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INDIGENOUS PEOPLES' PARTICIPATORY RIGHTS IN RELATION TO DECISIONS ABOUT NATURAL RESOURCE EXTRACTION: THE MORE FUNDAMENTAL ISSUE OF WHAT RIGHTS INDIGENOUS PEOPLES HAVE IN LANDS AND RESOURCES

James Anaya¹

I. INTRODUCTION

It has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them. This norm is reflected in articles 6 and 7 of I.L.O. Convention No. 169, and has been articulated by United Nations treaty supervision bodies in country reviews and in examinations of cases concerning resource extraction on indigenous lands. The existence of a duty to consult indigenous peoples is also generally accepted by states in their contributions to discussions surrounding the draft declarations on indigenous peoples' rights, at both the United Nations and in the Inter-American system. This widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law.

Ambiguity remains, however, as to the extent and content of the duty of consultation owed to indigenous peoples. In particular, there is much debate as to whether indigenous peoples' right to participation in decisions affecting them extend to a veto power over state action. Logically, the extent of the duty and thus the level of consultation required is a function of the nature of the substantive rights at stake. Thus the more critical issue underlying the debate over the duty to consult is the nature of indigenous peoples' rights in lands and resources. My remarks will focus on this question.

II. INTERPRETATIONS ADVANCED BY INDIGENOUS PEOPLES

Indigenous peoples have repeatedly and consistently advanced plenary conceptions of their rights over lands and resources within their traditional territories. In asserting property rights, indigenous peoples seek protection of economic, jurisdictional, and cultural interests, all of which are necessary for them to pursue their economic, social, and cultural development. Indigenous peoples' rights over land flow not only from possession, but also from indigenous peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual

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and emotional nexus with the earth and its fruits.² Indigenous peoples, furthermore, typically have looked to a secure land and natural resource base to ensure the economic viability and development of their communities.

These aspirations are reflected in article 26 of the United Nations Draft Declaration on the Rights of Indigenous Peoples, produced by the U.N. Working Group on Indigenous Populations, through a process in which indigenous representatives had a great deal of participation. Article 26 reads:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they traditionally owned or otherwise occupied or used. This includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.³

Although indigenous representatives were not as heavily involved in its drafting, a proposed declaration on the rights of indigenous peoples produced by the Inter-American Commission on Human Rights for approval by the Organization of American States contains a similar provision:

Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their . . . control, [ownership, use] and enjoyment of territories and property. Indigenous peoples [have the right] to [the] recognition of their property and ownership rights with respect to lands, territories and resources they have historically [occupied, as well as] to the use of those to which they have historically had access for their traditional activities and livelihood.⁴

These broad assertions of the nature and extent of indigenous peoples' rights over land and resources are not merely aspirational, but can already be seen as part of international law. The importance of lands and resources to the survival

2. For a compilation of indigenous peoples' statements about the land and its meaning, see T.C. McLuhan, *TOUCH THE EARTH: A SELF-PORTRAIT OF INDIAN EXISTENCE* (1971); see also THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985) (documenting the testimony of Alaska Natives concerning their feelings about the lands and resources that traditionally have sustained them); JULIAN BURGER, *REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 13-16* (1987) (on indigenous "land and philosophy").

3. Draft U.N. Declaration on the Rights of Indigenous Peoples, *adopted* Aug. 26, 1994, U.N. Sub-Commission on Prevention of Discrimination & Protection of Minorities, 46th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

4. Proposed American Declaration on the Rights of Indigenous Peoples, *approved* Feb. 26, 1997, Inter-Am. C.H.R., OEA/Ser/L/V/II.95, doc. 6 at 9 (1997).

of indigenous cultures and, by implication, to indigenous self-determination. That understanding is a widely accepted tenet of contemporary international concern over indigenous peoples.⁵

III. INTERNATIONAL LEGAL PRECEDENTS

A. ILO Convention No. 169

The International Labor Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries⁶ is the only international treaty solely concerned with indigenous peoples. It is significant to the extent it creates treaty obligations among ratifying states in line with current trends in thinking prompted by indigenous peoples' demands. The Convention is further meaningful as part of a larger body of developments that can be understood as giving rise to a new customary international law with the same normative thrust.

As understood in the Convention, indigenous land and resource--or territorial--rights are of a collective character, and they include a combination of possessory, use, and management rights. In its article 14(1), Convention No. 169 affirms:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Modern notions of cultural integrity, nondiscrimination, and self-determination join property precepts in the affirmation of *sui generis* indigenous land and resource rights, as evident in ILO Convention No. 169. The land rights provisions of Convention No. 169 are framed by article 13(1), which states:

5. See U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS 39, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986) (Jose R. Martinez Cobo, special rapporteur) ("It must be understood that, for indigenous populations, land does not represent simply a possession or means of production. . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.").

6. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), adopted June 27, 1989, 72 ILO Official Bull. 59 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169].

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Article 15, furthermore, requires states to safeguard indigenous peoples' rights to the natural resources throughout their territories, including their right "to participate in the use, management and conservation" of the resources. The concept of indigenous territories embraced by the convention is deemed to cover "the total environment of the areas which the peoples concerned occupy or otherwise use."⁷

Convention 169 also provides for recognition of indigenous land tenure systems,⁸ which typically are based on long-standing custom. These systems regulate community members' relative interests in collective landholdings, and they also have bearing on the character of collective landholdings vis-a-vis the state and others.

At the same time, the Convention falls short of upholding rights to mineral or subsurface resources in cases in which the state generally retains ownership of those resources.⁹ Pursuant to the norm of non-discrimination, however, indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners. In any case, the Convention mandates that indigenous peoples are to have a say in any resource exploration or extraction on their lands and to benefit from those activities.¹⁰

In applying the Convention, the ILO has held that consultations must be held when a variety of indigenous interests are involved, including legislative measures regulating the consultation process itself;¹¹ constitutional provisions concerning indigenous peoples;¹² development of lands adjacent to,¹³ or in

7. *Id.* art. 13(2).

8. *See id.* art. 17(1).

9. *See id.* art. 15(1).

10. *Id.* art. 15(2).

11. *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)*, ILO Doc. GB.282/14/2 (Nov. 21, 2001) [hereinafter *U'wa Report*] (impugning lack of consultation in three situations: the passage of a law governing consultation with indigenous peoples; the construction of a highway through indigenous lands; and granting permission for oil exploration in indigenous lands).

12. *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR)* ILO Doc. GB.289/17/3 (Mar. 19, 2004) [hereinafter *Mexico Report*].

13. *See U'wa Report, supra* note 11.

indigenous territories,¹⁴ to the complete destruction of those lands.¹⁵ Since indigenous peoples' underlying interests are significantly different in each of those circumstances, we would expect that the nature and extent of consultations required would also differ.

In a complaint concerning the Embera Katio people of Colombia, the ILO Committee responsible for Convention compliance found that, even though the government had engaged in a consultative process that had in fact led to an agreement with the Embera Katio people concerning the flooding of their lands for a hydroelectric project, the duty to consult had not been fully met because further consultation had not taken place in light of modifications to the project after the agreement, with the objective of obtaining consent to the modifications.¹⁶ The Convention's provisions specifically require "free and informed consent" for relocation of indigenous peoples, in the absence of which special procedures of consultation must apply.¹⁷ The ILO Committee pointed out that the objective of such consultations should be understood in connection with the Convention's other provisions and its general mandate that governments develop, "with the participation of the peoples concerned, coordinated and systematic action to protect their rights and to guarantee respect for their integrity."¹⁸

In two other cases concerning oil exploration concessions in Ecuador and Colombia, which had been granted with either no or very perfunctory consultations with the indigenous peoples concerned, ILO committees emphasized article 6(2), which requires that consultations must be in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement with the affected indigenous peoples.¹⁹ Although in those countries oil is understood to be under state ownership, the emphasis on consent accords with the indigenous interests in surface resources at stake.

14. *See id.*

15. *See id.*; see also *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association*, ILO Doc. GB.282/14/3 (Nov. 14, 2001) [hereinafter *Embera Report*].

16. *See Embera Report, supra* note 15.

17. ILO Convention No. 169, *supra* note 6, art. 16(2).

18. *Embera Report, supra* note 15, para. 58.

19. *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 Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, ILO Doc. GB.282/14/2 (Nov. 14, 2001) [hereinafter *Shuar Report*]. "[T]he concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord." *Id.* para 38. *See also U'wa Report, supra* note 10.

In yet another ILO proceeding concerning Mexico's Decree on Constitutional Reform in the Areas of Indigenous Rights and Culture, very different indigenous interests were at issue. In that case, there had been extensive consultations and agreement on the proposal to be put before Congress, but once that was done, subsequent consultation was restricted to brief legislative hearings, during which indigenous demands were not accommodated and in fact changes to the contrary were made. Although the process is analogous to that in the Embera case, where further consultation was required to meet the standards in the Convention, here, while admitting the consultation was not ideal, the Committee would not "conclude that such a list of 'best practices' is actually required."²⁰

B. U.N. Human Rights Committee

The duty to consult indigenous peoples has also been addressed by the United Nations Human Rights Committee. For example, two cases were brought before the Committee for violations of Sāmi cultural rights under article 27 of the International Covenant on Civil and Political Rights²¹ as a result of resource extraction in Sāmi reindeer herding areas.²² In these cases, Finland permitted logging and quarrying activities by private companies. In both cases, Sāmi advisory bodies had been consulted and changes to the licenses were made to accommodate their concern, although certain Sāmi constituencies continued to oppose the resource extraction. Relying on the fact of consultation and accommodation, as well as its view of the limited nature of the resource extraction, in both cases the Committee determined that the Covenant had not been violated. In these cases, the duty to consult arose by virtue of indigenous interest in cultural integrity and rights of use for certain purposes, and the resource extraction at issue was found not to substantially affect those rights. It is noteworthy that in neither case did the Committee consider that the Sāmi had property rights in the lands in question in addition to the cultural interests in those lands, in which case a more demanding duty of consultation would at least arguably have applied.

20. *México Report*, *supra* note 12, para 106.

21. Article 27 reads, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

22. See Ilmari Länsman et al. v. Finland, Comm. No. 511/1992, Hum. Rts. Committee, 52d Sess., U.N. Doc. CCPR/C/33/D/511/1992 (1994); Jouni E. Länsman et al. v. Finland, Comm. No. 671/1995, Hum. Rts. Committee, 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (1996).

C. U.N. Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination has also addressed the duty to consult and accommodate. In its General Recommendation 23,²³ the Committee called on states to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources[.]”²⁴ in fulfillment of the non-discrimination norm. CERD further exhorted states to “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.”²⁵ In its 1995 review of Nicaragua’s compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, CERD expressed concern at “insufficient participation of the indigenous groups in decisions affecting their land and the allocation of the natural resources of their land, their cultures and their traditions.”²⁶

D. Inter-American Human Rights Bodies

The Inter-American human rights system has also dealt with the issue of consultation and consent in its jurisprudence. “As early as 1984, for instance, the Inter-American Commission on Human Rights stated that the “preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.”²⁷ In three recent cases, all involving indigenous rights over land and resources, the Inter-American bodies have articulated a requirement for states to obtain the consent of indigenous peoples when contemplating actions affecting indigenous property rights, upon finding such rights to exist on the basis of traditional land tenure.

In the *Awás Tingni* case, the Inter-American Court recognized indigenous peoples’ collective rights to land and resources on the basis of article 21 of the American Convention on Human Rights, which reads: “(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and

23. *General Recommendation 23: Indigenous Peoples*, Committee for the Elimination of Racial Discrimination, U.N. Doc. A/52/18, annex V; CERD/C/51/Misc.13/Rev.4 (1997).

24. *Id.* para.5.

25. *Id.* para. 4(d).

26. *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 50th Sess., Agenda Item 103, para. 536, U.N. Doc. A/50/18 (1995).

27. Fergus MacKay, FPIC in International and Domestic Law, Address at the Briefing for World Bank Executive Directors on Free Prior Informed Consent (FPIC) (June 14, 2004), available at http://www.bicusa.org/bicusa/issues/FPIC_briefing_documents.pdf (citing *Report on the Situation of Human Rights of the Nicaraguan Population of Miskito Origin*, Inter-Am. C.H.R. 120, OEA/Ser.L/V/II.62, doc. 26 (1984)).

enjoyment to the interest of society.” Although the Court stressed that Nicaragua’s domestic law itself affirms indigenous communal property, the Court also emphasized that the rights articulated in international human rights instruments have “autonomous meaning for which reason they cannot be made equivalent to the meaning given to them in domestic law.”²⁸ The Inter-American Commission had maintained that, given the gradual emergence of an international consensus on the rights of indigenous peoples to their traditional lands, such rights are now a matter of customary international law. The Court accepted the Commission’s view that, in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that “possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.” Among the remedies ordered was that Nicaragua delimit, demarcate and title the community’s lands, “with full participation by the community and taking into account its customary law, values, customs and mores.”²⁹

Further, it ordered that “until that delimitation, demarcation and titling have been done, [it must abstain from any acts] that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the [Mayagna (Sumo) Awas Tingni] Community live and carry out their activities.”³⁰ Thus the court affirmed not only a right against state interference with indigenous peoples’ rights in lands and resources without their consent, but also an affirmative right to state protection from such interference by private parties.

The Inter-American Commission on Human Rights affirmed this holding, in its reports on the *Mary and Carrie Dann* and *Maya Indigenous Communities* cases. The *Dann* case concerned the purported extinguishment through machinations of the U.S. legal system of Western Shoshone traditional rights to land and resources. The case arose from the refusal of Western Shoshone sisters Mary and Carrie Dann to submit to the permit system imposed by the United States for grazing on large parts of Western Shoshone traditional lands. Faced with efforts by the United States government to forcibly stop them from grazing cattle without a permit and to impose substantial fines on them for doing so, the Danns argued that the permit system contravened Western Shoshone land rights. The United States conceded that the land in question was Western Shoshone ancestral land, but contended that Western Shoshone rights in the land

28. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am.Ct.H.R. (Ser. C) No. 79 (2001) (judgement on merits and reparations of Aug. 31, 2001), abridged version reprinted in 19 ARIZ. J. INT’L & COMP. LAW 395, 438 para. 164 (2002) [hereinafter Awas Tingni case].

29. *Id.* at 438 para. 164.

30. *Id.* at 432 para 153.

had been “extinguished” through a series of administrative and judicial determinations.

In its report, the Commission found violations of the international human rights to due process and property. With respect to the nature of indigenous interests in lands, the Commission described as general international legal principles:

- (1) The right of indigenous peoples to legal recognition of their varied and specific forms and modalities of control, ownership, use and enjoyment of their territories and property;
- (2) The recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied.³¹

The Commission further stated that international law requires “special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent.”³²

Most recently, in the *Maya Indigenous Communities* case, dealing with Maya land rights in their traditional territories in the south of Belize, within which the government had granted oil exploration and logging concessions. The Commission found that granting such concessions “without effective consultations with and the informed consent of the Maya people” constituted a violation of human rights guarantees. The Commission reaffirmed that international law upholds indigenous peoples’ land and resource rights, independent of domestic law, and held that

one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities ... [these rights] specially oblige a member state to ensure ... a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. ... [T]hese requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.

31. *Mary and Carrie Dann v. U.S.*, Case no. 11.140, Report No. 75/02, Inter-Am. C.H.R. para. 130, OEA/Ser.L/V/II.117, doc.1 rev.1 (2003) [hereinafter *Dann Case*].

32. *Id.* para. 131.

Thus the Inter-American Commission has articulated a link between consultation resulting in full and informed consent, and protection of indigenous peoples' property rights.

Where subsoil resources are part of ownership rights, equality requires they also attach to indigenous ownership. However, when indigenous land tenure systems encompass subsoil resources and therefore conflict with the state property regime, the result is unclear. Although a superficial application of the equality norm would appear to dictate state ownership of those resources, the recognition of indigenous peoples' land tenure systems itself is grounded in the fundamental norms of equality and self-determination. If equal respect for indigenous peoples' own land tenure systems is indeed the source of their rights over land and resources, then where those systems extend to subsoil resources, the equality norm itself would prevent the state from appropriating ownership of those resources without indigenous peoples' consent.

The issue of indigenous interests in subsoil resources is currently before the Inter-American Commission on Human Rights in the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*.³³

IV. CONCLUSION

This brief survey indicates a general norm duty on states to consult with indigenous peoples and accommodate their concerns whenever state action is contemplated that would affect their interests. In all cases, consultations must meet minimum procedural requirements, including ensuring that the indigenous peoples' have adequate information on the proposed measures to meaningfully participate, and that the procedures for consultation are culturally appropriate. However, the content of that duty is a function of the extent of the substantive rights at issue.³⁴

As a matter of international law, indigenous peoples have rights of property over land and natural resources arising out of their own customary land tenure systems. These property rights include collective ownership of their lands and attract all the protections attached to property generally. They are further reinforced by the cultural content of indigenous peoples' connection with their

33. See *Pueblo Indígena Kichwa De Sarayaku y Sus Miembros v. Ecuador*, Request 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005).

34. The Canadian Supreme Court has articulated a similar insight, although it includes as a factor the magnitude of the proposed activity, which has not been a factor affecting the duty to consult in international law. See *Delgamuukw v. British Columbia*, 153 D.L.R.4th 193 (1997) (where indigenous property rights proven, the duty to consult varies with the circumstances, from a duty to discuss important decisions where proposed breach is relatively minor, to full consent for very serious issues); see also *Haida Nation v. British Columbia*, 245 D.L.R.4th 33 (2004) (where property rights not proven, the scope of duty to consult is proportionate to the strength of the case supporting the right or title).

lands. When relocation of indigenous peoples from their traditional lands is proposed, consent is ordinarily required such that forced relocation is unacceptable. Similarly, where property rights are affected by natural resource extraction, the international norm is developing to also require actual consent by the indigenous people concerned. Where property rights are indirectly but still significantly affected, for example in the extraction of subsoil resources that are deemed to be under state ownership, the state's consultations with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the state bears a heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects. When property rights are attenuated or not involved, consultations should still have the objective of achieving agreement. And, if consent is not achieved the state must show that indigenous concerns were heard and accommodated, though without the heavy burden of mitigation that exists where property rights are at issue.



