.[108] As discussed above, the UNDRIP excludes an absolute right to veto to indigenous peoples. At the same time, however, it does not allow that States' interests systematically and indiscriminately trump the rights of indigenous peoples. What Article 32 of the UNDRIP does not specify, as noted above, is precisely under what circumstances indigenous peoples could have a right to say no to projects affecting their lands. In establishing different legal regimes with regard to small-scale and large-scale development projects, the IACtHR has sought to fill this legal gap. Pentassuglia has observed that the Court employed a 'sliding scale approach to participatory rights',[109] which recognizes that the 'level of effective participation is essentially a function of the nature and content of the rights and activities in question.'[110] This approach is also in line with the pronouncements of the Human Rights Committee that were discussed in section 2.2.3 above. In this sense, it can be said that the IACtHR has further elaborated on the flexible approach to FPIC previously developed by the Committee.

Further support to the rationale of the Court's decision has come from the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Special Rapporteur), who has recently noted that 'the strength or importance of the objective of achieving consent [should vary] according to the circumstances and the indigenous interests involved.'[111] Thus, for example, a 'direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent', and 'in certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.'[112]

In view of such considerations, it can be said that a new and dynamic understanding of FPIC is gaining increasing recognition at the international level. Importantly, this understanding has its normative foundations in Article 32 of the UNDRIP. In the light of the uncertainties that have traditionally surrounded the meaning of FPIC, this development is certainly to welcome.

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[108] Ibid., para. 131.
[109] G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Leiden: Martinus Nijhoff Publishers, 2009) 113.
[110] Ibid., p. 116.
[111] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, A/HRC/12/34 (15 July 2009), para. 47.
[112] Ibid.

This notwithstanding, it is not difficult to foresee potential problems related to such a dynamic approach. Instead of providing its own definition of a large-scale project, the Court referred to a 2003 report of the Special Rapporteur that described major developments as:

> 'process[es] of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining, power, extraction and refining plants, tourist developments, port facilities, military bases and similar undertakings.'[113]

The report further highlighted that this kind of projects are likely to cause profound social and economic changes in the territories and lives of indigenous peoples concerned, including loss of traditional territories and land, eviction, destruction and pollution of the traditional environment, social and community disorganization, and long-term negative health and nutritional impacts.[114] While such a description of large-scale projects is reasonably clear, it is not difficult to anticipate problems and challenges ahead. Projects such as the construction of large multi-purpose dams could be easily categorized as large-scale development projects. However, there might be occasions on which it will be more difficult to establish with certainty whether a specific project is to be regarded as large or small-scale. Another potential problem relates to the difficulty in determining the cumulative effects of several small-scale projects. While there is no reason to doubt that *ad-hoc* investigations could provide adequate responses to all the above complications, it will be important to see how the IACtHR as well as other judicial or quasi-judicial bodies will deal with each of these issues.

[113] 'The impact of large-scale development projects on human rights and fundamental freedoms of indigenous peoples and communities', Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People E/CN.4/2003/90 (21 January 2003), para. 6.
[114] Ibid., para. 2

4.2 The African Commission on Human and Peoples' Rights and FPIC: A Missed Opportunity?

On February 2010 the African Commission on Human and Peoples' Rights (ACHPR or Commission) issued an important decision in the *Centre for Minority Rights Development (Kenya)* v. *Kenya* case.[115] The claim was that the Government had removed the Endorois community from their ancestral lands without prior consultation and adequate compensation, thus violating, among other things, their right to property, natural resources and development as recognized respectively by Article 14, 21 and 22 of the African Charter on Human and Peoples' Rights (Charter).[116] This decision allowed the Commission to elaborate, for the first time, on the issue of indigenous peoples' land rights in the context of the Charter.[117] In doing so, the ACHPR importantly expanded the understanding of the right to property included in Article 14, recognizing that traditional possession of land by indigenous people has the equivalent effect as state-granted full property title, and that traditional possession entitles indigenous people to demand official recognition and registration of property title.[118] Confirming the jurisprudence of the IACtHR, the Commission also clarified that the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith. In respect of the latter circumstance, the ACHPR held that members of indigenous peoples are nevertheless entitled to restitution or to obtain other lands of equal extension and quality.[119] Importantly, the Commission also affirmed that the right to natural resources contained within indigenous peoples' traditional lands are vested in indigenous peoples, and held that, pursuant to article 21 of the African Charter, 'indigenous peoples have the right to freely dispose of their

[115] *Centre for Minority Rights Development (Kenya)* v *Kenya*, African Commission on Human and Peoples' Rights 276/2003 (4 Feb. 2010), available at http://www.escr-net.org/usr_doc/Endorois_Decision.pdf. (last visited 9 March 2011).
[116] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[117] For a detailed analysis of the case, see J. Gilbert, Indigenous Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights, *International and Comparative Law Quarterly 60* (2011), 245-270
[118] *Centre for Minority Rights Development (Kenya)* v. *Kenya*, para. 209.
[119] Ibid.

wealth and natural resources in consultation with the State.'[120] Finally, it also recognized that, pursuant to Article 22, indigenous peoples have the right to their economic, social and cultural development.

For the purposes of this article, the main finding refers to the alleged violation of Article 22 on the right to development. In this respect, the Commission specified that the State 'has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions [in relation to] any development or investment projects that would have a major impact within [their] territory.' [121] Applying this general principle to the case in question, it noted that Kenya 'did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction.'[122] This decision certainly upholds the IACtHR's jurisprudence on FPIC that was discussed above. It can therefore be taken to support the view that a new flexible understanding of FPIC is increasingly emerging at the international level.

That said, a passage of the judgment does raise some doubt as to the overall position of the Commission on FPIC. The latter part of Article 14 of the African Charter on the right to property establishes that this right 'may be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' In considering this provision, the Commission noted that the 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous peoples' lands rights, since rights over these lands are closely related with, *inter alia*, their right to life, to self-determination, and to exist as a people.[123] In addition, it specified that limitations on land rights should also respect the principle of proportionality, so that they should be the least restrictive measures possible.[124] A further requirement is that limitations of indigenous peoples' land rights must be in accordance with the law. This obligation, according to the Commission, requires that States consult the peoples concerned before encroaching their property rights, and provide, if necessary, adequate compensation. At this point, the Commission sought to clarify the meaning and scope

[120] Ibid., para. 268. It is important to note that Article 21 simply establishes that 'all peoples shall freely dispose of their wealth and natural resources', without any reference to the need to do so 'in consultation with the State'.
[121] *Centre for Minority Rights Development (Kenya)* v. *Kenya*, para. 291.
[122] Ibid., para. 290.
[123] Ibid., paras. 211-213.
[124] Ibid., para. 214.

of this consultative process. In so doing, and without expressly referring to it, the ACHPR endorsed a radical interpretation of FPIC by saying that '[i]n terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded.'[125] In the subsequent passage, however, the Commission noted that 'failure to observe the obligations to consult and seek consent … ultimately results in a violation of the right to property.'[126] Whether in the Commission's view States should obtain or merely seek the consent of the indigenous peoples concerned remains, therefore, unclear. Considering the difficulties in elaborating a workable, coherent, and widely accepted understanding of FPIC, it is to be hoped that future pronouncements will further clarify the ACHPR's position on such an important issue.

5. Conclusions

International human rights law fully recognizes the special relationship that indigenous peoples have with their lands, territories, and resources. Protecting this cultural relationship becomes essential in order to guarantee the survival, dignity and well-being of these peoples. Difficulties arise when States have strategic interests in some of the resources found on indigenous lands. It is widely accepted that in such circumstances indigenous peoples enjoy a right to be consulted before States can implement any measure. The principle of Free, Prior and Informed Consent clearly sets out the manner in which the relevant process of consultation between States and indigenous peoples should take place. FPIC is now recognized by virtually all bodies and instruments dealing with indigenous issues. Whilst its legal significance cannot be questioned, one crucial issue remains partially unresolved. By virtue of their right to control natural resources for national development goals, States claim that they can launch or authorize development projects on indigenous lands without necessarily having to obtain the consent of the indigenous peoples concerned. Indigenous peoples, instead, maintain that their rights to self-determination and to own and control ancestral lands entitle them to oppose any unwanted plan. Different instruments and bodies have provided diverse answers to this difficult question, leaving the legal contours of FPIC rather nebulous.

[125] Ibid., para. 226.
[126] Ibid.

Against this background, this article submitted that a flexible approach to FPIC, which finds its normative foundations in Article 32 of the UN Declaration on the Rights of Indigenous Peoples, is gaining increasing recognition. Such a flexible approach excludes that indigenous peoples should have a right to veto in relation to all matters affecting their lands. At the same time, however, it affirms that when a development project is likely to have a serious (negative) impact on the cultures and lives of indigenous peoples, States must obtain their consent before implementing it. By virtue of this (qualified) right, indigenous peoples can exercise more effective control over the broader consultation process, which, it should be stressed, does not simply revolve around the issue of consent. The Inter-American Court of Human Rights has fully endorsed this view. More than that, it has actually contributed to strengthening it by further elaborating on the circumstances which may request a more rigorous protection of indigenous peoples' rights. The Court has identified two different legal regimes in relation to small and large-scale development projects, with the latter imposing upon States the obligation not only to consult with indigenous peoples, but also to obtain their free, prior, and informed consent. The rationale behind such different treatments lies in the profound social and economic changes that major projects normally have on the territories and lives of the indigenous peoples concerned. The fact that on occasion it might be particularly difficult to determine with certainty the gravity of the consequences of a development project suggests that further elaboration on this matter is needed in order to add clarity to the relevant legal regime, as confirmed by the recent decision of the African Commission on Human and Peoples' Rights on the *Endorois* case.