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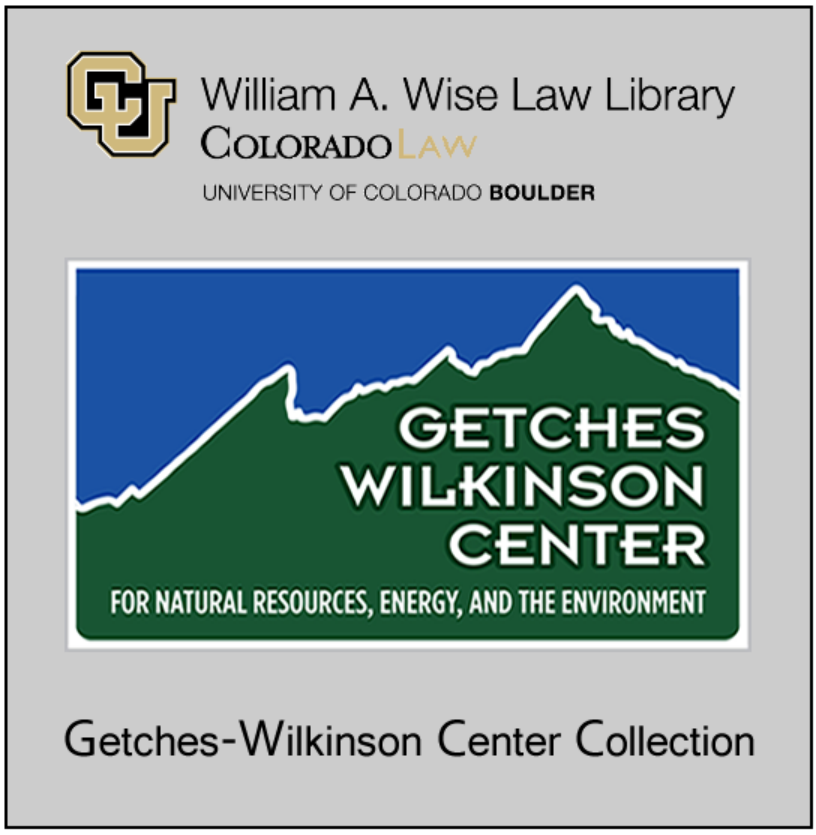
Kelsey Peterson



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Free, Prior and Informed Consent: ILO 169 and the UNDRIP

Kelsey Peterson, American Indian Law Program Fellow
University of Colorado Law School Class of 2015

The principle of "free, prior and informed consent" is deeply tied to the concept of "self-determination," recognized as a right of all peoples in the United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[1] The United Nations' Declaration on the Granting of Independence to Countries and Peoples provides: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[2]

Two major instruments provide foundations for "free, prior, and informed consent" as it pertains specifically to indigenous peoples in international law: the International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 ("ILO 169") [3] and the United Nations Declaration on the Rights of Indigenous Peoples of 2007 ("UNDRIP").[4] These two agreements include some different provisions and different language, but taken together, they emphasize free, prior, and informed consent as an emerging standard for governments and third parties interacting with indigenous peoples around the world.

Adopted in 1989, ILO 169 acknowledged the issues and challenges facing indigenous peoples around the world, including violations of their "fundamental human rights," and the "aspirations of these peoples" to self-governance, control of their ways of life, economic development and identity. ILO 169 outlines both the rights of indigenous groups and the obligations that governments have toward indigenous peoples.

ILO 169 includes one explicit use of "free and informed consent": in Article 16, free and informed consent is required, along with exceptional circumstances, to remove indigenous peoples from the lands they occupy. Beyond Article 16, ILO 169 recognizes the need to consult impacted indigenous peoples during government decisionmaking processes in several articles. For example, Article 15 outlines indigenous rights to participation in use, management and conservation of natural resources on their lands. In addition, Article 6 provides: "In applying the provisions of this Convention, governments shall: "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly and establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them." Under Article 6, these consultations shall "be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Other articles suggest meaningful consultation is required in a range of government decisions (alienation of land, education, and teaching of indigenous languages).

By its own terms, ILO 169 is only binding the ILO members who ratified it. As of 2013, twenty-two (22) counties had ratified ILO 169. The majority of those countries are in Central and South America, with a few in Europe (i.e. Norway, Denmark, Spain, and Netherlands) and a few in Asia and Africa (i.e.

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[1] Charter of the United Nations, 24 October 1945, 1 UNTS XVI; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 19, 1966, 993 U.N.T.S. 3. *See* also S. James Anaya, Indigenous Peoples in International Law 77-88 (1996).

[2] General Assembly Res. 1514 (XV), ¶ 2, UN. GAOR, 15th Sess. (Dec. 14, 1960), Art. 2.

[3] International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (adopted by the General Conference of the International Labour Organisation, Geneva, June 29, 1989; entered into force, Sept. 5, 1991) [hereinafter ILO 169].

[4] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 12, 2007) [hereinafter UNDRIP].

Nepal, Fiji, and Central African Republic). Notably but not surprisingly, the major settler governments (i.e. United States, Canada, Australia and New Zealand) did not ratify ILO 169. However, while ILO 169 is not binding on non-ratifying countries, it does serve as a set of best practices for the international community when making decisions that impact indigenous communities within their borders.

The UNDRIP furthers many of the same goals as ILO 169, but in many cases extends and broadens indigenous peoples' rights. Adopted by the UN General Assembly in 2007, the UNDRIP recognized that survival of indigenous communities depends on self-determination and cultural, spiritual and traditional practices.

The UNDRIP uses the language of "free, prior, and informed consent" ("FPIC") – contrasting with the terminology of "free and informed consent" and "consultation of ILO 169" – in a broad range of Articles. Article 10 provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Under Article 11, states must provide mechanisms to redress indigenous peoples who have lost cultural property taken without their FPIC. Article 19 requires states to obtain FPIC from indigenous peoples with respect to legislative or administrative measures that may affect those groups. Article 28 provides for redress when traditional territories are taken or damaged without the affected peoples' FPIC. Article 29 prohibits the storage or disposal of hazardous materials on indigenous peoples' territories without their FPIC. Article 32 requires states to obtain the FPIC of indigenous peoples before the approval of any resource development project of their lands or territories and to provide mechanisms for redress and measures for mitigation of any "environmental, economic, social, cultural or spiritual impact."

In addition to the express FPIC provisions of UNDRIP, the declaration as a whole uses strong language requiring the preservation of indigenous self-determination. Article 3 expressly recognizes the right of indigenous peoples to self-determination and that that right allows groups to freely pursue their own development. Article 18 recognizes the right for indigenous groups to "maintain and develop" their own decision making procedures and institutions. Article 29 recognizes the right of indigenous peoples to protect and conserve the environment on their lands and resources, including the responsibility of states to assist indigenous peoples in carrying out their environmental protection goals.

As a whole, while the UNDRIP potentially offers a more robust set of substantive obligations for states in their dealings with indigenous peoples, it does not carry the force of a treaty. While many more countries votes for UNDRIP than ratified ILO 169, the major settler states opposed the declaration. Since the vote to pass the UNDRIP, Canada, Australia and New Zealand changed their position and finally, in 2010, President Obama announced he would be reversing the Bush Administration's opposition to UNDRIP.

Taken together, the ILO 169 and UNDRIP outline the international community's move toward greater recognition and protection for indigenous peoples' rights worldwide. The scope and meaning of the term "free, prior, and informed consent" is currently developing through jurisprudence of bodies such as the Inter-American Court on Human Rights, statements of the UN Special Rapporteur on Indigenous Peoples Rights, as well as position papers and best practices by indigenous peoples, international organizations, industry associations, along with their advocates, partners, and others.[5]

[5] *See, e.g.,* David L. Deisley and Lloyd K. Lipsett, *Free Prior and Informed Consent: Observations on "Operationalizing" Human Rights for Indigenous Peoples*, 2013 NO. 2 RMMLF-INST PAPER NO. 2A (2013).