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A New Dawn over the Land: Shedding Light on Collective Ownership and Consent

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Introduction

It is now widely recognised that a profound cultural, social and spiritual relationship with their lands and territories is characteristic of indigenous peoples and fundamental to their survival. In spite of this fact, indigenous peoples have been and are repeatedly deprived of their lands, territories and resources.[1] Present day economic imperatives arising from globalisation are putting new strains on indigenous peoples' rights over their traditional territories.[2] Driven by the demands of an increasingly globalised economy and the opening up of markets in developing countries to foreign direct investment, activities such as mining, logging, dam construction and mono-cropping are becoming synonymous with violations of indigenous peoples' rights, resulting in ongoing tensions and conflicts between indigenous peoples, states and transnational corporations. Central to the realization of indigenous peoples' land and self-determination rights is their ability to ensure recognition and enforcement of these rights.

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[1] See *Indigenous Peoples and their Relationship to Land*, Final Working Paper Prepared by the Special Rapporteur, E-I Daes, UN Doc E/CN.4/Sub.2/2001/21.

[2] For references, see M Stewart-Harawira, *The New Imperial Order: Indigenous Responses to Globalization* (London, Zed Books, 2005).

In recent decades, owing to the difficulties encountered in relation to access to justice at the local level pertaining to the enforcement of their rights, many indigenous peoples have turned to international legal institutions.[3] This has resulted in the emergence of an important body of international human rights law relating to indigenous peoples' land rights.[4] However, this regime is still in its infancy and remains somewhat fragmented. Cognisant of this, indigenous peoples and the organisations that were involved in the negotiations for the adoption of the UN Declaration on the Rights of Indigenous Peoples ('the Declaration') placed great emphasis on the need for strongly worded and unambiguous language pertaining to their land, territory and resources and associated self-determination rights in this Declaration. Accordingly, it was expected that a universal declaration on the rights of indigenous peoples would reflect the importance of these rights for indigenous peoples.

The aim of this chapter is to evaluate the potential significance of the adoption of the Declaration in the development of international legal standards regarding indigenous peoples' land, territory and resource rights. Despite the expanding jurisprudence generated by the UN treaty monitoring bodies on indigenous peoples' rights,[5] questions remain as to the capacity of general international human rights law to successfully accommodate

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[3] The UN declared 1994–2004 the First World Decade on the Rights of Indigenous Peoples and 2005–15 the second decade; see GA Res A/RES/48/163 (1994) and Res A/RES/59/174 (2005). See also SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).

[4] J Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York, Transnational, 2006).

[5] See generally P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002).

indigenous peoples' specific territorial claims at the local level. Given this context, this chapter aims to examine to what extent the Declaration can serve as a positive force to protect indigenous peoples' land, territory and resource rights by providing the basis for the development of a strong corpus of specific territorial and associated self-governance rights for indigenous peoples. The chapter is divided into three sections. The first section analyses the extent to which the Declaration plays an important role in affirming and recognising indigenous peoples' specific relationship with their lands and territories. The authors go on to examine how, in a context where many states have traditionally been reluctant to recognise collective rights, the Declaration articulates a collective right to lands, territories and resources.[6] The following section addresses the requirement that, in accordance with their right to self-determination, indigenous peoples' free, prior and informed consent is obtained in the context of developments that impact on their lands and territories, in particular in relation to resource exploitation. It examines the Declaration's potential to contribute to the realisation of this self-determination requirement in practice and to act as a platform for the affirmation of a right to free, prior and informed consent within the normative framework of indigenous peoples' rights. Drawing from their analysis, the authors conclude the chapter by arguing that the true significance of the Declaration can only be fully appreciated when viewed in its historical context as having emerged from the systematic denial of indigenous peoples' rights; its contemporary context as an integral component of the evolving normative framework pertaining to the rights of indigenous peoples; and its future context as a platform for the elaboration and realisation of these rights.

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[6] D Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368; C Holder and J Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 *Human Rights Quarterly* 126.

Land Rights and Cultural Identity

The United Nations Permanent Forum on Indigenous Issues (PFII) recently observed that 'Land is the foundation of the lives and cultures of indigenous peoples all over the world.Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct culture is threatened.'[7] For indigenous peoples, land is not only a source of economic livelihood but also the source of spiritual, cultural and social identity. From this perspective indigenous peoples' claims to land rights involve not only traditional property rights and claim to title to territory but also cultural, social and spiritual claims. It is this specificity that indigenous peoples wanted the Declaration to reflect. The recognition of indigenous peoples' specific claims to land in the Declaration was seen as an important step for international law as, historically, international law had been a major factor in the alienation of indigenous peoples' land rights.

The Origins: International Law and Dispossession

International institutions working with indigenous peoples have begun to acknowledge this specific connection between cultural identity and land rights for indigenous peoples, but this practice is recent. Traditionally, international law and legal institutions at the national level have played a significant role in the destruction of indigenous peoples' cultures by supporting acts of dispossession and legalising the colonisation of indigenous peoples' territories.[8] Justifications of such colonisation were invariably based on racist approaches

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[7] Permanent Forum on Indigenous Issues, Report on the Sixth Session (14–15 May 2007), Economic and Social Council Official Records Supplement No 23, UN Doc E/2007/43, E/C.19/2007/12, para 4.

[8] See generally L Robertson, *Conquest by Law* (Oxford University Press, 2005); RA Williams, Jr, *The American Indian in Western Legal Thought* (Oxford University Press, 1990).

towards indigenous cultures. Notions such as terra nullius and discovery assumed that indigenous peoples were so uncivilised that they could be considered not to exist and that consequently their lands were open to conquest.[9] Ironically, the universalisation of international law was principally a consequence of the imperial expansion that took place in the past centuries, as one of the first doctrines of international law was the recognition of a right of conquest for the imperial powers.[10] Through such theory international law has affirmed the superiority of imperial colonial powers over indigenous communities. A clear distinction between the 'civilised' and the 'non-civilised' served to assert that international law applied only to the sovereign states that composed the so-called 'civilised family of nations'.[11] With the assumption of the superiority of 'civilised' states and the denial of the legal existence of so-called 'non-civilised communities', indigenous communities were refused ownership of their lands.

Probably the best summary of international law's approach to land rights during the colonial era comes from Lindley's famous book *The Acquisition of Backward Territory*, in which he

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[9] See especially M Bedjaoui, *Terra nullius, 'droits' historiques et autodétermination* (La Haye, Exposés oraux prononcés devant la Cour Internationale de Justice en l'affaire du Sahara Occidental, 1975).

[10] See generally P Keal, *European Conquest and the Rights of Indigenous Peoples* (Cambridge University Press, 2003).

[11] See generally M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

describes how law was used as a justification for the dispossession of indigenous peoples.[12] Chronologically, international law legitimised the acquisition of indigenous territories in two different ways. The first epoch saw the recognition of indigenous territorial existence, with international law developing around the notion of the right to acquire these territories by conquest. The second epoch was based on a different approach whereby indigenous peoples were regarded as legally non-existent. Thus, indigenous communities and nations could not hold territorial rights and this legacy of non-existence facilitated the subsequent colonisation of all indigenous land. Without going into detail on the role of international law in such instances of dispossession, it is important to bear in mind that it was only in 1992 that the Australian High Court recognised that terra nullius was a 'racist fiction',[13] and it was only during the twentieth century that it became 'possible to argue that the right of conquest has ceased to be upheld by international law'.[14] Overall, international law has clearly been a crucial tool that justified the dispossession of indigenous peoples of their territories; hence, viewed from a historical perspective, international law was not considered a logical ally and friend to support indigenous peoples' land rights; rather it was seen as a foe. It was with this historical background in mind that in 1985 the UN Working Group on Indigenous Populations (WGIP) started work on the elaboration of an international declaration on the rights of

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[12] MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green and Co, 1926, reprinted New York, Negro Universities Press, 1969) 11.

[13] *Mabo v Queensland (No 2)* (1992) 107 ALR 1.

[14] S Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, Clarendon Press, 1996) 8.

indigenous peoples.[15] It is consequently not surprising that one of the first affirmations in the preamble to the Declaration is the acknowledgement that 'indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources …'.

The Holistic Approach to Land Rights

As highlighted above, historically international law failed to recognise indigenous peoples' specific attachment to land. Hence recent recognition of indigenous peoples' specific attachment to their territories is seen as an important step under international law. In their claims under international law, indigenous peoples have insisted on the need to acknowledge their specific approach to land rights. This is reflected in the International Labour Organization's (ILO) Convention 169 which affirms that, in applying 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'.[16] Likewise, the World Bank operational policies on indigenous peoples also recognise 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'.[17] The African Commission on Human and Peoples' Rights (ACHPR) has also acknowledged the importance

[15] For an overview of the subsequent history of the draft declaration, see UN Doc E/CN.4/AC.4/1998/1/Add.1.

[16] Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) (1989) 28 ILM 1382, Art 13.

[17] World Bank Operational Policy (OP) 4.10 on Indigenous Peoples (2005), para 2. See also World Bank, BP 4.10 (2005).

of recognising indigenous peoples' specific and fundamental attachment to their traditional territory. The ACHPR recognises that indigenous peoples have 'a special attachment to and use of their traditional land, whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples'.[18] Overall, looking at the development of international law with regard to indigenous peoples' rights to land, there is a clear evolution towards the recognition of indigenous peoples' specific relationship with their traditional territories. This recognition was seen as an important step and was reaffirmed during the drafting of the Declaration. As a result, Article 25 affirms that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[19]

In this Article, the Declaration recognises not only indigenous peoples' specific spiritual attachment to their lands but also their inter-generational approach to land rights. This inter-generational aspect is important as indigenous peoples have insisted that not only is land not a commodity but it also part of their heritage to be transmitted from generation to generation.[20] As summarised by Lars Andres Baer: 'Without the land and the knowledge that

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[18] Advisory Opinion of the African Commission on Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples, 41st Ordinary Session, Accra, Ghana, May 2007.

[19] United Nations Declaration on the Rights of Indigenous Peoples, adopted by GA Res 61/295, 13 September 2007.

[20] J Gilbert, 'Seeking the Fair Land: Indigenous Peoples as Custodians of their Lands' in W Logan, M Langfield and M Mairead (eds), *Cultural Diversity, Heritage and Human Rights* (London, Routledge, 2009).

comes mainly from use of the land, we as indigenous peoples cannot survive.'[21] This specific cultural relationship to land is not only embedded in the present but is derived from the past and reaches into the future. Indigenous peoples' specific relationship with their land has three temporal dimensions to it:

(a) *Past*: indigenous peoples have a historical continuity with 'pre-invasion' and 'pre-colonial societies' that developed on their territories.

(b) *Present*: indigenous peoples live on these territories (or part of them).[22]

(c) *Future*: indigenous peoples are determined to transmit to future generations their ancestral territories.

The Declaration's recognition of the inter-generational facet of indigenous peoples' relationship to land can thus be seen as an important source of affirmation. Its reference to responsibilities towards future generations is perhaps indicative of international law's willingness to start addressing the relatively underdeveloped arena of the legal obligations and rights that flow from inter-generational considerations. Regarding the affirmation of indigenous peoples' specific cultural attachment to their lands, the preamble recognises 'the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and

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[21] Lars Anders Baer is a member of the United Nations Permanent Forum on Indigenous Issues, President of the Saami Parliament in Sweden, and a member of the Saami Council. See LA Baer, 'Protection of Rights of Holders of Traditional Knowledge, Indigenous and Local Communities' (2002) 12 *World Libraries* 17.

[22] UN Doc E/CN.4/Sub.2/1986/Add.4.

resources'. The Declaration acknowledges that indigenous peoples' relationship with their lands and territories is to be treated specifically, in a way which recognises indigenous peoples' holistic approach to land rights.

Emphasising the importance of respecting indigenous peoples' holistic approach to land rights, Article 8 states that any action which has the aim or effect of dispossessing indigenous peoples of their lands falls within the category of forced assimilation or cultural destruction. This article is the result of intense negotiations on the meaning of genocide in the Declaration. The original text proposed by the Sub-Commission to the former Commission on Human Rights established a clear link between so-called 'cultural genocide' (or 'ethnocide)' and 'any action which has the aim or effect of dispossessing' indigenous peoples of their lands.[23] There was a clear attempt to link dispossession of land with acts of genocide. During the drafting process some indigenous representatives highlighted that 'land was a key component of indigenous culture and dispossession of land was paramount to ethnocide'.[24] Many indigenous representatives stated that their removal from their traditional territories often amounted to cultural genocide, as the practice of dispossession, forced relocation or population transfer amounted to the destruction of their community. The adoption of Article 7 of the draft declaration would have established a clear link between land dispossession and international criminal prosecution.[25] However, this connection between land dispossession and genocide (or cultural genocide/ethnocide) was

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[23] UN Doc E/CN.4/Sub.2/1994/56, UN draft declaration, Art 7.

[24] UN Doc E/CN.4/2002/98 paras 73 and 74 and page 33.

[25] Note that the draft declaration used the term 'aim or effect', a requirement which is less onerous than the 'specific intent' threshold. See especially J Gilbert, 'Environmental Degradation as a Threat to Life: A Question of Justice?' (2003) 6 *Trinity College Law Review* 81.

strongly resisted by states and consequently the terms 'cultural genocide' and 'ethnocide' do not appear in the text adopted by the General Assembly. In many ways, Article 8 reflects a middle ground agreement by recognising that dispossession of land is a threat to indigenous peoples' cultures and could be akin to an act of forced assimilation but not an act of genocide per se. Hence, Article 8 recognises the crucial connection between indigenous peoples' survival and land rights but remains in conformity with international law on genocide, which does not recognise cultural genocide or ethnocide.[26] In addition, Article 10 of the Declaration adds that 'indigenous peoples shall not be forcibly removed from their lands or territories'. Overall, this part of the Declaration emphasises land as a key component of indigenous cultures, with dispossession consequently recognised as being paramount to cultural destruction.

Collective Land Rights: Content and Limitations

One of the critical battles that took place during the prolonged drafting process of the Declaration was centred on the issue of collective rights. During one of the sessions of the United Nations Working Group on a Draft Declaration on the Rights of Indigenous Peoples (WGDD), indigenous representatives highlighted that 'exercise of our collective rights is not only critical to indigenous spirituality, but also [to] maintaining the inter-generational nature of all our social, cultural, economic and political rights'.[27] They also pointed out that 'a key

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[26] For a discussion of the connection between genocide and land rights for indigenous peoples, see Gilbert (n 4) ch 3. More generally on the issue of genocide, see W Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press, 2000).

[27] Proposals by Indigenous Representatives, 7th session of the WGDD, UN Doc E/CN.4/2002/98, Annex II, page 28.

element of indigenous collective rights is the profound social, cultural, economic and spiritual relationship of indigenous peoples with our lands, territories, resources and environment'.[28] On the other side several states, including the United Kingdom and France, insisted on the 'inexistence' of collective rights under international law. One of the anxieties concerned the potential difficulties that might emerge in cases of antagonism between individual and collective rights. As a result, the preamble to the Declaration recognises and affirms that 'indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'. Article 1 also highlights that indigenous peoples have rights 'as a collective or as individuals'. While several articles in the Declaration make a distinction between indigenous peoples and indigenous individuals, the articles dealing with land rights do not make such a distinction. They recognise that when it comes to land rights the subjects of rights are indigenous peoples, not individuals.

Despite some states' arguments regarding the 'non-existence' of collective rights under international law, the recognition of collective rights to land for indigenous peoples is consistent with other existing legal standards. The Inter-American Court of Human Rights (IACHR) in the *Awas Tingni* case clearly affirmed the right to property in lands for 'members of indigenous communities within the framework of commonality of possession'.[29] ILO Convention 169 also recognises the collective nature of property in lands for indigenous peoples, and the jurisprudence of the Human Rights Committee (HRC) and the Committee

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[28] ibid.

[29] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Series C No 79) [2001] IACHR 9 (31 August 2001).

on the Elimination of All Forms of Racial Discrimination (CERD) also emphasises the collective nature of this connection.[30] Hence, on this issue, the Declaration conforms to other international standards, and all point towards the emergence of the recognition of indigenous peoples' collective rights to land. Moreover, it was important for the Declaration to recognise the need for greater protection of these collective rights as, to date, international law has been inadequate in the provision of this much-needed protection. In terms of the substance of such collective rights, it is worth analysing in detail the content of the Declaration, which makes some important contributions regarding notions of (1) ownership in the present tense; (2) recognition of indigenous peoples' traditional customary land laws; and (3) affirmation of rights to territories and lands as including natural resources.

Ownership: 'Past and Present'

In terms of the content of indigenous peoples' right to land, Article 26 affirms that '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'. In making this broad affirmation the Declaration does not get into the debate on what indigenous peoples' land rights do or do not constitute. Traditionally on this issue there has been some debate as to whether land rights for indigenous peoples means a right to ownership or a right to use the land.[31] The Declaration avoids such questions by adopting a broad approach to the content of a right to land, which means not only a right of ownership and use but also a right to develop and control. This is an important step, and one which rejects any narrow

[30] CERD, General Comment XXIII (51) on the Rights of Indigenous Peoples (adopted at the Committee's 1235th meeting, 18 August 1997) para 5.

[31] Gilbert (n 4).

approach to land rights as meaning only a right to use, an approach sometimes favoured by states. Crucially, the Declaration recognises that with ownership comes control over developments undertaken in indigenous lands.

However, the recognition of indigenous peoples' right to 'own, use, develop and control' their lands comes at a price: it is limited to present day occupation. Article 26 makes a distinction between rights to lands 'presently' occupied by indigenous peoples and rights to land 'traditionally' occupied by indigenous peoples. This distinction is the result of intense negotiation in which some states were reluctant to recognise indigenous peoples' land rights to traditionally owned territories that are now out of indigenous peoples' control. Australia, for example, underlined that it could only support the text of Article 26 if it applied to lands that indigenous peoples currently owned or exclusively used.[32] As a result, Article 26 makes a distinction between traditional territories and land now in possession of indigenous peoples and those that are not. Under paragraph 1 indigenous peoples have 'the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'; while under paragraph 2 they 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'. The content of the 'right' in paragraph 1 remains somewhat ambiguous as it mentions a 'right' to the lands but does not qualify whether it is a right to own, use, control or develop. The ambiguity associated with the right to land traditionally owned but no longer occupied by indigenous peoples could be seen as an 'ambiguous compromise': ambiguous because it will be up to national jurisdictions to interpret what rights indigenous

[32] Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003), para 32.

peoples have to the lands that they have traditionally owned, occupied or used in the past; and a compromise because it does not adopt the position of those states which wanted to ensure that land rights were only recognised in terms of land presently occupied. Such 'ambiguous compromise' is not surprising as the issue of land rights over historical and traditional territories touches on the contentious issue of 'dealing with the past'. In many ways this relates to the issue of reparations for past wrongs, an issue with which, traditionally, international law has not been at ease.[33]

Article 26 is not the only article dealing with historical claims. The entire Declaration could be seen as an attempt to address the issue of reparation of past wrongs, as one of the overriding goals of the Declaration is reconciliation. The preamble recognises that 'indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'. So not only does the Declaration recognise that indigenous peoples have suffered in the past, it also affirms that such historical dispossession still has some impact on indigenous peoples' lives nowadays. This underlines one of the philosophies behind the Declaration, which is to recognise past wrongs and to address present day situations by building a bridge between them. Land rights are the cornerstone of such a bridge. One of the difficult issues in the Declaration was the notion of reparations and remedies for past wrongs. Originally the draft declaration proposed by the former Sub-

[33] See generally G Ulrich and K Boserup (eds), *Reparations: Redressing Past Wrongs,* Human Rights in Development Yearbook (Oslo, Kluwer Law International, 2003); and E Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore, Johns Hopkins University Press, 2000).

Commission referred to a right to restitution of lands in its Article 27.[34] Due to resistance on the part of some states towards the recognition of a right to restitution of lands, Article 28 of the Declaration develops a 'right to redress' instead.[35] It reads:

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Restitution of land becomes part of a larger right to redress, not the main principle. Yet, the Declaration affirms the rule that restitution should be the first principle, and only when it is not possible should other methods of compensation be contemplated. This approach reflects the position adopted by CERD in its General Comment XXIII, which states that 'only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.'[36]

Overall, on the issue of collective land ownership, while the Declaration makes a distinction between lands presently occupied (right to own, use, develop and control) and lands historically occupied (a right to lands), such division is attenuated by the affirmation of a

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[34] 'Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent.' UN draft declaration, Art 27.

[35] J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207.

[36] CERD, General Recommendation 23 Indigenous Peoples, UN Doc A/52/18, Annex V, para 5.

regime for remedies for past wrongs which includes a right to land restitution. The affirmation of a right to redress, and a right to restitution, is crucial as in many ways the question of land rights is often a question of restoring lands that were taken under a past discriminatory enterprise and linked to a continuing denial of indigenous peoples' rights. From this perspective, the recognition of an ambiguous 'right to lands' traditionally occupied has to be coupled with the affirmation of a right to redress and restitution. Moreover, regarding the link between past and present occupation, the Declaration also insists on the need for states to recognise that indigenous peoples' land rights derive from traditional occupation and indigenous laws and customs relating to land ownership. This may be seen as another positive step towards reconciliation between past practices, which rejected indigenous peoples' own customary land laws, and the present situation.

Laws, Traditions and Customs: Recognition and Adjudication

Regarding the content of a collective right to land for indigenous peoples, another crucial aspect of such a right concerns its source and origin. While most indigenous communities have elaborated traditional laws and customs regarding land rights, such laws are usually ignored, not recognised, or not respected by states' formalised legal systems.[37] This non-recognition of indigenous peoples' own laws regarding land rights is an important area of contention between states and indigenous peoples, which often result in the latter losing their rights to their lands. On this issue Article 26 of the Declaration affirms that when states give legal protection to indigenous peoples' land rights they should do so with 'due respect' for indigenous peoples' customary laws. More specifically, paragraph 3 of Article 26 affirms that 'States shall give legal recognition and protection to these lands, territories and

[37] See generally D Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (Minority Rights Group International, March 2005).

resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.' This is an important affirmation given that in most situations indigenous peoples are dispossessed of their lands as a result of state authorities' non-recognition of their traditional forms of land tenure systems. On this issue the Declaration goes even further by calling on states to recognise indigenous peoples' customary systems of laws when recognising and adjudicating land rights. Article 27 reads:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

This article provides for a sort of 'guideline' or 'framework', inviting states to put in place a 'transparent process' at the national level that gives space to indigenous peoples' customary laws. The emphasis is on the need for states to establish a process that will recognise indigenous peoples' customary land laws. This part of the Declaration does not argue for a rejection of the formal state systems and for the application of indigenous peoples' own laws only; rather the aim is to encourage states to establish a process which will give 'due respect' to indigenous laws. It is important to highlight that such a process will play a role not only in the adjudication of land rights but also in the process of recognition of such rights. This provides more space for the recognition of indigenous peoples' rights based on their own traditional ownership rather than official state recognition of such rights—again an approach based on the idea of reconciliation between states' institutions and indigenous peoples.

Regarding the operationalistion of such recognition, one might find this part of the Declaration disappointing: while it supports the establishment of a 'transparent process' it does not provide details on how such a process should work. At this stage it is important to bear in mind that the aim of the Declaration is to set basic minimum international standards and to affirm the need to give due recognition to indigenous peoples' own laws. For centuries, legal institutions at the international and national levels have dismissed indigenous customary systems of laws as being 'backward' or 'uncivilised'.[38] The Declaration attempts to contribute to the redress of this injustice by calling on states to put in a place a 'transparent process' which gives space to indigenous peoples' systems of laws when it comes to recognition and adjudication of land rights. Regarding practical implementation of such an obligation, one of the only limitations is set out in Article 34 of the Declaration, which states that indigenous peoples' customs have to be in accordance with international human rights standards. This addresses one of the issues raised by some of the states involved in the drafting of the Declaration regarding potential conflicts between customary laws and human rights law, in particular the rights of women with regard to familial and inheritance rights. The Declaration, otherwise, provides the framework for states, in cooperation with indigenous peoples, to develop systems that will give some space for indigenous laws, traditions and customs. The processes employed to develop these systems are required to be open, participative and transparent.

Rights over Natural Resources

Another important component of indigenous peoples' collective rights to their land is the recognition of their rights over the resources contained in those lands. Article 26 affirms that

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[38] See generally Anghie (n 11); Keal (n 10); and L Benton, *Law and Colonial Cultures* (Cambridge University Press, 2002).

indigenous peoples' land rights (presently and traditionally occupied) refer to a right over lands, territories and resources. This recognition is particularly significant when viewed in the context of the increased global demand for primary natural resources, much of which are located within indigenous peoples' territories. Control over natural resources is an area of historical and ongoing conflict between states, indigenous peoples and other private actors such as transnational corporations that are increasingly encroaching on indigenous peoples' territories to exploit natural resources located therein. Hence, the recognition that land rights also means control over natural resources is an affirmation which has potentially profound implications for indigenous peoples. As with other potentially far-reaching provisions of the Declaration, this acknowledgement on the part of states is the result of prolonged debate during the drafting process, with some states, often notably those most active in the area of resource exploitation on indigenous peoples' lands both at home and abroad, reluctant to recognise rights over natural resources.

Moreover, it is worth noting that on this issue of ownership and control over natural resources ILO Convention 169 recognises a right to use such resources rather than a right of ownership.[39] During the drafting of ILO 169 there was intense debate as to whether land rights should include rights over natural resources. Several states argued that ownership of natural resources was exclusively reserved to states and that in most national legislations

[39] Art 15 states: 'The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.'

such resources could be granted to private individuals on a concessionary basis only.[40] Due to this insistence of states and arguably a reduced voice of indigenous peoples due to a less than inclusive drafting process, the ILO Convention makes a distinction between a right to own land and territories and a right to use natural resources. The Declaration, with its recognition of the right to own, use, control and develop resources, reflects the position of indigenous peoples and the contemporary challenges they face in relation to their cultural survival.

This recognition is part of a larger evolution of international law on the issue of indigenous peoples' rights in relation to natural resources. The IACHR has been especially active in examining issues relating to the rights of indigenous peoples over natural resources. In the landmark decision of *Awas Tigni* the Court asserted that the term 'property' used in Article 21 of the American Convention includes 'those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value'.[41] Likewise, in the case of the Yakye Axa community the Court pointed out that 'the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components

[40] See especially the debates of the Working Party: International Labour Conference, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107), Provisional Record 25, 76th session, Geneva, 1988.

[41] *Awas Tingni Community v Nicaragua* (n 29) para 144.

derived from them, must be safeguarded by Article 21 of the American Convention'.[42] More recently the Court confirmed and refined its position in the *Saramaka* case, stating:

> the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[43]

This decision of the IACHR, highlighting that it would be 'meaningless' to recognise land rights for indigenous peoples without recognising their rights over natural resources, mirrors the rationale adopted in the UN Declaration linking control over natural resources with indigenous peoples' survival. This position is illustrative of the evolution in the recognition of indigenous peoples' land rights and an increased awareness of the profound impact that external forces, such as unwanted exploitation of natural recourses, can have on their cultural survival, which has occurred since the adoption of ILO Convention 169 some 20 years ago. To protect and give effect to these recognised rights to territories, lands and

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[42] *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs), IACHR, judgment of 17 June 2005, Series C No 125 (2005).*

[43] *Case of the Saramaka People v Suriname* (Series C No 172) [2007] IACHR 5 (28 November 2007) para 122.

resources in the context of unwanted exploitation, the Declaration requires that states obtain indigenous peoples' free, prior and informed consent (FPIC).

The Requirement to Obtain FPIC: Natural Evolution or Groundbreaking Development?[44]

As discussed in the introduction to this chapter, activities such as mining, logging, dam construction and mono-cropping are becoming synonymous with violations of indigenous peoples' rights. These economic development projects, executed for the most part without the adequate participation of indigenous peoples, have had a serious impact on their well-being. The former Special Rapporteur on indigenous people and their relationship to land, Erica-Irene Daes, described the associated problem of expropriation of indigenous lands and resources without indigenous peoples' consent as 'growing and severe'.[45] This widespread phenomenon of imposing projects on indigenous peoples without their consent has come to be termed by indigenous peoples as 'development aggression'.[46] This is particularly

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[44] This section of the chapter is based on Cathal Doyle's doctoral thesis which addresses the operationalization of Free Prior and Informed Consent in the extractive sector. See also Doyle, Cathal, "Free, prior and informed consent: a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector", submission made to the UN OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights, Moscow in December 2008 Available at ww2.ohchr.org/english/issues/indigenous/resource_companies.htm.

[45] E-I Daes, *Indigenous Peoples' Permanent Sovereignty over Natural Resources,* E/CN.4/Sub.2/2004/30/Add.1, para 7.

[46] Permanent Forum on Indigenous Issues, 4th session, New York, 16–27 May 2005, Special Theme: Millennium Development Goals Information Received from the United Nations System, E/C.19/2005/4/Add.13, 28 March 2005, paras 3-6; see also Report of the Special Rapporteur on the

pervasive in the extractive sector and its negative impact on indigenous peoples has been described as enormous.[47] The associated ongoing violations of indigenous peoples' rights, combined with increased demand and prices for minerals and the fact that much of the world's remaining mineral resources are located in indigenous territories,[48] has led many indigenous peoples to conclude that development aggression in the area of natural resource extraction poses a grave threat to their cultural survival.[49] Given this context, it is hardly surprising that the unprecedented volume and scale of extractive projects currently being planned in indigenous territories is escalating tensions and conflict between indigenous peoples, states and transnational corporations.

International Human Rights Law and FPIC

The former UN Working Group on Indigenous Populations (WGIP) pointed to the ruling of the International Court of Justice (ICJ) in the *Western Sahara* case as evidence that consent

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situation of human rights and fundamental freedoms of indigenous people (R Stavenhagen), 21 January 2003, UN Doc E/CN.4/2003/90, para 28.

[47] J Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc E/CN.4/2006/97, paras 25, 29.

[48] R Moody, *Rocks and Hard Places* (London, Zed Books, 2007) 10; see also AA Tujan, Jr and RB Guzman, *Globalizing Philippine Mining* (Manila IBON Foundation Inc Databank and Research Centre, IBON Books, 2002) 153.

[49] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (R Stavenhagen), Mission to Philippines (2002) UN Doc E/CN.4/2003/90/Add.3, para 63. See also Report of the Special Rapporteur (n 46) para 20, providing examples of developments that are threatening the existence of indigenous peoples in locations around the world.

has formed the basis of agreements between states and indigenous peoples since as far back as 1975.[50] Others point to the fact that consent as a principle in relation to dealings with indigenous peoples has been operational for hundreds of years, dating back to the original treaties negotiated with indigenous peoples by colonisers.[51] Regardless of when consent was initially established as a principle in relation to negotiations between states and indigenous peoples, it is clear that the adoption of FPIC as a general principle in negotiations with indigenous peoples has gained significant momentum in recent years. This momentum is reflected in the fact that FPIC is increasingly referenced in international instruments and fora ranging from general comments, recommendations and concluding observations of UN treaty bodies to jurisprudence of treaty bodies and regional courts, reports and analyses of UN special procedures and legislation, and jurisprudence emerging from national jurisdictions. In recognition of the importance of FPIC, the PFII and the WGIP worked on developing methodologies and legal frameworks aimed at promoting the principle of FPIC and assisting with its implementation.[52] ILO Convention 169, the only international treaty

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[50] International Court of Justice, *Western Sahara: Advisory Opinion of 16 October 1975* [1975] ICJ Rep 12. The ICJ advisory opinion refers the 'freely expressed will and desire' of a people. See M Janis, 'The International Court of Justice: Advisory Opinion on the Western Sahara' (1976) 17 *Harvard International Law Journal* 609. For an analysis of the self-determination issue in the Western Sahara see J Castellino, *International Law and Self Determination: The Interplay of Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (Leiden, Martinus Nijhoff, 2000).

[51] M Colchester and F MacKay, 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent', Forest Peoples Programme, August 2004, www.forestpeoples.org.

[52] 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; WGIP

specifically dedicated to indigenous peoples, contains an explicit reference to indigenous peoples' informed consent in the context of relocation. It also recognises indigenous peoples' right to 'decide their own priorities for the process of development' and requires that states consult with them through their representative institution, 'with the objective of achieving agreement or consent to the proposed measures'.[53]

The HRC, the Committee on Economic Social and Cultural Rights (CESCR) and CERD have all clarified that the right to self-determination applies to indigenous peoples.[54] Consistent with this recognition of the right to self-determination these treaty bodies have pointed to state duty to seek and obtain FPIC in the context of activities impacting on indigenous peoples' rights and interests.[55] Both CERD and the CESCR have instructed states that indigenous

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Standard-Setting Legal Commentary on the Concept of Free, Prior and Informed Consent, Expanded Working Paper submitted by AI Motoc, E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005.

[53] ILO Convention 169 (1989) Art 6. Art 15 requires consultation in the context of exploration or exploitation of subsoil resources.

[54] HRC: Australia UN Doc CCPR/C/69/AUS (2000) para 10, Mexico CCPR/C/79/Add.109 (1999) para 19, Canada CCPR/C/79/Add.105 (1999), paras 7 and 8, Sweden CCPR/C/74/SWE (2002) para 15, Norway CCPR/C/79/Add. 112 (1999) paras 10 and 17 and Denmark CCPR/C/70/DNK (2000) para 11. CESCR: Russian Federation UN doc E/C.12/1/Add.94 (2003), Para 39; the Philippines UN Doc E/C.12/PHL/CO/4 (2008), para 16; Sweden E/C.12/SWE/CO/5 (2008) para 15. CERD General Comment XXI (1996) clarifies that self-determination applies to 'all peoples' Its General Comment XXIII on 'indigenous peoples' is an implicit recognition of this right to self-determination as 'peoples'.

[55] The terminology used by the treaty bodies relation to the requirement for consent varies from the weaker formulations of 'seek' / 'endeavour to obtain' FPIC, to the stronger formulations of 'obtain' / 'require' FPIC. For examples of the latter CERD Concluding observations to Ecuador

peoples' consent is required in the context of extractive projects.[56] In 2009, in its ruling on the *Poma-Poma v Peru* case, the HRC stated that for indigenous participation in decision-making to be effective their FPIC was required and that 'mere consultation' was inadequate to ensure protection of their rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[57] This ruling was consistent with the HRC's 1994 decision in the case of *Lansman v Finland*, where it clarified that the scope of a state's freedom with regard to development on indigenous peoples' lands cannot be 'assessed by reference to a margin of appreciation but by reference to the obligations it has undertaken in Article 27'.[58] To date CERD has been the most engaged and innovative international human rights body on the

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CERD/C/ECU/CO/19 15 (2008); CERD's Early Warning Urgent Action letter to the Philippine Government (7 March 2008) and HRC *Poma-Poma v Peru* UN Doc CCPR/C/95/D/1457/2006 (

24 April 2009).

[56] See CERD, General Comment XXIII (n 30). See also CERD, Concluding Observations on Ecuador, 2003, CERD/C/62/CO/2: 'as to the exploitation of subsoil resources located subjacent to the traditional lands of indigenous communities the Committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in General Comment XXIII on the Rights of Indigenous Peoples. The Committee therefore recommends that the prior informed consent of these communities be sought'; CESCR Concluding Observations on Ecuador, 32nd session, 26 April–14 May 2004, E/C.12/1/Add.100, paras 12 and 35; CESCR Concluding Observations on Colombia, 27th session, 12–30 November 2001, E/C.12/1/Add.74, paras 12 and 33

[57] HRC *Poma Poma v Peru* (n 55) Paras 7.6 and 7.4. Complaint taken against Peru in 2006 under the Optional Protocol to the ICCPR.

[58] *Lansman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994), para 9.4 the Committee clarified that 'measures whose impact amount to a denial of the right [to culture] will not be compatible with the obligations under article 27'.

subject of FPIC. Its General Comment XXIII, issued in 1997, on the Rights of Indigenous Peoples states that 'no decisions directly relating to their rights and interests are taken without their informed consent'.[59] The focus of CERD's current work in relation to indigenous peoples is reflective of the increased emphasis being placed on FPIC following the adoption of the Declaration. In addition to an increased emphasis on the requirement to obtain FPIC in its concluding observations to states,[60] CERD is currently examining cases in countries including Brazil, Botswana, Canada, Niger, the Philippines, Peru, India and Indonesia in the context of its Early Warning Urgent Action procedure, and has asked those states' respective governments to respond to allegations regarding their failure to obtain the FPIC of the affected indigenous peoples.[61]

Support for the affirmation of a right to FPIC can also be found in reports and declarations of UN Special Rapporteurs. The former Special Rapporteur on the human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, emphasised the importance of the 'right to free prior and informed consent by indigenous peoples', which includes their 'right to say no', describing it as being of 'crucial concern' in relation to large-

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[59] CERD, General Comment XXIII (n 30) para 4(d).

[60] Ecuador UN Doc CERD/C/ECU/CO/19 (2008), Russia UN Doc CERD/C/RUS/CO/19 20 (2008), and Philippines UN Doc CERD/C/PHL/CO/20, (2009) addressing FPIC for resource exploitation.

[61] See Early Warning Urgent Action letters sent following CERD's 73rd, 74th and 75th sessions, 2008 - 2010, http://www2.ohchr.org/english/bodies/cerd/early-warning.htm.

scale or major development projects and 'essential' for the protection of their human rights.[62]

The current Special Rapporteur, S James Anaya, has argued that we are witnessing the development of an international norm requiring the consent of indigenous peoples when their property rights are impacted by natural resource extraction.[63] The Rapporteur addressed the issue of FPIC in his 2009 annual report to the Human Rights Council and in communications and statements to the Ecuadorian and Peruvian governments in 2008 and 2010 respectively.[64] In his comments on FPIC the Rapporteur cited the UN Declaration and

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[62] Report of the Special Rapporteur (n 46) paras 13 and 66. He points out that FPIC is necessary as too many major developments do not respect the consultation and participation criteria that are laid out in ILO Convention 169.

[63] SJ Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction' (2005) 22 *Arizona Journal of International and Comparative Law* 17: 'Where property rights are affected by natural resource extraction, the international norm is developing to also require actual consent by the indigenous peoples concerned.' See also F MacKay, 'Indigenous Peoples' Rights and Resource Exploitation' (2004) 12 *Philippines Natural Resources Law Journal* 58.

[64] In the case of Ecuador the Special Rapporteur addressed the requirement for FPIC in response to a request for advice regarding the drafting of its constitution. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (S James Anaya), Addendum A/HRC/9/9/Add.1, 15 August 2008, Annex 1. In the case of Peru the Rapporteur addressed the requirement for consent in relation to legislative developments following his country visit, see 'Declaración pública del Relator Especial sobre los derechos humanos y libertades fundamentales de los indígenas, James Anaya, sobre la "Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo" aprobada por el Congreso de la República del Perú' 7 de julio de 2010.

the recent IACHR *Saramaka v Suriname* ruling,[65] holding that measures which have a potentially substantial impact on the basic physical and/or cultural well-being of an indigenous community should not proceed without their consent.[66] The Rapporteur proposed that the extent of the obligation to obtain consent be a function of the potential impact of a proposed measure on indigenous peoples' lives and territories, with significant and direct impacts leading to a 'strong presumption' of the requirement for consent. He further noted that this requirement could 'in certain contexts' 'harden into a prohibition of the measure or project in the absence of indigenous consent.'[67] In his 2010 statement to the Government of Peru the Rapporteur noted that the UN DRIP indicated that consent was a requirement, as opposed to merely an objective, under Article 32 for extractive projects which may have significant social, cultural or environmental impacts on indigenous peoples.[68]

The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), established by the Human Rights Council, is also in the process of addressing the right to FPIC. Having

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[65] Report of the Special Rapporteur 2008 (n 64). See also *Saramaka People v Suriname* (n 43).

[66] Report of the Special Rapporteur 2008 (n 64) para 39

[67] 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 47

[68] Declaración pública del Relator Especial (n 64) 'El Relator Especial agregaría además, como ejemplo en el que se requiere el consentimiento indígena, el caso de una propuesta de instalación de actividades de extracción de recursos naturales dentro de un territorio indígena cuando esas actividades tuviesen impactos sociales, culturales y ambientales significativos.' The Rapporteur also noted that consent was a requirement in the situations covered under Articles 10 (relocation) and 29 (disposal of hazardous materials) of the Declaration.

recommended at its 1st session in October 2008 that the Durban Declaration and Programme of Action 'should acknowledge that both the right to self determination and the principle of FPIC are now universally recognized through the adoption of the Declaration',[69] the EMRIP proceeded to examine the issue in more detail at its 3rd session in the context of its draft study on indigenous peoples' right to participate in decision making. The draft study, notes that indigenous peoples view the right to FPIC as 'a requirement, prerequisite and manifestation of the exercise of their right to self-determination' and that particular emphasis is placed on FPIC in the context of large-scale natural resource extraction.[70] Likewise the PFII dedicated its 9th session in 2010 to the issue of development with culture and identity in accordance with Article 3 (self-determination) and Article 32 (development and FPIC) of the Declaration.

At the regional level the IACHR has recently reaffirmed the requirement for FPIC, citing Article 32 of the Declaration in its November 2007 ruling on the *Saramaka v Suriname* case. It stated: 'the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.'[71] The Inter-American Court and Commission respectively, previously identified the requirement for consent in the cases of the *Awas*

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[69] Report of the expert mechanism on the rights of indigenous peoples on its first session A/HRC/10/56 (8 January 2009) page 4

[70] 'Progress report on the study on indigenous peoples and the right to participate in decision-making. Report of the Expert Mechanism on the Rights of Indigenous Peoples' UN Doc A/HRC/EMRIP/2010/2 (17 May 2010) para 34

[71] *Saramaka People v Suriname* (n 43) para 134.

Tingni v Nicaragua and *Mary and Carrie Dann v The United States*.[72] In addition, the Proposed American Declaration on the Rights of Indigenous Peoples contains a similar clause to Article 32 of the UN Declaration, requiring FPIC for 'any plan, program or proposal affecting the rights or living conditions of indigenous peoples'.[73] The updated procedure of the working group responsible for the drafting of the American Declaration requires that the UN DRIP serve as 'a point of reference' for reaching agreement on those articles where consensus had not yet been reached. [74] This would appear to imply that a standard lower than the requirement to obtain FPIC, as recognized in the UN DRIP, would not be acceptable. In 2009 case of *Kenya v Endorois* the ACHPR also affirmed the requirement for FPIC to be obtained in accordance with indigenous peoples' customs and traditions in the context of development projects that could have a major impact in their territories.[75]

At the national level a number of jurisdictions, including the Philippines, Australia's Northern Territory, Venezuela and Greenland have enacted legislation recognising the requirement to

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[72] *Awas Tingni Community v Nicaragua* (n 29) para 143 and *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002) para 165

[73] 'Eleventh meeting of negotiations in the quest for points of consensus (United States, Washington D.C. – April 14 to 18, 2008) Record of the current status of the draft American Declaration on the Rights of Indigenous Peoples' OEA/Ser.K/XVI GT/DADIN/doc.334/08 (18 April 2008) Article XXIX page 19

[74] 'Report of the chair on the meeting for reflection on the meetings of negotiations in the quest for points of consensus' OEA/Ser.K/XVI GT/DADIN/doc.321/08 (14 January 2008) page 4.

[75] African Commission on Human and Peoples Rights Case 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2009) para 291

obtain indigenous peoples' informed consent prior to approving activities in their territories.[76] As a further reflection of evolving customary international law in the area of indigenous participation rights, a number of donor governments have also recognised the importance of FPIC as a key principle in safeguarding indigenous peoples' rights. These include the governments of Denmark and Spain, which, along with the European Commission, have incorporated the principle of FPIC of indigenous peoples into their development strategies.[77]

Jurisprudence at the national level has also recognised the duty to obtain indigenous peoples' FPIC. The Supreme Court of Canada in the *Delgamuukw v British Columbia* case

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[76] Philippines: Indigenous Peoples Rights Act (IPRA) Republic Act No 8371 (1997) Chapter III s 3g; Greenland: The Greenland Home Rule Act, Act No 577, (1978), Sect 8(1) which included 'a mutual right of veto' over mining projects. This Act has been superseded by the Act on Greenland Self-Government adopted 19 May 2009, which transfers responsibility for the mineral resource area to Greenland's Self Government authorities; Venezuela: Ley Organica de Pueblos y comunidades Indígenas Gaceta Official de la Republica Bolivariana De Venezuela Numero 38,344 Caracas (2005)Chapter II Art 11 -19; Australia: Aboriginal Land Rights (Northern Territory) Act An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes. (No 191 of 1976), Sect 42.

[77] The EC has included FPIC as the key principle in development cooperation: see 'The European Consensus on Development, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy', Official Journal of the European Union 2006/C 46/01 paras 101 and 103. See also 'Strategy for Danish Support to Indigenous Peoples' (Danish Ministry of Foreign Affairs, Danida, May 2004) 11; and Report of the Government of Spain to the PFII 6th session, 21 February 2007, UN Doc E/C.19/2007/4 para 4.

clarified that where aboriginal people hold title to land, the government's duty to consult is 'in most cases … significantly deeper than mere consultation' and can require the 'full consent of an aboriginal nation'.[78] In its October 2007 landmark ruling in *Maya Villages of Santa Cruz and Conejo v The Attorney General of Belize and the Department of Environment and Natural Resources*, the Supreme Court of Belize referenced the FPIC requirements in both the Declaration and CERD's General Comment XXIII on the rights of indigenous peoples. The Court ordered that the state cease and abstain from any acts, including the granting of mining permits and the issuing of regulations concerning resource use, which impacted on the Mayan indigenous communities 'unless such acts are pursuant to their informed consent'.[79] In 2010 the Court reaffirmed the applicability of its 2007 ruling to all 'the Maya villages in the Toledo Districts'.[80] In the 2009 case of *Álvaro Bailarín y otros, contra los Ministerios del Interior y de Justicia; de Ambiente, Vivienda y Desarrollo Territorial; de Defensa; de Protección Social; y de Minas y Energía* the Constitutional Court of Colombia addressed the requirement to obtain FPIC in relation to the issuance of a concession for mining exploration.[81] The Court ruled that the state has a duty to obtain FPIC in accordance with indigenous peoples' customs and traditions where large scale investment or

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[78] *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 168.

[79] *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim Nos 171 & 172, 2007, Supreme Court of Belize (18 October 2007) para 136(d).

[80] *The Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of Toledo District et al v The Attorney General of Belize and the Minister of Natural Resources* Environment Claim No. 366, 2008 Supreme Court Of Belize (28th June 2010) para 126 (i)

[81] Constitutional Court of Colombia Sentencia T-769/09 [2009] page 36 (between n27 and 28)

development plans may have a major impact within their territories.[82] These recent jurisprudential developments pertaining to FPIC illustrate the importance of the strongly worded and unambiguous language contained in the Declaration, particularly in relation to the development, utilisation and exploitation of resources. Despite the objections of some states to this language during the drafting and negotiating process, indigenous peoples' insistence that it not be compromised prevailed. The adoption of the Declaration, which contains no fewer than six references to the requirement to obtain FPIC, is an acknowledgement by states that FPIC is, in principle (if not yet in practice), a minimum standard to be respected 'for the survival, dignity and well-being of the indigenous peoples of the world'.[83]

Scope of Requirement to Obtain FPIC in the Declaration

The Declaration provides a normative framework for future engagement between indigenous peoples and states, the private sector or the UN system.[84] If implemented in good faith it provides an opportunity to address historical power imbalances between indigenous peoples and those wishing to access their lands and exploit their resources. In so doing, it affords a unique opportunity to significantly reduce the potential for further development aggression and to address existing conflicts. Fundamental to, and inseparable from, the Declaration's framework is respect for what indigenous peoples view as two of its

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[82] ibid

[83] Art 43.

[84] United Nations Development Group Guidelines on Indigenous Peoples' Issues, February 2008, p 10; see also Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007.

core principles, namely self-determination and FPIC.[85] It has long been argued by indigenous peoples that the fulfilment of their right to self-determination is dependent on the recognition of their rights to lands and territories and the resources contained therein.[86] According to Erica-Irene Daes, the modern concept of self-determination, in order to be meaningful, 'must logically and legally carry with it the essential right of permanent sovereignty over natural resources'.[87] This reasoning is reflected in the IACHR's *Saramaka v Suriname* ruling that indigenous peoples' land rights would be rendered meaningless 'if not connected to the natural resources that lie *on and within* the land'.[88] International law also recognises that implicit in indigenous peoples' right to self-determination is the right to effective participation and consultation in relation to any measures that impact on them.[89]

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[85] Art 3 states: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

[86] Daes (n 42) para 8: '[I]t has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having legal authority to exercise control over their lands and territories.'

[87] ibid, para 17.

[88] Emphasis added. This qualification that resources are inclusive of those on and within lands is in line with the provisions of the Declaration. These provisions do not make any distinction between subsoil and non-subsoil resources and as such the use of the term 'resources' within the Declaration is inclusive of both.

[89] See F MacKay, Compilations of UN Treaty Body Jurisprudence Volumes I, II and III Covering the Years 1993–2008, Forest Peoples Programme available. See also Programme of Action of the Second International Decade of the World's Indigenous People, Objective (ii).

The right to self-determination also embodies the 'freely expressed will and desire' of a people.[90] Consequently for indigenous peoples, the standard that has crystallised as the basis for effective consultation and participation in the context of development in their territories is FPIC.[91]

Fundamental to a people's right to self-determination is their ability to chart their own destiny. FPIC, which provides for the right to reject projects or measures that directly impact on a people and thereby enable them to exercise control over their destiny, flows directly from this aspect of the right to self-determination. FPIC therefore is premised on and essential for the operationalisation of the right to self-determination. In recognition of this the PFII and experts have described FPIC as 'a substantive framework' that is integral to indigenous peoples' rights to lands and resources[92] and central to the exercise of their right to self-determination with respect to developments affecting them.[93] FPIC, while of particular significance to issues pertaining to control over lands, territories and natural resources, is also essential for the realisation of other self-determination rights.[94] Reflective

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[90] ICJ Western Sahara Advisory Opinion (n 50)

[91] The HRC has stated that effective participation in the decision-making process 'requires ... the free, prior and informed consent of the members of the community' *Poma Poma v Peru* (n 55) Para 7.6.

[92] PFII, Report of the International Workshop on Methodologies (n 52) para 41.

[93] P Tamang, Indigenous Expert, 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices Contribution', PFII Workshop on FPIC, UN Doc PFII/2004.WS.2/8.

[94] WGIP Standard-Setting Legal Commentary (n 52) para 33. See also 'Statement to the Third session of the UN Expert Mechanism on the Rights of Indigenous Peoples Presentation under Agenda Item 3

of this is the fact that references to FPIC in the Declaration are broad in scope and extend to such areas as redress for the taking of cultural, intellectual, religious and spiritual property[95] and the requirement to obtain FPIC 'before adopting and implementing legislative or administrative measures that may affect' indigenous peoples.[96]

Within the context of rights to lands, territories and resources the Declaration explicitly requires FPIC in four contexts. First, it is required prior to any relocation of indigenous peoples from their lands or territories.[97] Secondly, FPIC must be obtained prior to the storage or disposal of hazardous materials in their lands or territories.[98] Thirdly, the Declaration affirms that indigenous peoples have a right to redress wherever 'lands, territories and resources, which they have traditionally owned or otherwise occupied or used … have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.[99] Finally, Article 32 addresses the contentious issue of development projects that impact on indigenous peoples' lands, territories and resources. It states that:

Cathal Doyle on behalf of University of Middlesex Department of Law & Philippines Indigenous Peoples Links'. Available at www.docip.org

[95] Art 11. This provision is in line with developments requiring FPIC under the Convention on Biological Diversity see Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. UN Doc UNEP/CBD/COP/10/5/Add.4, Page 16

[96] Art 19.

[97] Art 10.

[98] Art 29.

[99] Art 28.

> 1. 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.
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> 2. States 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, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
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> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The first paragraph of Article 32 contextualises the requirement for FPIC which is articulated in the second paragraph. It frames FPIC as a prerequisite for the realization of a self-determined development path premised on control over lands and resources.[100] Viewed from this perspective FPIC is integral to the right to self-government and autonomy, being not only necessary to prevent unwanted developments, but also essential in ensuring that indigenous peoples shape developments by and for themselves. Consequently, FPIC is required for 'any project affecting their lands or territories and other resources'. This differs from the FPIC protections afforded in Articles 10 and 29 in two significant ways. On the one hand, the focus of Article 32 is limited to projects, whereas Articles 10 and 29 are not subject to this restriction. On the other hand, Article 32 does not link the requirement for FPIC to

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[100] This affirmation is consistent with indigenous peoples' right to development recognized in Article 23 and the right to self-determination under Article 3. See C Doyle & J Gilbert Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development" in European Yearbook on Minority Issues Special Focus: Contemporary Challenges of Globalization (EURAC, Bolzano/Bozen, forthcoming)

specific impacts of projects, and in this regard its scope is broader than that of Articles 10 and 29.

In summary, Article 32 places FPIC at the core of indigenous peoples' right to development. It requires FPIC for all projects affecting indigenous peoples, and does not place any limitations on FPIC in relation to either the type of project or its potential impact. It does, however, place special emphasis on projects that involve the 'development, utilization or exploitation of mineral, water or other resources'. The wording 'any such activities' in paragraph 3 would appear to imply that it should be read in the light of paragraph 2, and not interpreted separately as justifying the pursuit of activities without meeting the requirement for FPIC.[101] Instead, it makes clear that even where FPIC has been given, there is a duty on the state to ensure that appropriate redress and mitigation measures are provided for.

Article 32 also requires that states consult with indigenous peoples 'in good faith' through their 'own representative institutions'. Article 33 states that indigenous peoples have the right to 'determine the structures and to select the membership of their institutions in accordance with their own procedures'. Taken together these articles address one of the most common issues encountered by indigenous peoples in consultations with states and companies where the requirement to obtain FPIC has been recognised: that of portraying individuals amenable to the interests of these external entities, but who are not selected according to the community's procedures, customs or traditions, as being representative of the community.[102] A short overview of the content of the principle of FPIC or, as it is often interchangeably referred to, the right to FPIC, is provided in the following paragraph.

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[101] Article 28 addresses such situations requiring redress for taking or use of resources without FPIC.

[102] This was a consistent theme that emerged from regional consultations held with indigenous peoples in the Philippines in preparation for the ICERD indigenous peoples shadow report, July–

FPIC, in the context of development projects, requires that good faith consultation processes with indigenous peoples be free from all external manipulation, coercion and intimidation; that the affected indigenous peoples be notified that their consent will be sought sufficiently in advance of the approval, or commencement, of any activities; and that there be full disclosure of information regarding all aspects of a potential project in a manner that is accessible and understandable to the indigenous people. Finally, indigenous peoples can approve or reject a project or activity. This decision to approve or reject should be based on the consensus of all indigenous people affected and be reached though their traditional decision-making processes and representative institutions in accordance with their customary laws and practices. Consent may be required at multiple phases during the consultation and negotiation processes and throughout the projects lifecycle. If consent is given following good faith negotiations it should result in a legally binding agreement that ensures equitable benefit sharing arrangements. Effective grievance mechanisms spanning the entire project lifecycle, including any post-project impacts, should be guaranteed. FPIC therefore establishes the processes for consultation and negotiations that have to be followed and imposes a requirement that the outcome of these processes be recognised and upheld. Both the process and outcome components of FPIC are necessary to ensure indigenous peoples' effective participation in the decision-making process.

While literature elaborating on the content and meaning of FPIC exists, work remains to be done in terms of assessing the mechanisms, measures and conditions required to ensure its

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August 2008 (on file with authors). The issue of representation was addressed in *Saramaka People v Suriname* (n 43) para 164: '[T]he question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.'

meaningful implementation in practice in accordance with the right to self-determination.[103] Such analysis and any conclusions drawn should be based on the actual experiences of indigenous communities and reflect their perspectives.[104]

Objections to the Inclusion of FPIC in the Declaration: A Right of Veto?

The inclusion of the requirement for FPIC in the Declaration, given its potentially profound implications for control over and access to resources, was inevitably going to be contentious.

As the requirement to obtain consent implies respecting the right to say 'no', one of the key contentious issues raised by certain states revolved around the notion of a 'right to veto'. Objections to the inclusion of a requirement to obtain FPIC came primarily from the four countries that voted against the adoption of the Declaration, namely New Zealand, the United States, Australia and Canada. These same countries are home to most of the world's transnational mining companies, many of which have operations or interests in indigenous territories either at home or abroad. The position of New Zealand, the United States and Australia with regard to FPIC is laid out in joint statements submitted to the PFII and the

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[103] F MacKay, 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Review' (2004) 4 *Sustainable Development Law and Policy* 43-65. Forest Peoples Programme, an organisation focused on forest peoples' rights, has published numerous reports on FPIC, including analyses of its implementation in a number of states. Numerous submissions were made to the World Commission on Dams regarding FPIC: see www.dams.org.

[104] The Tebtebba Foundation has conducted a number of such studies on the implementation of the FPIC in the Philippines (on file with the authors). The authors participated in consultation in relation to a number of FPIC processes conducted in the Philippines as part of the preparation of the 2009 Philippines ICERD Indigenous Peoples Shadow Report see http://www2.ohchr.org/english/bodies/cerd/cerds75.htm

Human Rights Council: '[I]t is our firm position that there can be no absolute right of free, prior, informed consent that is applicable uniquely to indigenous peoples and that would apply regardless of circumstances.'[105] They further stated that giving a 'veto' to particular sub-groups of the population was not a position that a democratic government could accept.[106] Canada also objected to the use of the concept of FPIC in the Declaration, which it argued could be interpreted as 'giving a veto to indigenous peoples over many … development proposals … which concern the broader population and may affect indigenous peoples'.[107] During the drafting process these states made unsuccessful attempts to weaken the requirement for FPIC by proposing that the operative verb 'obtain' be changed to 'seek', in relation to FPIC.

A requirement to obtain indigenous peoples' consent in relation to development projects in their territories is now firmly enshrined within the normative framework of indigenous peoples' rights. At present however there appears to be some divergence of opinion within the human rights regime in relation to the situations which trigger this requirement.[108]

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[105] Statement of Peter Vaughn to the PFII, Representative of Australia, on behalf of Australia, New Zealand and the United States of America, on Free, Prior and Informed Consent, 22 May 2006, New Zealand Ministry of Foreign Affairs and Trade. http://www.australiaun.org/unny/soc_220506.html

[106] Note verbale dated 2 August 2006 from the Permanent Mission of Australia to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, see UN Doc A/HRC/2/G/1 (24 August 2006).

[107] Canada's position on the United Nations Draft Declaration on the Rights of Indigenous Peoples, 29 June 2006, http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp.

[108] On the one hand the requirements of Art 32 of the Declaration that FPIC be obtained for 'any project' and CERD's General Comment XXIII requirement that 'no decisions that impact on the rights and interests of indigenous peoples be taken without informed consent' do not place any explicit

These opinions can be broadly grouped into two categories. The first is aligned with the view of many indigenous peoples and holds that FPIC is required for any project or activity affecting their lands, territories and resources or their well-being. The second, which also requires respect for FPIC, holds that it is only absolutely essential when there is a potential for a profound or major impact on the property rights of an indigenous people or where their physical or cultural survival may be endangered.[109]

The first position is premised on the fact that consent is an integral part of the right to self-determination. This implies that indigenous peoples have a right to determine if any projects that directly impact on them may or may not proceed. The outcomes envisaged are 'consent', 'no consent' or 'conditional consent', where consent is given contingent on

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limitations on when FPIC should be sought. On the other hand the Inter-American Court in case of the *Saramaka People v Suriname* (n 43) and the Special Rapporteur on Fundamental Freedoms and Human Rights of Indigenous Peoples have suggested that where the basic well-being or physical or cultural survival of the community is not at risk or where a project does not have a 'major impact', consent may not be an absolute condition for pursuing the project. See Report of the Special Rapporteur Annex 1 (n 64).

[109] According to the Saramaka judgement 'survival' 'must be understood as the ability of the [indigenous or tribal people] to "preserve, protect and guarantee the special relationship that [they] have with their territory", so that "they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected' see Inter-American Court of Human Rights case of the Saramaka People v. Suriname Judgment of August 12, 2008 (Interpretation of the judgment on preliminary objections, merits, reparations, and costs) para 37.

certain binding conditions.[110] In putting forward this argument, indigenous peoples have acknowledged that this exercise of their right to self-determination must be consistent with respect for the right to self-determination of others in the state.[111]

FPIC, viewed from the legal perspective of indigenous peoples' rights to self-determination and to permanent sovereignty over the natural resources located in their territories, could be seen as a compromise between two antagonistic international norms. It allows states to attempt to reconcile the apparently irreconcilable, namely indigenous peoples' inherent right to natural resources under the principle of permanent sovereignty with states' claims to sovereignty over these same resources under doctrines, such as the Regalian doctrine, which are upheld by most states where natural resource extraction occurs.[112] This

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[110] See statement by Alberto Saldamando on behalf of the International Indian Treaty Council (IITC) under Agenda Item 3, Study on Indigenous People's right to participate in decision-making to the EMRIP at its 3rd session July 2010 www.docip.org

[111] Statement by Mattias Ahren on behalf of the Arctic Council under Agenda Item 3, Study on Indigenous People's right to participate in decision-making to the EMRIP 3rd session July 2010 www.docip.org

[112] In common law jurisdictions ownership of surface generally implies ownership of subsoil resources. In most other jurisdictions ownership of subsoil resources is claimed by the state. For an analysis of the issue of the Regalian doctrine versus Ancestral Domains which include subsoil resources and the associated requirement to obtain FPIC in the Philippines, see AT Pagayatan and FJ Victoria (eds), *A Divided Court, A Conquered People? Case Materials from the Constitutional Challenge to the Indigenous Peoples' Rights Act of 1997* (Quezon City, Legal Rights and Natural Resources Centre Inc, Kasama sa Kalikasan LRC-KSK, Friends of the Earth-Philippines, 2001). For a related discussion, arguing that indigenous lands were always private property and never public lands, see M Leonen, 'Weaving

perspective is closely aligned with the position of many indigenous peoples—that FPIC be required for 'any' projects that impact on their control over these resources. Also supporting this position is the fact that it would appear to be consistent with the ordinary meaning of the term 'obtain consent' used in the Declaration when considered in the context of its recognition of indigenous peoples' right to self-determination and its acknowledgement of historical injustices, 'preventing them from exercising, in particular, their right to development in line with their needs and interests'.[113]

The second position holds that the extent of the requirement to obtain consent is a function of the degree of impact of the proposed activity. Under this interpretation provisions of the Declaration are not absolute and therefore limitations can be placed on the exercise of indigenous peoples rights, including their rights to self-determination and FPIC. Any such restrictions to the enjoyment of rights must however satisfy a number of criteria.[114] This approach envisages the consent requirement articulated in the Declaration as varying on a

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Worldviews: Implications of Constitutional Challenges to the Indigenous Peoples' Rights Act of 1997' (2000) 10 *Philippines Natural Resources Law Journal* 3-44.

[113] Declaration on the Rights of Indigenous Peoples, preamble. Art 31 of the Vienna Convention on the Law of Treaties (1969) requires that the ordinary meaning of the words in a treaty be interpreted 'in their context and in light of its object and purpose'. This criterion could also be used for interpreting the provisions of the Declaration.

[114] Saramaka Interpretation (n 109) paras 34 & 35: notes that the Court under its jurisprudence Article 21 requires that restrictions must be 'a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society' and in addition restrictions must not amount 'to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members'.

case by case basis,[115] ranging from an ILO Convention 169 style 'consultation with the objective of consent' requirement for measures or projects with minor impacts, to a strict 'obligation to obtain consent' for those with potentially major impacts or threatening the physical or cultural survival of a people. Under this interpretation of when FPIC is required it could be argued that, in the context of projects in their territories, the Declaration already identifies certain circumstances in which FPIC is always essential. Those explicitly mentioned are 'the development, utilization or exploitation of mineral, water or other resources',[116] 'relocation',[117] 'disposal of any hazardous materials',[118] and the taking of 'cultural, intellectual, religious and spiritual property'.[119] This position could be used as a counter argument to the objections raised by New Zealand, Australia and the United States to FPIC on the grounds that it 'would apply regardless of circumstances'.

From an implementation perspective, basing the requirement to obtain FPIC on the possible impact of a project raises the question of who determines the potential impact on the well-being of a community or its property rights. Indigenous peoples' complaints in relation to natural resource extraction are generally targeted at states. Leaving the matter of determining the impact of these projects to the state, and consequently the decision as to whether FPIC is required or not, would therefore appear to change little in practice and is unlikely to be readily accepted by indigenous peoples. This view is reflected by the fact that

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[115] Saramaka interpretation (n 109) para 42

[116] Art 32.

[117] Art 10.

[118] Art 29.

[119] Art 11.

indigenous peoples are working at national, regional and international levels, in conjunction with the PFII, to develop their own framework of indicators for monitoring their well-being.[120] If the principles underlying the development of this framework are to be respected, then the logical conclusion is that indigenous peoples should be the ones to decide under which circumstances FPIC is required.

Finally, the case for limiting or denying the requirement for FPIC is frequently based on the argument that indigenous peoples do not have an absolute right to 'veto' projects that are deemed to be in the public interest.[121] However, it is important to bear in mind that in the context of extractive projects this public interest argument is strongly contested and is rarely, if ever, substantiated.[122] Furthermore, international and regional human rights bodies

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[120] Indicators of Well-being, Poverty and Sustainability Relevant to Indigenous Peoples February 2008, UN Doc E/C.19/2008/9. For additional material on indicators relevant for Indigenous Peoples see http://www.tebtebba.org/index.php?option=com_docman&task=cat_view&gid=53&Itemid=27

[121] This argument on behalf of some states and the extractive industry as a basis for denying a veto right can be traced back to discussions on the revision of ILO Convention 107 in 1986. See International Labour Conference, Partial Revision of the Indigenous and Tribal Populations Convention, No 107 (1957) Provisional Record 36, 75th session, 19.

[122] International empirical studies questioning the macro economic benefits of mining include JD Sachs and AM Warner, *Natural Resource Abundance and Economic Growth* (Cambridge, MA, Harvard Institute for International Development, 1997); JD Sachs and AM Warner, 'The Curse of Natural Resources' (2001) 45 *European Economic Review* 827–38; RM Auty, *Resource Abundance and Economic Development: Improving the Performance of Resource-Rich Countries* (United Nations University World Institute for Development and Economic Research, 1998); TM Power, *Digging to Development: A Historical Look at Mining and Economic Development. An Oxfam America Report*, September 2002. The concerns raised in these studies regarding the limited benefits accruing to

and national courts have cautioned states against infringement of indigenous peoples' rights on the basis of national development and public interest.[123] An interpretation of the Declaration that justifies derogations from the requirement to obtain FPIC on the basis of such arguments could therefore lead to a shift in the burden of proof away from the state and onto indigenous peoples in a manner that is incompatible with the spirit and intent of the Declaration.

The Potential Impact of FPIC in the Declaration on Non-State Actors

Along with states, the extractive industry, international financial institutions (IFIs) and investors have a major role to play in the realisation of FPIC in practice.[124] The economic imperatives facing developing countries, in the context of a global development model that

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developing countries from resource extraction are exacerbated in many countries by generous tax incentives to entice foreign investment, high levels of corruption associated with the sector and the potential long-term impacts on other economic sectors such as agriculture, fisheries and tourism.

[123] HRC *Lansman v Finland* (n 58); CERD has held that the exploitation of resources for national development 'must be exercised consistently with the rights of indigenous and tribal peoples' Suriname CERD/C/64/CO/9/Rev.2, Para 15 (2004); the 'Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25th June 1993, Part I, at para. 10. UN Doc. A/CONF.157/23, 12th July 1993 affirms that 'development may not be invoked to justify the abridgement of internationally recognised human rights'; See also Canadian Supreme Court case *R v Sparrow* [1990] 1 S.C.R. 1075.

[124] The NGO community and UN system also have an important role to play in the implementation of FPIC in their activities. The United Nations Development Group Guidelines on Indigenous Peoples issued in February 2008 to assist the UN system in mainstreaming indigenous peoples' rights accords the principle of FPIC a central position.

promotes foreign direct investment (FDI) and bilateral investment agreements, can dictate the legislative protection these states afford to indigenous peoples vis-a-vis the interests of transnational corporations, including mining companies.[125] In keeping with this prescription for development, some international bodies, states, investors and mining companies are arguing that the realisation of the Millennium Development Goals (MDGs) and poverty alleviation can be achieved through increased FDI in the extractive sector. This linking of the extractive industry and FDI to the MDGs should place an even greater onus on all involved to ensure adherence to the highest human rights standards, including the standards articulated in the Declaration. Failure to do so could result in an untenable position whereby the realisation of the MDGs, which should benefit indigenous peoples, becomes contingent on violations of their rights.[126]

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[125] Regarding impacts on legislation see E Caruso et al, 'Synthesis Report' in *Extracting Promises: Indigenous Peoples, Extractive Industries & the World Bank* (Baguio City, Tebtebba Indigenous Peoples International Centre for Policy Research and Education & Forest Peoples Programme, 2005). See also Tujan and Guzman (n 48). On agreements between host countries and companies see especially the Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (2008) para 35.

[126] C Doyle, 'Indigenous Peoples and the Millennium Development Goals: Sacrificial Lambs or Equal Beneficiaries?' (2009) 13 *International Journal of Human Rights* 44. See also United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2007, *Transnational Corporations, Extractive Industries and Development,* which focuses on FDI in the extractive sector and suggests that it may help with the realisation of the MDGs but fails to mention the requirement for FPIC when addressing impacts on or participation of indigenous peoples.

The World Bank Group has, to date, failed to include FPIC as a requirement in its policies pertaining to indigenous peoples, despite strong recommendations that it do so emerging from two major international reviews it had commissioned, one on dams and the other on the extractive industry.[127] Instead the Bank has opted to include what it terms Free Prior Informed Consultation (FPICon) resulting in broad community support (BCS). The Bank's own Compliance Advisor/Ombudsman (CAO) has expressed concern in relation to the 'ambiguity' of the Bank's 'determination of BCS'.[128] This insistence on FPICon rather than FPIC has been strongly criticised by non-governmental organisations, indigenous peoples and the Eminent Person responsible for the Extractive Industry Review.[129] The implications of the adoption of

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[127] World Commission on Dams, www.dams.org, and 'Striking a better balance Volume 1 The World Bank Group and Extractive Industries The Final Report of World Bank Extractive Industry Review' December 2003 http://irispublic.worldbank.org/85257559006C22E9/All+Documents/85257559006C22E985256FF6006843AB/$File/volume1english.pdf.

[128] 'IFC's Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy, Commentary on IFC's Progress Report on the First 18 Months of Application', Office of the Compliance Advisor/Ombudsman (CAO) IFC and MIGA, World Bank Group, Advisory Note, 17 December 2007.

[129] F MacKay, 'The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same?' (2005) 22 *Arizona Journal of International and Comparative Law* 81. See also E Salim, 'Business as Usual with Marginal Change: EIR Final Comment on the WBG Management Response to the EIR', Jakarta, 22 July 2004, in *Extracting Promises* (n 101) 340–50. Indigenous peoples and their support organizations have criticized BCS as being inconsistent with their right to self-determination see statement by Cathal Doyle on behalf of Indigenous Peoples Links (PIPLinks); the Forest Peoples Programme (FPP); the Asian Indigenous Peoples Pact (AIPP); the Foundation for Aboriginal and Islander Research Action (FAIRA); Russian Association of Indigenous Peoples of the North (RAIPON);

the Declaration on the World Bank's polices, however, remain to be seen. As a specialised agency of the United Nations it is coming under pressure to respect the rights and principles contained in the Declaration and to uphold its obligations under Article 41 to 'contribute to the full realization of the Declaration' and Article 42 to 'promote respect for and full application of the provisions of this Declaration'.[130] The Banks private sector arm, the International Financial Corporation (IFC) initiated a review of its performance standards in 2009 and identified FPIC as one of four 'key operation topics'.[131] However, absence of any clear evidence to support its position, and despite repeated demands in consultations for the incorporation of FPIC into its performance standards, the IFC continues to hold that its current standard of FPICon is 'functionally equivalent' to FPIC.[132] In doing so it refuses to accept its responsibility to respect international human rights law as it pertains to indigenous peoples and is increasingly isolated among other IFI's.

Organizacions de Naciones y Pueblos Indigenas en Argentina (ONPIA) and Middlesex University Department of Law under Agenda Item 4 to the 3rd session of the EMRIP 2010. www.docip.org

[130] Statement to EMRIP ibid. See also reports of consultations held in Manila, Washington DC and Brussels in 2010 and Turkey 2009 where demands were made that the IFC policy be updated to include FPIC, reports available at http://www.ifc.org/ifcext/policyreview.nsf/Content/Resources#P2Summaries

[131] 'Progress Report on IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information Review and Update Process' International Finance Corporation (14 April 2010) paras 34 and 35 and Annex A 'Review and Update of IFC's Sustainability Framework: Overview of Key Issues'.

[132] ibid page 26

The European Bank for Reconstruction and Development's (ERBD) Environmental and Social Policy, issued in May 2008, 'recognises the principle, outlined in the UN Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required for the project-related activities'. It requires clients who propose to develop natural resources commercially in indigenous peoples' lands to 'enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation'.[133] The Asian Development Bank safeguard policy issued in July 2009 includes a requirement to obtain FPIC.[134] However, the ADB policy includes a definition of consent as 'broad community support' which is incompatible with the requirement that it be obtained in a manner that respects indigenous customs and traditions. The policy also places limitation on when the requirement for consent applies.[135] The Inter-American Development Bank (IDB) adopted its current policy on indigenous peoples prior to the adoption of the Declaration in 2006. It mirrors ILO

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[133] European Bank for Reconstruction and Development (EBRD), Environmental and Social Policy, issued May 2008, page 50, http://www.ebrd.com/pages/about/principles/sustainability/policy.shtml. There appears to be some ambiguity in the EBRD definition of consent with a footnote in the policy linking it to involvement in, rather than authorisation of, a project. It states: 'Consent refers to the process whereby the affected community of Indigenous Peoples arrive at a decision, in accordance with their cultural traditions, customs and practices as to whether to become involved in the proposed project.'

[134] Asian Development Bank, Safeguard Policy Statement July 2009

[135] ibid para 33. The policy restricts the requirement for FPIC to projects involving 'commercial development of natural resources within customary lands under use that would impact the livelihoods or on cultural, ceremonial, or spiritual uses of the lands that define the identity and community of Indigenous Peoples'.

Convention 169's requirement that consultation must have the objective of achieving agreement or consent.[136] In line with the IFC reasoning the IDB states that, while it has not included FPIC in its policy, 'it has included the equivalent—good faith negotiation—for special cases (proactive projects and projects with significant impact)'.[137] This statement would appear to imply that the IDB acknowledges that good faith negotiations include the right of indigenous communities to say 'no' to such projects. Importantly following the IACHR's *Saramaka v Suriname* ruling, FPIC is effectively required under the IDB policy, which identifies 'applicable legal norms' as including 'international jurisprudence of the Inter-American Court of Human Rights'.[138] In addition to banks, investors also play a significant role in funding extractive projects. Increasing demand from customers for ethical investment options has resulted in some investors advocating for respect of indigenous peoples rights and making attempts to encourage extractive companies to obtain FPIC.[139] However such

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[136] Inter-American Development Bank Operational Policy on Indigenous People (OP-765) and Strategy for Indigenous Development (GN -2387-5), July 2006.

[137] UN Doc E/C.19/2008/4/Add.10, Permanent Forum on Indigenous Issues, Information Received from the United Nations System and other Intergovernmental Organizations, Inter-American Development Bank, 7 February 2008.

[138] Inter-American Development Bank Operational Policy (n 137), page 19.

[139] Ethical Funds Company, 'Sustainability Perspectives Winning the Social License to Operate Resource Extraction with Free, Prior, and Informed Community Consent', February 2008, https://www.ethicalfunds.com/SiteCollectionDocuments/docs/FPIC.pdf see also 'Improving Vedanta Resources' governance of responsible business practices' Experts in Responsible Investment Solutions (EIRIS) July 2010 and Robert Kropp 'Investors Urge US to Support Rights of Indigenous Peoples' Sustainability Investment News July 30, 2010 http://www.socialfunds.com/news/article.cgi?sfArticleId=3003

initiatives are rare, with most policies in this sector driven, at best, by the standards produced by and for extractive industry bodies themselves.

The International Council for Minerals and Metals (ICMM) is the body that represents many of the major companies in the global mining industry. Despite making promises in discussions with indigenous peoples to include FPIC in its standards, it failed to do so.[140] Instead it only recommends that companies 'seek broad community support' for their projects, a position which is even weaker than that of the World Bank. The ICMM argues that 'practical implementation of FPIC presents significant challenges for government authorities as well as affected companies as the concept is not well defined and with very few exceptions, is not enshrined in local legislation'[141] However, the fact that FPIC is enshrined in legislation in a number of countries, in some cases for over a decade, and an increasing number of voluntary agreements pertaining to its implementation exist in other sectors, belies this claim.[142] The ICMM argument also ignores the fact that pressure exerted

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[140] ICMM Position Statement, *Mining and Indigenous Peoples*, released May 2008. The statement did not recognise the requirement to obtain FPIC but did commit ICMM members to participating 'in national and international forums on indigenous peoples' issues, including those dealing with the concept of free, prior and informed consent. See www.icmm.com. See also Moody (n 48) 10–11.

[141] Forest Peoples Programme and Association of Saramaka Authorities, *Free, Prior and Informed Consent: Two Cases from Suriname* (FPIC Working Papers, Forest Peoples Programme, Moreton-in-Marsh, March 2007) 16, www.forestpeoples.org/documents/law_hr/fpic_suriname_mar07_eng.pdf. See also Mining and Indigenous Peoples Issues Roundtable: Continuing a Dialogue between Indigenous Peoples and Mining Companies. IUCN-ICMM Dialogue on Mining and Biodiversity Sydney, Australia' 30-31 January 2008 Page 7

[142] See generally Forest Peoples Programme, *Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A Guide for Companies* (Forest Peoples Programme, Moreton-in-Marsh, October

by the mining industry on governments in developing countries contributes to their reluctance to enact legislation pertaining to the implementation of FPIC in the first place.[143] Furthermore, it is ethically, and arguably legally, questionable not to uphold a principle of international human rights law on the ground that it has not yet been enshrined in local legislation.[144] It is to be hoped that the adoption of the Declaration and associated developments in international human rights law will eventually result in a revision of the ICMM's and its member's positions vis-a-vis FPIC. Doing so would arguably be in the industry's own long-term interest.[145]

2008). See also M Colchester and M Farhan Ferrari, *Making FPIC Work: Challenges and Prospects for Indigenous People* (Forest Peoples Programme, June 2007), providing an overview of experiences of FPIC in Suriname, Guyana, Peru, Peninsular Malaysia, Indonesia, Papua New Guinea and the Philippines.

[143] For example in Australia pressure excreted by the mining industry resulted in the weakening of the consent requirement in the 1976 Northern Territories Land Rights Act see http://www.nlc.org.au/html/land_act_changes.html.

[144] The International Financial Institution (IFC) notes in its advice to companies on complying with ILO Convention 169 states that: 'There may also be circumstances where private sector companies' actions could influence or compromise the State's implementation of its obligations under international agreements, such as Convention 169'. See 'ILO Convention 169 and the Private Sector: Questions and Answers for IFC Clients', IFC World Bank Group, March 2007.

[145] Even ignoring the legal and moral obligations incumbent on companies to respect indigenous peoples' rights, strong arguments can be made as to why respecting the principle of FPIC may be beneficial to the industry in relation to its reputation and its capacity to ensure meaningful community engagement and maximise the prospect of long-term project viability. For an example of

The Future of FPIC and its Implications for the Declaration's Implementation

Overall, when considering the potential future impact of the requirement to obtain FPIC in the Declaration it is important not to lose sight of its historical and contemporary context. Historical pacts between indigenous peoples themselves, and subsequently between indigenous peoples and states, show that consent has long been a basic principle in agreements involving indigenous peoples. Unfortunately, history also shows that where such agreements existed states have failed to respect them, invariably to the detriment of indigenous peoples. The re-emergence of the requirement to obtain indigenous peoples' consent over recent decades is undeniable. It can be traced from the relatively limited requirement under ILO Convention 169 to obtain consent in relation to relocation, through to CERD's 1997 interpretation of ICERD in its General Comment XXIII as requiring states parties to obtain indigenous peoples' informed consent in relation to all 'decisions that directly impact on their rights and interests', and up to the FPIC obligations articulated in the Declaration in light of its recognition of indigenous peoples right to self-determination. These provisions of the Declaration requiring FPIC are now informing international law, as evidenced by decisions of the HRC, the IACHR, the ACHPR and national Courts, the analysis of Special Rapporteurs, and the growing number of cases involving failure to obtain FPIC that are being considered by CERD under its Early Warning Urgent Action procedure.

In state practice, there currently exist varying degrees of recognition of FPIC, ranging from states that deny any requirement for FPIC to states that have enshrined it in legislation or have considered affording it constitutional protection. Even within the human rights regime, while there is clear acknowledgement of the necessity of FPIC to ensure the well-being of

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such an argument see World Resource Institute, *Development without Conflict: The Business Case for Community Consent*, May 2007, pdf.wri.org/development_without_conflict_fpic.pdf.

indigenous peoples, there exists some divergence of opinion as to when it should be mandatory. While these divergent opinions and practices might look like inconsistencies within the human rights regime, they may be more appropriately seen as reflective of an evolution along the spectrum of participative rights towards a consensus on a principle of, or right to, FPIC that effectively protects the well-being of indigenous communities in a manner that is consistent with their right to self-determination.[146] This evolution involves a shift in the established balance of power and will, as a result, occur at different rates in differing contexts. Nevertheless, despite any apparent inconsistencies, a clear trend is emerging within the international human rights regime toward recognition of the requirement for FPIC in line with what has been agreed upon with the adoption of the Declaration.

Finally, while FPIC is often referred to as a principle, it might more appropriately be conceived of as a right. Many, if not most, indigenous peoples hold this view.[147] They see FPIC as an inherent right of indigenous peoples, without which the rights to self-determination, lands, territories, resources and development can be rendered effectively meaningless. Denial of FPIC implies that control over decisions pertaining to their lands and resources, and by extension over their futures, is taken from them. Consultation with indigenous peoples is essential. However, consultations and negotiations without a requirement for consent freezes existing power relations and leaves indigenous peoples

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[146] B Clavero, 'The Indigenous Rights of Participation and International Development Policies' (2005) 22 *Arizona Journal of International and Comparative Law* 41 suggests that the existing spectrum of consent related obligations, ranging from mere consultation to veto rights, indicate that international law is in a 'transitional phase' with regard to indigenous peoples' participation.

[147] Repeated statements referring to a right to FPIC have been made by indigenous communities at the PFII, the former WGIP, and the Experts Mechanism on the Rights of Indigenous Peoples www.docip.org. See also WGIP Standard-Setting Legal Commentary (n 52).

with no leverage to influence the outcome of decision-making processes. States, global financial institutions and transnational extractive corporations currently hold this decision-making power and are clearly reluctant to share it with indigenous peoples. In this sense, indigenous peoples' struggle for what they regard as their right to FPIC is perhaps best conceived in terms of Shivji's conceptualisation of human rights when he argues that:

> seen as a means of struggle, 'right' is therefore not a standard granted as charity from above but a standard-bearer around which people rally for struggle from below. By the same token the correlate of 'right' is … power/privilege where those who enjoy such power/privilege are the subject of being exposed and struggled against.[148]

FPIC seen in this light is a powerful tool in indigenous peoples' struggle to alter longstanding discriminatory power equations. To ensure its effective implementation indigenous peoples will have to continue to rally and demand respect for this right to FPIC in all fora available to them. The adoption of the Declaration is a reflection of the adeptness of indigenous peoples in terms of getting their rights recognised. The extent to which FPIC is implemented in practice will be a measure of how successful they are in ensuring that they are upheld.

Conclusion

Some states have in the past maintained that the Declaration is only 'aspirational ... with political and moral force but not legal force'.[149] However, this limited conception of the Declaration fails to appreciate its true significance. A more appropriate and realistic conception of the Declaration holds that it is an integral part of the evolving normative

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[148] IG Shivji, *The Concept of Human Rights in Africa* (London, Council for the Development of Economic and Social Research in Africa, 1989) 71.

[149] Statement by Mr Hill on behalf of Australia. Report of the General Assembly 61st session UN Doc A/61/PV.107 (2007) page 12

framework of indigenous peoples' rights. The Declaration is in fact reflective of, and contributes to, the evolution of this normative framework pertaining to the recognition of indigenous rights. It attempts to address the fragmentation of the existing human rights regime by consolidating the rights this regime has recognised as pertaining to indigenous peoples into a single framework specific to them. However, it does not purport to be all-encompassing. Rather, acknowledging its place within the normative human rights framework, it provides space for evolution which may impact on those rights. The Declaration also lays out a roadmap for the future realisation of indigenous peoples' rights. It does so by providing a comprehensive, yet flexible, rights-based framework for the engagement of states, corporations, developmental and UN agencies with indigenous peoples. This framework is premised on the principles of self-determination, FPIC and the recognition of indigenous peoples' collective rights to their land, territories and resources. While unambiguous in its requirement of adherence to these principles as the basis and minimum standard for engagement with indigenous peoples, the Declaration avoids being overly prescriptive as to the mechanics of how this engagement should occur in specific contexts. An example of this is the Declaration's instruction to states to establish and implement processes, in conjunction with, and ensuring the participation of, indigenous peoples, to adjudicate indigenous peoples' rights pertaining to their lands, territories and resources while ensuring that due respect and consideration is given to their customs, traditions, laws and land tenure systems. This need for the recognition of indigenous peoples' customs and land tenure systems identified in the Declaration is in line with recent developments within the international human rights regime calling for the recognition of indigenous peoples' customary laws as sources of law and for greater recognition of the cultural rights of indigenous peoples, including the maintenance of their traditional customary land tenure systems.

Following its adoption the human rights regime has proceeded to acknowledge the importance of the Declaration as a component of the normative framework of indigenous peoples' rights. Recent decisions emerging from national and regional courts citing the Declaration and its provisions on, inter alia, land rights and FPIC bear testimony to its pivotal and evolving role within this normative framework. Complementary developments within the international human rights regime such as CERD's increased emphasis on the rights and principles articulated in the Declaration, particularly FPIC, should assist indigenous peoples in their effort to ensure that the rights articulated in the Declaration are realised in practice, and states in understanding their obligation to facilitate this.

In terms of land, territory and resource rights, the Declaration is consistent with the existing body of international law and is sufficiently precise to give rise to identifiable and practicable rights and obligations and attract broad international support. Overall, within the current framework of international law regarding indigenous peoples' rights to lands, territories and resources, the Declaration has to be seen and accepted as a threshold reflecting the minimum standard of international law in this area. Over six decades have passed since the adoption of the Universal Declaration on Human Rights. Given the unprecedented influence this document has had on legal systems throughout the world it is worth highlighting that a declaration is a call to adopt universal accepted minimum standards of protection on which a system can then be developed. This is how international human rights law has evolved, and it is how indigenous peoples' rights will evolve. Hence, the affirmation of rights to lands, territories and resources in the Declaration does not represent the end, but rather the beginning, of a process of implementation. Operationalising FPIC and establishing adjudication mechanisms that respect indigenous peoples' customary laws and land tenure systems are tangible examples of how this implementation process must proceed.

The Declaration therefore sets the minimum threshold on which the future system of protection at the international, regional, national and local levels ought to be based. Viewed from the past and looking towards the future, the real revolution behind the Declaration is arguably the affirmation by states that they are not the only entities entitled to title to territory; that they do have to recognise and uphold the inherent rights of indigenous peoples which preceded the creation of the state. Consequently, control over lands, territories and resources does not lie exclusively with the government of a country; indigenous peoples have fundamental rights to ownership, use and control over their lands, territory and resources.