

REVIEWING PRESSING HUMAN RIGHTS ISSUES OF INDIGENOUS AND TRIBAL PEOPLES

REVISANDO CUESTIONES URGENTES DE DERECHOS HUMANOS
DE LOS PUEBLOS INDÍGENAS Y TRIBALES

Received: 20/04/2019 – Accepted: 20/07/2019

María Cristina Alé¹

Friedrich–Alexander University in Erlangen–Nuremberg, Germany
mcristinaale@derecho.uncu.edu.ar

¹ Lawyer (University of Mendoza, Argentina) and LL.M in International Human Rights and Humanitarian Law (Europa–Universität Viadrina–Frankfurt (o), Germany). She holds specializations in Business and Human Rights, Environmental Law, Conflict Management and Transformation, Strategic Litigation and the Protection of Human Rights Defenders. Currently, she litigates internationally in the field of human rights and environmental law and is a PhD Candidate at the Friedrich–Alexander University in Erlangen–Nuremberg (Germany). Member of the Editorial Board of the Journal República y Derecho (RYD), Facultad de Derecho, Universidad Nacional de Cuyo, Argentina.

Abstract

Throughout history, indigenous peoples have been excluded, marginalized, mistreated and disregarded. The United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention, C169 tried to emphasize the need to grant them protection that is both broader and more appropriate while taking their particular characteristics into consideration. However, these protections are insufficient and ineffective in the face of current problems related to expansion of the extractive frontier in its varied forms, which mostly end in controversies among the indigenous communities present in the territories at stake, the States, and the companies who perform such activities. Three interconnected and interrelated cardinal issues that are the most affected are: the principle of non-discrimination, the right to land and natural resources, and the right to participation and consultation.

Keywords: Participation and consultation; Land and natural resources; Extractive industries; Prior and informed consent; Environmental and social impact assessment.

Resumen

A lo largo de la historia, los pueblos indígenas han sido excluidos, marginados, maltratados y desatendidos. La Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas y el Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales, trataron de enfatizar la necesidad de otorgarles una protección más amplia y apropiada, teniendo en cuenta sus características particulares. Sin embargo, estas protecciones son insuficientes e ineficaces frente a los problemas actuales relacionados con la expansión de la frontera extractiva en sus diversas formas, que en su mayoría terminan en controversias entre las comunidades indígenas presentes en los territorios en cuestión, los Estados y las empresas que realizan tales actividades. Los tres problemas cardinales interconectados e interrelacionados más afectados son: el principio de no discriminación, el derecho a la tierra y los recursos naturales, y el derecho a la participación y consulta.

Palabras clave: Participación y consulta; Tierra y recursos naturales; Industrias extractivas; Consentimiento libre, previo e informado; Evaluación de impacto ambiental y social.

Summary

1. Introduction
2. Differences between minorities, people and indigenous people
 - 2.1 Minorities
 - 2.2 Peoples' rights
 - 2.3 Indigenous peoples
 - 2.3.1 Concept
 - 2.3.2 Legal protection
3. Pressing human rights issues
 - 3.1 Non-discrimination and equality
 - 3.2 Land and natural resources
 - 3.2.1 Concept
 - 3.2.2 Protection of identity
 - 3.2.3 Environmental and social impact assessment
 - 3.3 Participation and consultation
 - 3.3.1 Dimensions, content and divergencies of the rights to participation and consultation
 - 3.3.2 Consent
 - 3.3.3 Regional experiences
4. Human rights obligations of the state and the private sector
5. Conclusion
6. Bibliography and Sources

1. Introduction

Although the colonial period has been underway across the world for 500 years, it concluded –in the majority of cases– in the period after the Second World War (WWII). However, it has been affirmed that colonial relations are ongoing on in diverse ways. Even where the rule of law reigns at its highest, imposition of ways of life and consequential forced assimilation is imposed by the majorities and ruling elites –national and international– towards other subjugated groups. Such is the case of indigenous communities.

Indigenous peoples constitute about five percent of the world's population, nearly 370 million people spread across over 70 countries. Not only are they legitimately endowed with special rights due to historical reasons, as acknowledged by international law, but in the current context of global ecological crisis, their work of care towards the Earth's ecosystems and biodiversity is vital for humanity as a whole².

At present, however, they are literally on the front line in the struggle for their right to live, as well as for their cultural and economic survival, in the face of extractive activities carried out in territories where they live and use. With this in mind, I will try and sketch a general tour of the most urgent rights that are presently facing the gravest violations, with the aim of a) providing a broad vision of the most vulnerable indigenous peoples' rights, b) how those rights have been interpreted in light of available international norms, and c) the flaws of rules that will be presented. In this sense, and after having clarified some key concepts and differences, I will focus on three key pillars: the principle of non-discrimination, the right to land and natural resources, and the right to participation and consultation. Before concluding, I will refer to the responsibility that concerns the main stakeholders who impact the rights of indigenous peoples.

2. Differences between minorities, people and indigenous people

2.1 Minorities

Article 27 of the International Covenant on Civil and Political Rights (ICCPR)³ institutes the rights of minorities. The Human Rights Committee (HR Committee) –an organ for interpreting the scope and meaning of the articles of the Covenant– in General Comment No. 23 on the implementation of article 27⁴ emphasizes the performance of the States' parties with regard to the rights

2 International Labour Organization, Indigenous and tribal peoples. Available at: <https://www.ilo.org/global/topics/indigenous-tribal>

3 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

4 Human Rights Committee, General Comment 23, article 27 – Fiftieth session (1994) in Compilation of

accorded to minorities: on the positive side, they formally recognize minorities' rights; on the negative side, they fail to effectively grant those rights. In this regard, article 27 expounds the latter side in the following:

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

Along these lines, there are two criteria to take into consideration regarding to the rights of minorities: the objective element, which corresponds to shared ethnic, cultural, national, religious and/or linguistic characteristics of the group that are different from other groups; and the subjective element, which refers to self-identification by individual members of the minority group, that is, that members see themselves as belonging to a group that is distinct from other groups and want to preserve those differences.

Accordingly, the term minority refers to a social group that is considerably inferior in number than other people within the same State, are not dominant in the population of the state, and are different in ethnic, linguistic, religious and/or cultural terms in relation to the rest of the State's population. It is relevant that, as in all the groups, there may exist minorities within a particular group –e.g., women, children, disabled people, the elderly, or sexual minorities.

Even though “human rights means equal enjoyments of basic rights for everybody, whereas minority rights can be described as a special right recognized to the exclusive benefit of minority groups”⁵, these rights are not privileges; rather, they present a form of positive discrimination which justifies the differential treatment of a specific group of people who exhibit similar characteristics in order to protect the effective recognition of particular rights, and refers to actions positively aimed at reducing, or ideally eliminating,

General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38.

5 PENTASSUGLIA, Gaetano, *Minorities in International Law*, 1st edition, Strasbourg: Council of Europe, 2003, part 1, p. 48.

discriminatory practices against historically excluded sectors, with the primary objective of seeking to equalize their living conditions with those of the general population.

2.2 Peoples' rights

Peoples' rights, which have been identified as third generation or third dimension rights, comprise the right to peace, the right to development, the right to a safe environment and the right to self-determination. The concept of "people" used to be identified with that of "nation", or even with "the rights of collectivities"; however, eventually, the territorial criterion developed by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities prevailed. It states the following:

- a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;
- b) it implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population; and
- c) people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR. Peoples' rights are national rights which have the special characteristic of being collective rights⁶.

Not only has it been recognized as *ius-cogens* of colonial people⁷ but also as an international *erga-omnes* obligation⁸.

The right to self-determination, as part of peoples' rights, has been vastly recognized in international legal instruments⁹. As such, it relies on the singularity

6 CRISTESCU, Aureliu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study "The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments", in: UN Doc. E/CN.4/Sub.2/404/Rev.1, 19981, para. 279.

7 UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV), art. 2.

8 ICCPR art. 1; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art. 1.

9 UN-Charter (art. 1 no. 2 and art. 55) 26.06.1945; Declaration on the Granting of Independence to Colonial

of being a collective right, recognized as a legal norm of international law since it came into force via the United Nations (UN) Covenants, which are recognized as a peremptory norm of international law, part of the *ius cogens* only for colonial purposes and recognized as an *erga omnes* obligation in international law.

The right to self-determination enshrines two facets: the external facet and the internal facet. The external facet is the right to a sovereign state and can be applied both to a population with a sovereign State of its own and to those without one. In the latter case, it comes into tension with the principle of sovereignty because it potentially involves a violation of the territorial integrity of another State. As a result, it might take the form of a secession or an association with a neighboring State. The driver of this facet has always been the concept of decolonization, which began its ascendance after WWII. Conversely, the United Nation General Assembly expanded the scope of the right to a second, internal facet¹⁰: internal self-determination, which encompasses the right of a people within a State to develop from an economic, social and political perspective, as well as to freely determine their political status, without the goal of becoming an independent State¹¹.

The distinctiveness of the right to self-determination is that it cannot be claimed from a juridical perspective at the international level. This denotes a weakness in terms of its exercise and its limited *locus standi* in this regard: on the one hand, only States can present an action before the International Court of Justice¹²; on the other hand, only individuals are able to present claims before the HR Committee¹³.

Countries and Peoples 14.12.1960; ICCPR art. 1; ICESCR art. 1; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; CSCE Final Act of Helsinki CSCE/OSCE; African Charter on Human and Peoples' Rights, art. 20.
10 UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637
11 See: GRIFFIOEN, C., Self-determination / Utrecht: Science Shop of Law, Economics and Governance, Utrecht University. Supervised by the Institute of International, Social and Economic Public Law ISBN: 978-90-5213-196-2; MCCORQUODALE, Robert, Self-Determination: A Human Rights Approach. International and Comparative Law Quarterly, 1994, 43. 857 - 885. 10.1093/icljaj/43.4.857, p. 863-864.

12 United Nations, Statute of the International Court of Justice, 18 April 1946, art. 34 I.

13 UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19

2.3 Indigenous peoples

2.3.1 Concept

Indigenous peoples and tribal groups present singularities which differentiate their rights from both those of minorities¹⁴ and from peoples' rights.

Even though the Indigenous and Tribal Peoples Convention, C169 (ILO Convention)¹⁵, establishes that indigenous peoples are descendants of populations “which inhabited a country or geographical region during its conquest or colonization or the establishment of present state boundaries” and they “retain some or all of their own social, economic, cultural and political institutions”¹⁶, the UN system has not arrived at a universal legal definition of indigenous people. There have been efforts in that direction, but never a consensus. It has been stated that “a definition of indigenous shall cover as widely as possible all of the aspects that each indigenous peoples consider fundamental to their identity”¹⁷, but a question which arises is –given the particular features of the diverse contexts and ways of life– who could determine an overall framework that defines them? Additionally, is the issue of non-indigenous peoples trying to arrive at a definition of what constitutes indigeneity. This was noted by the former Chairperson of the Working Group on Indigenous Populations, Erica Daes, who said that “indigenous peoples have suffered because of definitions imposed on them by others”¹⁸.

A definition proposed by the HR Committee understands indigeneity as referring to those groups “composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when

December 1966, United Nations, Treaty Series, vol. 999, p. 171.

14 There are some States where indigenous people are majorities such as Bolivia, where they represent 62% of the population, according to the United Nation Development Program (2006).

15 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 (ILO Convention).

16 ILO Convention art. 1.a.

17 Translation by the author of the present paper. PLIEGUE, Thomas y ARRIGO, Mariano, “Historia y desarrollo de los pueblos indígenas. Criterios jurídicos para la definición de «indígena»”, BID América (1999).

18 E/CN.4/Sub.2/AC.4/1995/3 Note by the UNWGP Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples, p. 4.

persons from a different culture or ethnic origin arrived there from other parts of the world"¹⁹, but this definition tends to be partial and insufficient. Although the most accepted and cited definition in the doctrine was given in 1972 by the Special UN Rapporteur Mr. Martínez Cobo, it has been criticized for focusing more on the historical background than on current survival issues²⁰. It states:

"Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant"²¹.

The definition was then broadened by incorporating the principle of self-identification, which is when an individual identifies himself or herself as indigenous (subjective definition) and has been accepted by the group or community as one of its members (objective definition)²². This is an expression of the self-determination principle²³.

The main criteria for identifying a group as indigenous was given by the

19 Commission on Human Rights, Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations, Doc. E/CN.4/Sub. 2/L.566 [1972], Chapter II, para. 34.

20 See: COATES, K. S. (2004). A global history of indigenous peoples: Struggles and survival. New York: Palgrave Macmillan, p. 9.

21 E/CN.4/Sub.2/1986/Add.4.

22 COBO, J. M. (1986) Study on the Problem of Discrimination Against Indigenous Populations. Report for the UN Sub-Commission on the Prevention of Discrimination of Minorities, E/CN.4/Sub.2/1986/7/Add.1.

23 The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions (2013) HR/PUB/13/2 Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights August, p. 7.

Chairperson–Rapporteur of the Working Group on Indigenous Populations:

- a) Priority in time, with respect to the occupation and use of a specific territory;
- b) The voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether these conditions persist or not²⁴.

Additionally, it clarifies that these elements should be admitted as a general framework rather than as part of a strict definition²⁵. Representatives of Asian and African countries raised concerns that these factors should not be emphasized as determinant conditions for “aboriginality”²⁶.

2.3.2 Legal protection

The General Assembly approved the UN Declaration on the Rights of Indigenous Peoples (UN Declaration)²⁷ on 27th September 2007 after a deep, extensive and complex debate between States and the representatives of the indigenous and tribal communities. As an international instrument it has served as a framework to be observed by States and provided minimum standards for the implementation of their respective national norms. It must also be comprehended and interpreted in relation to other international and regional rules and norms on the matter, which are being gradually accepted by States and seem to be likely sources of international customary law.

24 E/CN.4/Sub.2/AC.4/1996/2, para. 69.

25 E/CN.4/Sub.2/AC.4/1996/2, para. 70.

26 Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (2005), pp. 92–93.

27 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

The ILO Convention²⁸ is the main international legally binding instrument on the matter. It was adopted on 27 June 1989 and came into force on 5 September 1991. Its essential approach has been settled in the preamble, which expresses the need to abandon the assimilationist orientation of early standards²⁹, recognizes and condemns discrimination on the enjoyment of fundamental human rights, and recognizes as legitimate the aspirations of indigenous peoples to gain control over their way of life and their institutions, within the institutional framework of the State they live in, as well as admit their contribution to the cultural diversity and to the social and ecological harmony of humankind. The Convention's articles lay down the principles of non-discrimination, the right to participation and consultations, and the protection of their cultural identity and values, while also mentioning explicitly the State responsibility of taking measures aimed at offering opportunities for developing, respecting their integrity and protecting their rights³⁰. Sadly, to date only 23 countries have ratified the ILO Convention.

Although indigenous peoples are the subjects of a specific category of rights, they are also bearers of all civil, political, economic, social, and cultural rights, as well as fundamental freedoms recognized as human rights. This was reaffirmed by the ILO Convention because indigenous peoples have been victims of exploitation, marginalization, discrimination, ethnocide or even genocide throughout history, and currently their fundamental rights are also being violated³¹. Given their particular characteristics, there are some human rights with special relevance for individuals of indigenous origin. Among them are civil rights such as the right to participation, free association, and freedom of

28 International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989, C169.

29 See, for example: International Labour Organization (ILO), *Indigenous and Tribal Populations Convention*, C107, 26 June 1957, C107.

30 See also: YUPSANIS, Athanasios. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview. *Nordic Journal of International Law* 79 (2010) pp. 433–456.

31 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169) 2013*. Handbook for ILO Tripartite Constituents / International Labour standards Department. International Labour Organization. – Geneva.

expression or access to justice. Furthermore, most economic, social and cultural rights are essential to indigenous peoples, and those related to natural resources and land are key, i.e. the right to health, water, a healthy environment, housing, work, education services, among others. In addition, the principle of non-discrimination is a core principle that holds relevance when it comes to protecting and respecting their rights.

Further in cases where they qualify as such, indigenous peoples are also bearers of rights that protect minorities, not only under article 27 ICCPR –as individual rights but with collective or group aspects– but also under special norms such as those applying to children, women, etc. In this regard the HR Committee has issued concluding observations and rendered decisions in the matter³². In General Comment N° 23 on article 27³³, paragraph 7, it states explicitly how States must conduct positive actions in the protection of cultural identities:

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”.

In addition, indigenous people are, collectively, bearers of the third dimension (or third generation rights), namely peoples’ rights. The cornerstone here is the right to self-determination, which is normally only exercised in its internal facet of autonomy or self-government³⁴. In this sense, the HR Committee has

32 See: UN Human Rights Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, 26 March 1990; *Lännsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

33 UN Human Rights Committee, CCPR General Comment No. 23: article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

34 UN Declaration on the Rights of Indigenous Peoples, art 3 and 4.

expressed that the right to self-determination under article 1 of the ICCPR provides a close connection to the interpretation of article 27 of the ICCPR, when stating that it exercises significant influence in cases where decision-makings affects indigenous peoples' natural environment, culture, and means and manners of subsistence³⁵. The external facet of self-determination is only exercisable in extreme cases of massive and systematic human rights violations. This last restriction is due to the principle of sovereignty, which is not subordinate to the principle of self-determination³⁶.

As with all conventions, with the spirit and aims derived from them, the applicability of article 31, paragraph 1 of the Vienna Convention on the Law of Treaties³⁷ reminds us that the provisions of the treaties must be interpreted in good faith in accordance with its object and purpose. Hence, States obliged by these treaties should abide by the terms of the convention in order to avoid consequent responsibilities.

3. Pressing human rights issues

3.1 Non-discrimination and equality

International and regional human rights systems are built on principles of non-discrimination and equality, which are like two sides of the same coin. They are transversal concepts in the realization of human rights³⁸. Equality

35 UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1.

36 In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the Charter of the United Nations, the General Assembly resolution 2625 (XXV), among other resolutions of the United Nations General Assembly CRISTESCU, Aureliu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study "The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments", in: UN Doc. E/CN.4/Sub.2/404/Rev.1, 19981, para. 279.

37 Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Pag. 331.

38 Constitution of the World Health Organization, adopted by the International Health Conference, 22 July 1946. UN General Assembly, Entry into force of the constitution of the World Health Organization, 17

does not mean identical treatment to all people, but instead, consideration of the necessities and particularities of diverse social groups³⁹.

The HR Committee, in General Comment N°18, explains that:

“The term *discrimination* [...] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”⁴⁰.

The principle of non-discrimination would be violated whenever any constraint, segregation, or difference is made affecting the most fundamental freedoms and entitlements, such as equality. Because the non-discrimination principle is also enshrined in the Universal Declaration of Human Rights (UDHR)⁴¹, and some of its rules are customary international law, the principle applies to all situations, including those beyond the scope of the international and regional human rights treaties.

The term non-discrimination does not signify the necessity of uniform treatment (when there are significant differences in situations) between one person or group and another, as long as there is a reasonable and objective justification for differential treatment. Equitable treatment of groups objectively different also constitutes discrimination⁴². In this regard, the UN Committee on the Elimination of Racial Discrimination institutes that discrimination is not

November 1947, A/RES/131.

39 UN Office of the High Commissioner for Human Rights (OHCHR), “Fact Sheet No. 34, The Right to Adequate Food”, p. 20.

40 UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para. 7.

41 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

42 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 8.

simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference"⁴³.

Discrimination can assume different forms. Direct discrimination (or disparate treatment) is produced when a person is treated, has been treated, or would be treated in a less favorable manner as compared to another, based on grounds such as gender, marital status, family status, sexual orientation, religion, age, disability, or race. Continuing on this train of thought, the Economic Social and Cultural Rights Committee (ESCR Committee), in General Comment N° 20 concerning non-discrimination (article 2.2 ICESCR)⁴⁴, states that if direct discrimination arises from a law, a constitution, or public documents, it constitutes a form of "formal discrimination" (or discrimination *de iure*). Indirect discrimination (or disparate impact/effect), in turn, is produced when there is an apparently neutral or impartial norm, criterion, or practice –namely the ground is unprohibited– but its application entails detrimental or disadvantageous effects as compared with other persons or groups under the same ground, unless that provision, criterion or practice is objectively justified. Hence, in this case the different treatment is manifested in the outcome or the effect, without being the main motivation of the norm.

The legal dimension confirmed by the ESCR Committee⁴⁵ explicitly refers to "everyone" as right-holders. An action (or omission) by the State may involve some grade of indirect discrimination on the grounds of either property⁴⁶ and/or the economic and social situation, thus conceding a privilege to a group –companies, producers, investors, etc.– in detriment of the vast population⁴⁷. This could

43 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 7.

44 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para. 10.a.b.

45 See ICESCR, art. 11– art. 12.1.

46 The Committee explains in General Comment 20, para. 25 that "Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it".

47 Art.2.2 ICESCR states the grounds, but the list is not exhaustive: "The States Parties to the present Covenant

also involve a systematic discrimination against such affected groups, which is outlined as “legal rules, policies, practices, or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups”⁴⁸.

With regard for indigenous peoples, the point of departure related to the concept of discrimination was 1971 –when the Special Rapporteur to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Martínez Cobo, started leading a comprehensive study on discrimination against indigenous populations⁴⁹. The study recommended urgent action for eliminating all forms of discrimination against indigenous people. It was considered a seed for the foundation of international human rights system (mechanisms, special bodies and instruments) with focus on indigenous concerns.

From a legal perspective, both the ILO Convention and the UN Declaration present principles of non-discrimination and equality as transversal principles. The ILO Convention aims at overcoming discriminatory practices that vulnerate, affect or violate the rights of indigenous peoples, especially on aspects in which they are either more vulnerable or are significantly affected. This implies that these rules are articulated with the universal normative body of fundamental rights and freedoms, with the aim of ensuring an effective protection of fundamental rights for them and other members of society. In this regard, “indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms, without hindrance or discrimination. The provisions of the Convention shall be applied, without discrimination, to male and female members of these peoples”⁵⁰. Likewise, the UN Declaration⁵¹ affirms that: “... indigenous

undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

48 Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009), para. 12.

49 See: UN, Economic and Social Council: Study of the problem of discrimination against indigenous populations, 1982, 1st sess.: New York (E/1982/34).

50 ILO Convention, art. 3.1.

51 See: UN Declaration on the Rights of Indigenous Peoples, art. 2.

peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity”.

The enjoyment of these rights must be guaranteed to indigenous people not only as individuals, but also as a collective⁵².

In this context, the right to equality and non-discrimination is viewed as offering dual protection. On one hand, it focuses on the conditions inherently required to maintain indigenous peoples’ way of life and, on the other, on actions that exclude or marginalize indigenous peoples from the society⁵³. Accordingly, the Committee on Racial Discrimination has drawn attention towards discerning permanent rights from temporal measures –the latter being understood as those plans, programs and preferential regimes carried out by the State for the benefit of disfavored groups. It explicitly points out that those permanent rights include indigenous peoples’ rights to lands, and that States should carefully observe the distinctions between “special measures” and permanent human rights in their law and practice⁵⁴. In this respect, a structural, “substantive”, or “de facto” discrimination, given in a certain society must be mitigated, not only from legislation (which sometimes arrives after the conflict has come to light), but also through cross-cutting structural, substantive, and systemic policies. In this sense, States, under international human right law, are under the obligation to mitigate both the causes and effects of these inequalities⁵⁵.

52 See: UN Declaration on the Rights of Indigenous Peoples, art. 1 “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law”.

53 OHCHR, A Manual for National Human Rights Institutions: The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, p. 18.

54 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, the meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 15.

55 See, for example: *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172; *Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Judgement of 17 June 2005, Series C No. 125; *the Mayagna (Sumo) Awas Tingni Com-*

3.2 Land and natural resources

3.2.1 Concept

The evolution of indigenous peoples' rights over lands they have traditionally occupied has passed through different stages. During the 16th Century, the Spanish School of International Law, with Francisco Suarez, Francisco de Vitoria, Francisco Suarez and Bartolomé de las Casas as its most prominent speakers, had already recognized these rights, but over the years that acknowledgment lost intensity⁵⁶.

Even though in recent years indigenous peoples have gained international and regional attention, this does not translate into practice, since the concept of “development” pursued by the States where they live often subordinates the rights of indigenous peoples, making them vulnerable, especially with regard to the development of extractive industries in regions like Africa or South–America: mining, forestry, oil and natural–gas extraction and large hydroelectric projects have all affected the lives of indigenous peoples⁵⁷.

Protecting environment, especially the relationship between land and natural resources, is vital for both the material subsistence and cultural integrity of indigenous peoples⁵⁸. The constraint of access to land and nature leads to a deprivation of self–determination and their most fundamental rights. In this regard, it is crucial to understand concept of land and its scope, given that this is always the point of departure for the main conflicts between the indigenous

munity v. Nicaragua, Inter–American Court of Human Rights, Judgment of 31 August 2001, Series C No. 79. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 196.

56 MARK, G.C., *Indigenous Peoples in International Law: The significance of Francisco and Bartolomé de las Casas*, Australian Year Book of International Law 13 (1993), pp. 1–51.

57 UN, Human Rights Council, Report to the Human Rights Council. Summary of activities. Extractive industries operating within or near indigenous territories. A/HRC/18/35, para. 22.

58 Inter–American Commission on Human Rights, Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter–American Human Rights System (OEA/Ser.L/V/II. Doc. 56/09, 2009), para. 56.

communities, States and other non–State actors. At a glance, the term land comprehends the surface above and the natural resources underneath it within a given territory. However, this broad conceptualization leaves room for difficulties and needs to be refined.

Firstly, the territory is not limited to the inhabited land, but covers also the surrounding areas which provide natural resources for subsistence. Worth mentioning is the fact that those areas and natural resources may be used or occupied seasonally or sporadically where indigenous peoples have historically had access for practicing their traditional activities and in order to obtain their subsistence⁵⁹.

Secondly, the ways of life and subsistence of indigenous groups are intimately linked with recognition of the land they have traditionally inhabited, including their respective ecosystems⁶⁰, and the possibility of passing it from generation to generation⁶¹. Under international law, a traditional occupation confers a right to land even when that right is not recognized by the State⁶², the use and the enjoyment of the property being an integral part of the right to property granted⁶³.

Thirdly, indigenous groups can legally be removed from their lands as an exceptional measure, but only when free, prior, and informed consent (FPIC) which will be discussed in the next Section, is provided, and with the right of receiving compensation and equivalent lands, when the eventual return to their land is not possible⁶⁴.

59 These clarifications have been developed and supported by the Inter–American Court of Human Rights in cases such as: *Saramaka People v. Suriname*. Preliminary objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 114. IACHR, Report N. 40/04, Case 12.053, Maya indigenous communities of the Toledo District (Belize), October 12, 2004, para. 129; Case of the *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 120. ILO Convention, art. 14.1.

60 ILO Convention, art 13.2.

61 *Ibidem*, art. 14.1.

62 CEACR, 73rd Session, 2002, observation, Peru, para. 7.

63 This concept was developed by the Inter–American Court of Human Rights, when interpreting the scope of art. 21 of the American Convention of Human Rights. See for example: IACrTHR, Case *Salvador Chiriboga v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008. Series C No. 179, para. 55.

64 ILO Convention, art. 16.

Regarding the natural resources placed in their lands, the ILO Convention explicitly states that they will be “especially safeguarded”⁶⁵. This provision is of transcendental importance, since the livelihood of indigenous people usually depends on the use, management, conservation and consumption of natural resources. Even though this has been recognized extensively in all regions of the world, there is a key exception that effectively breaks with this right and constitutes the seed of most of the present conflicts—regarding indigenous peoples: when the State retains the ownership of minerals or sub–surface resources, or the right to other natural resources⁶⁶. This is the classic example of extractive industries, where the private sector obtains the licenses or concessions from the State to explore and exploit a given geographical area.

In this case, the ILO Convention establishes a series of measures in order to safeguard the rights of indigenous peoples. The obvious measure is consultation, requiring FPIC, in order to proceed with any project affecting their access to the natural resources in their legally recognized territories. Another possibility is offering them benefits from the activities of exploration and exploitation of the natural resources⁶⁷, as well as to receive compensation for any damages. Because the ILO Convention expressly clarifies that the receipt will be realized “wherever possible”, it provides the States with a discretionary criterion to comply with this rule.

3.2.2 Protection of identity

The cultural identity of indigenous peoples is one of the core aspects enabling not only their cultural reproduction, but also their physical existence; thus, it is recognized and protected by law⁶⁸.

65 Ibidem, art. 15.1.

66 Ibidem, art. 15.2.

67 Ibidem, art. 15.2.

68 See: STAVENHAGEN, R. “*Cultural Rights: A social science perspective*”, in H. Niec (ed.), *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights, Paris and Leicester*, UNESCO Publishing and Institute of Art and Law. Culture is (a) “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and

The ILO Convention has been established in order to protect indigenous and tribal peoples, not only in terms of their own ways of life and identities, languages and religions, but also in their own institutions.

The same spirit is depicted in the UN Declaration, which states that indigenous peoples have the right to maintain and strengthen their spiritual relationship with their traditional lands and resources in order to uphold their responsibility towards future generations as well as the right to "own, use, develop and control the land, territories and resources they acquire by reason of traditional ownership"⁶⁹.

The protection of cultural identity has been recognized to fall within the scope of article 27 ICCPR by the HR Committee⁷⁰ and by regional organisms⁷¹.

In this sense, article 27 ICCPR has been widely invoked and interpreted diversely by the HR Committee. For example, in *Lubicon Lake Band v. Canada*⁷²

beliefs" (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) "in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate" (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) "covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development" (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions); (d) "the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behavior and social relationships in everyday life".

69 UN Declaration on the Rights of Indigenous Peoples, articles 25 and 26.

70 UN, Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

71 See also: Case No. 7615 Inter-America Commission Res. No 12/85 OAS Doc. OEA/Ser.L/V/(March 5,1985); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya* (Endorois case) 276/2003 African Commission on Human and Peoples Rights (Feb 2010).

72 UN Human Rights Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/

found that article 27 ICCPR was violated because enjoyment of the Band's ethnic, religious and linguistic culture was impeded since their land was expropriated for commercial interests –oil and gas exploration– and destroyed, thus depriving the people of their means of subsistence and their ways of life.

In another case, *Länsman v. Finland*⁷³, the HR Committee held a similar interpretation of article 27 ICCPR –that is was protective of access to and control of traditional economic livelihoods or cultural life therefore, affirming that States were limited by article 27 ICCPR when pursuing economic development through the granting of permits to private enterprises.

The Interamerican Commission of Human Rights, in the *Yanomami's Community case*⁷⁴, drew reference to article 27 ICCPR and the protection of traditional culture and ways of life, compromising access to and control over the Yanomami's traditional land. In this case, Brazil failed to take timely and effective measures to protect the Yanomami community's human rights when granting mining licenses to a private company, which permitted the building of a road trespassing indigenous lands.

The cornerstone of the right to cultural identity is an integration between cultural and sustainable environmental practices, insofar as the roots of a given culture are embedded in the environment where this culture has developed. Safeguarding the right to cultural identity thus requires measures which enable indigenous and tribal peoples to keep their ways of life as relating to their respective environment⁷⁵. Accordingly, the Convention on Biological Diversity addresses the need to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities”⁷⁶.

C/38/D/167/1984, 26 March 1990.

73 UN GAOR, *Länsman et al v Finland*, Communication No. 511/1992, 52nd Session, UN Doc. CCPR / C / 52D / 511 / 1992, opinion approved 8 November 1994.

74 Inter-American Commission on Human Rights: Brazil, *Yanomami's Community*. Case N° 7615. Report N° 12/85.

75 METCALF, Cherie, *Indigenous Rights and the Environment: Evolving international law*, Ottawa L. Review, 2004, pp.101 and 107.

76 UN Convention on Biological Diversity United Nations, Treaty Series, vol. 1760, Pag. 79. art 8 (j).

3.2.3 Environmental and social impact assessment

The rule of article 7.3 of the ILO Convention shows that conducting an environmental and social impact assessment (ESIA) before approving any economic project is essential in granting effective realization of indigenous peoples' rights. The same article affirms that "studies [must be] carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities". Thus, the process must be carried out, on the one hand, with the participation of the peoples concerned, and, on the other hand, the studies must be made from a holistic perspective –social, spiritual, cultural and environmental. This implies that studies that focus only on environmental aspects would not fulfill the norm. Furthermore, cooperation with the peoples concerned, in the form of participation and consultation, should be carried out in all phases of planned activities –exploration and exploitation– and prior and prospective ESIA should be required⁷⁷.

The ESIA –recognized also by the Inter-American Court of Human Rights⁷⁸– must be carried out by "independent and technically capable entities, with State supervision" and with the purpose "... to preserve, protect and guarantee the special relationship"⁷⁹ that indigenous peoples have with their lands, and prior to granting concessions to the company being evaluated, in order to give full grant to the right to information and effective participation by indigenous people. This also means that if the State must grant all the consequent rights involving the ESIA, the process is a duty of the State which must be performed or supervised by itself, precluding the intervention of the company interested in the making of the ESIA.

Regarding its content, the internationally accepted standard, proposed by the World Bank, says that the ESIA must "identify and assess the potential

77 ILO Convention, art. 7.3.

78 Inter-American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129.

79 Inter-American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129.

environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures” and refers to the need of adopting an integrative approach in its content⁸⁰. Additionally, the Inter-American Court of Human Rights affirmed that the most comprehensive and international standards need to be observed⁸¹.

Compliance with both the rules related to the process and the results obtained from it are key for the State and for interested third parties. As article 7.3 of the ILO Convention reads: “The results of these studies shall be considered as fundamental criteria for the implementation of these activities”, which means the ESIA is not merely a formality to fulfill the requirements of the convention before a planned project; on the contrary, it has the capacity to jeopardize, postpone, or even cancel a business license if indigenous peoples rightfully invoke their rights as being violated.

3.3 Participation and consultation

The right to participation must be respected as a human right in itself, but also as a means towards the fulfillment and development of other human rights.

This provision is included in several universal legal instruments. As mentioned above, article 27 of the ICCPR does not explicitly include this right, but in General Comment N° 23, paragraph 7, the HR Committee established that it is vital to enable the exercise of cultural rights, especially –in the case of indigenous peoples– over the use of land resources. In this regard, the HR Committee states that “the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”⁸². Therefore,

80 World Bank, Operational Policy 4.10, Annex A: Definitions, para. 2.

81 Inter-American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, par. 41. In the footnote No.23 refers explicitly to the “Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities”.

82 UN, Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities),

it may be said that article 27 of ICCPR, which contains the core of the rights of minorities, tacitly includes the abovementioned provision.

Additionally, the provision is recognized in the UN Declaration, article 18; in the ILO Convention, articles 6.1, 6.2, 7 and 15; in the International Convention on the Elimination of All Forms of Racial Discrimination, article 5.d.VI; and in the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, article 2.

Legal compliance with international and regional norms has profound implications in sensitive topic-areas regarding the exploration, exploitation, and extraction of minerals in territories inhabited by indigenous populations. This situation is common in countries in the global south, which present a vast area of natural resources and focus their economic activities in extractive industries, therefore producing confrontations between private and public interests, and those of indigenous peoples'. In this respect, the mechanisms established by governments for the participation of indigenous peoples must be timely, in conformity with the law, effective, and with the goal of allowing them real opportunities to influence the outcome of the process.

3.3.1 Dimensions, content and divergencies of the rights to participation and consultation

The right to participation is multidimensional; hence it is necessary to unravel its scope. It is possible to establish three main external dimensions in which the right may be exercised. The first-dimension deals with political participation in general public, local affairs. The second dimension is the participation of indigenous peoples in making decisions on issues that affect them directly or indirectly. The third dimension is participation in international affairs.

Alongside the external dimensions above, there is an internal aspect of the right to participate that refers to the autonomy of indigenous peoples in their development as well as decisions concerning their internal affairs. This aspect is closely with the right to self-determination⁸³.

8 April 1994, CCPR/C/21/Rev.1/Add.5. Par. 7.

83 UN - General Assembly-Situation of human rights and fundamental freedoms of indigenous people - Annual Report, 2010, para. 39-46.

By putting this right into practice, the State where indigenous peoples live has the duty to take affirmative measures, not only from a formal perspective (such as the compliance of national legislation with international standards and obligations), but also in ensuring the implementation and effectiveness of these dimensions through public policies. Accordingly, it is essential to distinguish participation from consultation. The former requires no consent but rather representation in order to exercise the right, while the latter requires both representation and consent.

In a report by the committee in charge of examining a claim alleging Argentina did not observe the ILO Convention, the governing body explained the principle of representativity⁸⁴. The claim concerned questions of representation and consultation at the national level in the Province of Río Negro, lands and discrimination against the performance of traditional activities by the Mapuche people in the province of Río Negro. One of the claims was based on a lack of representativity because some communities had not been duly convened to the consultation. The Committee made it clear that the criterion of representativeness is an essential requirement of the consultation and participation procedures foreseen by the Convention, and it should be understood as a right of the different indigenous peoples and communities to participate in these procedures through their own representative institutions. Therefore, State authorities must ensure that all organizations arising from the indigenous peoples' own deliberation processes must be convened to the consultation and participation procedures, and that the different positions and sensitivities are represented⁸⁵.

Following the General Observation (CEARC) adopted by the Committee of Experts regarding the right to consultation, the concept can be disaggregated in three main points: a) the subject matter of consultation and/or participation; b) the authority responsible for carrying it out; and c) fulfillment of the elements consent in order to carry out a consultation⁸⁶.

84 ILO, Governing Body on a representation concerning Argentina alleging violation of ILO Convention 169 (2008) GB 303/19/7.

85 *Ibidem*, para. 76.

86 General Observation (CEACR), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Adopted 2010, published 100th ILC session (2011).

The particular issues subject to consultation are those related to administrative and legislative matters that affect indigenous populations directly⁸⁷; in particular a) those permitting or undertaking programs for exploration or exploitation of mineral or surface resources over the land where they live⁸⁸; b) those related to their capacity to alienate their lands or transmit their rights outside their community⁸⁹; c) those related to educational matters⁹⁰; and d) those related with vocational training programs⁹¹.

The responsibility for the consultation lies with the State⁹². Hence, it falls within the State obligations, with consequent responsibility as a result of non-compliance, even when its implementation has been delegated to other actors.

The process of consultation must be "formal, full and exercised in good faith, there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord"⁹³; as well as "undertaken with the objective of reaching agreement or consent to the proposed measures"⁹⁴. It is noteworthy that simply providing information does not fulfill the legal requirements. Thus, the right to consultation is collective in nature and is enjoyed by the indigenous peoples themselves who decide which institution or persons will legitimately represent them in order to exercise their right to participation⁹⁵.

The mechanism given by the ILO Constitution under article 24 about tripartite committees established by the Governing Body has been used in

87 ILO Convention, art. 6.1. a.

88 *Ibidem*, art. 15.2.

89 *Ibidem*, art. 17.2.

90 *Ibidem*, art. 27.3 and 28.1.

91 *Ibidem*, art. 22.

92 *Ibidem*, art. 2 and 6.

93 General Observation (CEACR) – Indigenous and Tribal Peoples Convention, Op. Cit., p. 10.

94 *Idem*.

95 BENAVENTE, Javier, MEZA-LIMA, Rocío, "Derecho a la Participación y a la consulta previa en Latinoamérica- Análisis de experiencias de participación, consulta y consentimiento de las poblaciones afectadas por proyectos de industrias extractivas", 2010, p. 56. Edición: RED MUQUI – Red de propuesta y acción – Fundación Ecuémica para el Desarrollo y la Paz – FEDEPAZ – Perú.

different cases regarding the features of fulfilling the right to consultation and the exploitation of natural resources.

In a case filed against Ecuador in 2001, the Tripartite Committee stated that “the spirit of consultation and participation constitutes the cornerstone of the ILO Convention on which all its provisions are based”⁹⁶, and remarks on the importance that the consultation process be carried out in an adequate and effective manner, both in the face of exploitation and exploration of natural resources, “as early as possible and including in the preparation of environmental impact studies”⁹⁷. The Tripartite Committee emphasized, in a case filed against Colombia, that meetings or consultations conducted for merely informative purposes or after an environmental license has been granted do not meet the requirements of articles 6 and 15(2) of the ILO Convention⁹⁸. Another case, filed against Brazil, was reported by the Tripartite Committee, which, after declaring again the main features of an adequate and effective consultation process, pointed out that:

“... consultation, as envisaged in the Convention, extends beyond consultation on specific cases: it means that application of the provisions of the Convention must be systematic and coordinated, and undertaken with indigenous peoples...”⁹⁹.

3.3.2 Consent

The process of consulting also implies pursuing the objective of achieving a FPIC, which also means setting in motion a process of dialogue and genuine exchange between the parties, to be carried out in good faith, regardless of whether they reach an agreement¹⁰⁰. Then the consent must be *free*, which means that it should be carried out without coercion, intimidation, manipulation or any other external intervention; it must be *prior* to the authorization of any

96 ILO, Governing Body, 282/14/2, para. 31.

97 *Ibidem*, para. 38.

98 ILO, Governing Body, 282/14/3, para. 90.

99 ILO, Governing Body, 304/14/7, para. 43.

100 ILO, Governing Body, 303/19/7, para. 81.

activities resulting from the above referenced decisions and with enough time to allow the indigenous decision-making process; and it needs to be *informed*, which means that the parties must have been notified all data necessary to enable actual participation provided in local languages, culturally adequate forms of communication and provide all needed information to understand the nature, size, grounds and effects of the project¹⁰¹.

The right to FPIC is also linked to the right to self-determination (explained above) and to the concept of ethno-development¹⁰² –understood as the mode of defining development in accordance with each cultural context and cultural frameworks, which may result in differing notions of development¹⁰³.

Even though some international and regional institutions have recognized the FPIC, the position of the World Bank –as an international economic institution which, among other things, finances projects that often affect indigenous communities– has been questioned since its policy on indigenous peoples promotes a simple “consultation” process which explicitly names “free”, “prior” and “informed” consultation, omitting the term “consent”¹⁰⁴.

Conversely, and leaving aside its not legally binding status, the UN Declaration is a valuable instrument since governments require its use in order to obtain indigenous peoples’ FPIC about the following topics: relocation (article 10), administrative measures that affect them (article 19), the storage of hazardous materials inside Indigenous land (article 29) and utilization of their resources (article 32).

The ILO Convention, on the other hand, leaves it up to States to define the mechanisms of consultation, but to counterbalance this discretionary power on the part of the State, it defines minimum standards to activate the consultation

101 Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, UN Doc E/C.19/2005/3, endorsed by the UNPFII at its fourth session in 2005.

102 STAVENHAGEN, R. Etnodesenvolvimento: Uma dimensao ignorada no pensamento desenvolvimentista [Ethno development: an ignored dimension on developmentalist thinking], Anuário Antropológico/1984/1985. Rio de Janeiro. 84: 13-5.

103 See: HANNA, Philippe & VANCLAY, Frank, Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, Impact Assessment and Project Appraisal, 31:2, pp. 146-157, DOI: 10.1080/14615517.2013.780373.

104 World Bank, Operational Manual 4.10 on Indigenous Peoples, July 2005.

mechanism as well as the content of consent¹⁰⁵. This has raised some questions about the scope, the implications and binding effect of consent, and the possibility of veto power in case of a negative evaluation by the indigenous people. The conclusion reached was that veto power is not allowed because it would amount to privileging this right above the sovereignty of State.

Implications of the requirement of consent can be found within the norm when it illustrates that it should be achieved “in a form appropriate to the circumstances, with the objective of achieving [the] agreement or consent [of the peoples concerned] to the proposed measures”¹⁰⁶. Additionally from a teleological interpretation of the preamble, the body of the text and the *travaux préparatoires*, it could be concluded that the aim of this requirement for consent is to promote genuine dialogue and give indigenous people the chance to participate effectively and influence issues that concern them. This has also been affirmed by the Tripartite Committee in a case filed against Colombia:

“... while article 6 does not require consensus to be obtained in the process of prior consultation, it does provide that the peoples concerned should have the possibility to participate freely at all levels in the formulation, implementation and evaluation of measures and programs that affect them directly”¹⁰⁷. It further says that: “...the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach a consensus. A meeting conducting merely for information purposes cannot be considered as consistent with the terms of the Convention”¹⁰⁸.

105 ILO Convention, art. 15.

106 *Ibidem*, art. 6.2

107 Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention 1989 (No.169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union and the Colombian Medical Trade Union Association, Document: GB. 277/18/1, Document: GB. 282/14/4, Geneva, 14 November 2001, para. 61.

108 Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of

3.3.3 Regional experiences

While the abovementioned ILO Convention does not give the right to a veto option, regional experiences go one step further in terms of both the meaning and the content of the right to consultation, on the one hand, and the possibilities to the right to veto, on the other.

Within the InterAmerican regional system of human rights, the American Convention of Human Rights grants the possibility of expanding "the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said states is a party"¹⁰⁹. In this sense, the Inter-American Court of Human Rights ruled upon the scope of application of the American Convention¹¹⁰. In the *Saramaka* case, the Court affirmed that the ILO Convention is applicable under the scope of the American Convention¹¹¹. The plaintiffs petitioned the court to enjoin the activities carried out by mining and logging companies on their territory based on concessions granted by the State without consultation. The Court remarked that "the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions"¹¹². Moreover, the Court went beyond this, affirming that "the Court considers that the difference between 'consultation' and 'consent' in this context requires further analysis"¹¹³. Beyond the fact that the Court left this affirmation open without any other clarification, it denotes a hint of concern about the content of both concepts –consent and consultation–;

the Indigenous and Tribal Peoples Convention 1989 (No.169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union and the Colombian Medical Trade Union Association, Document: GB. 277/18/1, Document: GB. 282/14/4, Geneva, 14 November 2001, para. 90.

109 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978), art. 29, section 2.

110 See, for example Inter-American Court of Human Rights, Case of the *Yakye Axa Indigenous Community v. Paraguay* (Ser C) No. 125.

111 Inter-American Court of Human Rights, Case of the *Saramaka People v. Suriname* (2007) (Ser C) No. 172, para. 92.

112 *Ibidem*, para. 134.

113 *Idem*.

furthermore, the word “consent” is understood in other juridical contexts as a synonym of acceptance, permission, affirmation, or authorization. The Court found that article 21 of the Convention was violated to a degree when the State failed to supervise the prior ESIA before granting its concession to the activities at issue¹¹⁴.

Another landmark decision concerning Ecuador was reaffirmed of the prevalence of the right to FPIC as well as “the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected”¹¹⁵. The background of this decision was a claim by the Kichwa indigenous town of Sarayaku because their communal land had been subjected to oil exploration by a private company authorized by the state of Ecuador without prior consultation. The community had also suffered threats and violence against some of its members, destruction of sacred sites, deforestation, pollution of the community’s drinking water, among others.

Considering that the possibility of exercising the right to veto remains unclear, a report from the Interamerican Commission establishes that consent from the people is mandatory in the following situations¹¹⁶:

- a) When the development of investment plans implies a displacement or permanent relocation from their traditional lands.
- b) When the execution of development or investment plans or concessions for the exploitation of natural resources deprives indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.
- c) In cases of storing or disposal of hazardous materials in indigenous lands or territories.

Within the African System of Human and Peoples’ Rights, the African

114 Inter-American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 154.

115 Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 164, 165, 166 and 167.

116 Inter-American Commission on Human Rights, Report Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09 30 December 2009 para. 334.

Charter on Human and Peoples’ Rights¹¹⁷ does not contain any special article regarding the right to FPIC, but it could be derived from other norms such as the right to property –individual and collective. The African Commission of Human Rights, on the other hand, has in some cases referred to participation by communities without explicitly mentioning the right to FPIC¹¹⁸. However, the *Ogoni* case ruled in conformity with the right to a healthy environment, and the *Endorios* case was framed from the perspective of the right to development. Moreover, in 2012, the African Commission issued a resolution that called on States “to ensure participation, including the free, prior and informed consent of communities”¹¹⁹.

This is to be carried out in the context of participation in decision–making process regarding the governance of natural resources, and not only is it limited to indigenous people, but also to all those affected by natural resource projects. Additionally, the only case regarding indigenous people that reached the African Court in 2017 was a case about the Ogieks Community which was evicted from the Mau Forest in Kenya. The Court held that Kenya failed to act in conformity with due effective consultation¹²⁰. In this regard, even though the Court has not been sufficiently specific regarding the precise scope of such right, it has taken a great step towards the clarification and content development of this right within the African System¹²¹.

117 Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

118 See: *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001) and *Centre for Minority Rights Development & Others v. Kenya* (2009) AHRLR 75 (ACHPR 2009).

119 African Commission on Human and Peoples’ Rights, 224: Resolution on a Human Rights–Based Approach to Natural Resources Governance (May 2012).

120 *African Commission on Human and Peoples’ rights v. Republic of Kenya*. Application No.006/2012. Judgment of 26 May 2017, para. 210.

121 See also: ROESCH R. ‘*The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa*’, African Human Rights Law Journal, 2016, Vol.16, No. 2, pp. 505–531. <http://dx.doi.org/10.17159/1996-2096/2016/v16n2a9>

4. Human rights obligations of the state and the private sector

The State –both as a guarantor of human rights and as subject of international law– has the obligation to respect, protect and fulfill human rights. Regarding the unique situation of indigenous people, the bulk of the conflicts are mainly related to extractive industries and collisions between their operations and indigenous peoples' rights. This implies that third parties are also part of the map of actors: in this case, the commercial enterprises that acquire the licenses or certificates from the State in order to carry out their activities.

The State has legally binding primary obligations and must take concrete steps in order to comply at a national level with the provisions of the international obligations. Private sector actors must be forced to comply through national legislation as well as through monitoring instruments, regulations, implementation of international standards, etc.

Private companies –beyond the fact that they are not bound by international instruments, thus the responsibility to enforce law remains with State– should comply with the soft law and the international standards of human rights developed in recent years, on the matter.

The standards in matters of business and human rights lie on the following pillars: 1) the responsibility of the State to protect human rights from potential violations by third parties; 2) the corporate responsibility to respect human rights, including due diligence in their acts; and 3) the access of victims to effective remedies¹²².

Continuing this idea, the International Finance Corporation of the World Bank (IFCWB)¹²³ developed a guideline for the private sector, providing advice and explanations concerning the ILO Convention. It remarks that:

122 UN Human Rights Council, Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5; A/HRC/14/27 and Organization for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, 27 June 2000.

123 See: World Bank. 2007. ILO Convention 169 and the private sector: questions and answers for IFC clients (English). IFC Quick Notes; IFC E&S. Washington, D.C. World Bank Group.

"In order to minimize risk, companies would be advised to satisfy themselves that the government has fulfilled its responsibilities. Specifically, companies should look into whether:

- the process used for identifying indigenous and tribal peoples' lands is consistent with the requirements of Convention 169,
- legal or other procedures for resolving indigenous peoples' land claims and disputes are acceptable and have been subject to consultation by those affected,
- if title to land has derived originally from indigenous peoples, this title was properly obtained in accordance with the law, and without taking advantage of [a] lack of understanding of laws on [the] part of the affected stakeholders in order to secure possession,
- the relevant government authorities have recognized the indigenous peoples' rights to natural resources,
- appropriate consultation takes place prior to the granting of exploration and exploitation licenses,
- mechanisms are in place to enable the communities concerned to participate in the benefits of the project and to compensate them fairly for their losses. This due diligence should form part of a social and environmental assessment..."¹²⁴.

Given the fact that companies do not have legally binding international norms and can only fulfill soft laws with the consequent due diligence and the so-called corporate social responsibility, the International Finance Corporation of the World Bank has precisely specified items to take into account that the State –as guarantor of the human rights– must comply with in order to avoid unnecessary risks when enterprises carry out their activities. Notwithstanding the desirability of economic development, the HR Committee still highlights the State's responsibility to protect, and refers to its legally stipulated limitations:

"A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to

be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27...¹²⁵.

Hence, the HR Committee affirms that the legal stipulations should cover all substantial activities that effectively deny the right to enjoy cultural rights. Then, the HR Committee clarifies which non-derogable substantial activities are that cannot be surrendered to economic activities: 1) traditional activities such as hunting, fishing or reindeer husbandry; and 2) measures that must be taken to ensure the effective participation of members of minority communities in decisions that affect them¹²⁶.

Regarding the right to be consulted and the obligation of the State to do this, the Special Rapporteurs have made clear that the State keeps the duty and responsibility of carrying out and ensuring the consulting process even when it delegates implementation to private actors or to another authority. The Special Rapporteurs have also affirmed that the processes are not to be conducted by the private companies at stake since the objectives and interest of both actors –indigenous peoples and private companies– are usually opposed. This is because private companies' interests "are principally lucrative and thus cannot be in complete alignment with the public interest or the best interests of the indigenous peoples concerned"¹²⁷.

125 *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994), para. 9.4 and 9.5.

126 *Idem*.

127 UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, para. 54–55, 72.

5. Conclusion

The specific normative framework that protects indigenous people presents two major drawbacks. First, as a binding norm, ILO Convention 169 has to date been ratified by only twenty–three States. However, this shortcoming could be compensated, although not ideally and only partially, through the application of article 27 of the ICCPR, whose Convention has been ratified by 172 States. It is also paradoxical that within the ILO system –from which Convention 169 stems, and whose objective is to empower and protect indigenous people– does foresee protection mechanisms for the stakeholders to present their claims, be it in the form of individual communications or as collective complaints (with the exception of workers or employers’ associations). Second, since the UN Declaration is not legally binding, it does not hold the legal force of a treaty and is thus insufficient in terms of ensuring compliance and enforcement, but it does grant a legal framework of minimum standards to be fulfilled by the States and other actors.

Regarding the principle of non–discrimination, the central principle of human rights and therefore transversal to all the regulations on the subject, is mainly affected in two ways: indirectly, through public policies carried out by States, which systemically structure the development of their economies (e.g. tax policy, promoting certain economic industries) and directly, insofar a social sector is consistently privileged to the detriment of another sector of the population –in this case, the indigenous communities.

Land and natural resources are vital for both the material subsistence and the cultural integrity of indigenous peoples. A constraint of land and nature ends in deprivation of self–determination and of their most fundamental rights. This happens from the moment that there is no due protection for the cultural identity of indigenous peoples, be it as a result of the structural organization of the economy or/and because priority given by the States to some social groups over others (indirect or direct discrimination), or/and in the case of the deterioration of the natural environment in territories that are directly affected by the exercise of economic activities –mostly by the extractives industries– taking place without adequate and effective compliance with the ESIA.

Regarding the right to participation, it must be respected both as a human

right in itself, and as a means of fulfilling and developing other human rights. It has been shown here that most of the relevant legal cases address problems concerning the lack of participation and consultation accorded to indigenous communities on issues affecting them. Effective participation and consultation are affected, for example, when the representation of indigenous communities is vitiated, which on the other hand, is often the manifestation of a structural and systemic deficit on the part of the States in matters of census, communication, et cetera. As a result, the right to consultation is violated in most cases.

Furthermore, since the requirement of consent is normally considered fulfilled when a dialogue with the affected party has been held and the required information has been provided, the traditional meaning and substantial use of the term, understood as assent, approval or authorization of a matter to be resolved, is not applicable. On the other hand, when the objective pursued by the requirement of consent is to give the affected party the ability to exert some level of influence on a decision-making process by the State –assuming this has not been already tacitly made–, at the very minimum, it ignores the imbalance or asymmetries of power between the actors involved in the process. Hence, the legal requirement of consent is fundamentally vitiated, as long as it is conceived of more as a formality than as a matter of substance.

The system of human rights responsibilities is an obligation of the State. This system is becoming obsolete since, in recent decades, economic factors have played a fundamental role in the framework of human rights. It is well known that many developing countries depend economically on extractive resources as well as on commodities. This economic dependence strengthens bonds between big economic actors and States, to the detriment of other social groups that may be affected in their rights.

Although for several years institutional initiatives have been underway to try and extend binding human rights liability to private companies, and NGOs with some lawyers are trying to push the change of the system through the use of all possible legal and non-legal tools provided by the international, regional and national systems (e.g. the use of strategic litigation), there is still a long way to go. For now, apart from the minimum standards of compliance and the expectation of good faith on the side of private actors, obligations to respect, protect, and fulfill human rights still reside with the State alone. However, this

does not preclude the responsibility of private actors to abide by human rights standards, even in their own self-interest. Indeed, in the event of conflict with indigenous communities, the failure to comply with human rights obligations on the part of the State does not exonerate private actors from their own responsibility, for example by alleging "lack of legal security". Rather, in such cases private actors might be confronted with a presumption of bad faith, negligence, and lack of due diligence on their part, because they know or should have known both about the pertinent State obligations in the matter and about the soft law in human rights and environmental matters.

In the mode of a concluding word, it is worth recalling the foundation stone of the human rights system: The Preamble of the Universal Declaration of Human Rights states that every person and all organs of society are obliged to promote and protect human rights. Whether it is the State, the members of the civil society, or the private sector –each from the standpoint of their particular responsibilities and capabilities– all are included in the view of the spirit and goal of the human right system: the protection of fundamental rights and human dignity.

6. Bibliography and Sources

A Manual for National Human Rights Institutions: The United Nations Declaration on the Rights of Indigenous Peoples (August 2013).

African Commission on Human and Peoples' Rights v. Republic of Kenya. Application No.006/2012. Judgment of 26 May 2017.

African Commission on Human and Peoples' Rights, Resolution on a Human Rights-Based Approach to Natural Resources Governance – ACHPR/Res.224(LI) 2012.

BENAVENTE, Javier, MEZA-LIMA, Rocío, "Derecho a la Participación y a la consulta previa en Latinoamérica-Análisis de experiencias de participación, consulta y consentimiento de las poblaciones afectadas por proyectos de industrias extractivas", 2010. Edición: RED MUQUI – Red de propuesta y acción – Fundación EcuMénica para el Desarrollo y la Paz – FEDEPAZ – Perú.

GRIFFIOEN, C., *Self-determination* / Utrecht: Science Shop of Law, Economics and Governance, Utrecht University. Supervised by the Institute of International, Social and Economic Public Law ISBN: 978-90-5213-196-2;

Centre for Minority Rights Development & Others v. Kenya (2009) AHRLR 75 (ACHPR 2009).

- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.
- METCALF, Cherie, *Indigenous Rights and the Environment: Evolving international law*, Ottawa L. Review, 2004.
- Chief Bernard Ominayak and Lubicon Lake Band v. Canada, CCPR/C/38/D/167/1984, UN.
- COATES, K. S. (2004). A global history of indigenous peoples: Struggles and survival. New York: Palgrave Macmillan.
- Inter-American Commission on Human Rights: Brazil, Yanomami's Community. Case N° 7615. Report N° 12/85
- Constitution of the World Health Organization, adopted by the International Health Conference, 22 July 1946. UN General Assembly, Entry into force of the constitution of the World Health Organization, 17 November 1947, A/RES/131.
- CRISTESCU, Aureliu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study "The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments", in: UN Doc. E/CN.4/Sub.2/404/Rev.1, 1998. E/CN.4/Sub.2/AC.4/1995/3 Note by the UNWGIP Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples.
- MARK, G.C., *Indigenous Peoples in International Law: The significance of Francisco and Bartolomé de las Casas*, Australian Year Book of International Law 13 (1993)
- OHCHR, CCPR General Comment No. 23: The rights of minorities (Article 27) UN Doc CCPR/C/21/Rev.1/Add.5 (04.08.1994).
- General Observation (CEACR) – Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Adopted 2010, published 100th ILC session (2011).
- ILO, Governing Body on a representation concerning Argentina alleging violation of ILO Convention 169 (2008) GB 303/19/7.
- Inter-American Court of Human Rights, Case Salvador Chiriboga v. Ecuador. Preliminary Objections and Merits. Judgment of May 6, 2008. Series C No. 179.
- Inter-American Court of Human Rights, Report Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09 30 December 2009.
- Inter-American Court of Human Rights, Report N. 40/04, Case 12.053, Maya indigenous communities of the Toledo District (Belize), October 12, 2004.
- Inter-American Commission on Human Rights, Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human

- Rights System (OEA/Ser.L/V/II. Doc. 56/09, 2009).
- Inter-American Commission on Human Rights: Brazil, Yanomami's Community. Case N° 7615. Report N° 12/85.
- International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919.
- International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 (ILO Convention).
- Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations. Judgment of June 27, 2012. Series C No. 245.
- Länsman et al v Finland, Communication No. 511/1992, UN GAOR, 52nd Session, UN Doc. CCPR / C / 52D / 511 / 1992, opinion approved 8 November 1994.
- MARTÍNEZ COBO, J. (1986) Study on the Problem of Discrimination Against Indigenous Populations. Report for the UN Sub-Commission on the Prevention of Discrimination of Minorities, E/CN.4/Sub.2/1986/7/Add.I
- M^CCORQUODALE, Robert, Self-Determination: A Human Rights Approach. *International and Comparative Law Quarterly*, 1994, 43. 857 – 885. 10.1093/iclqaj/43.4.857.
- Organization for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, 27 June 2000.
- Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975.
- Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978).
- PENTASSUGLIA, Gaetano, *Minorities in International Law*, 1st edition, Strasbourg: Council of Europe, 2003, Part 1
- HANNA, Philippe & VANCLAY, Frank, Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, *Impact Assessment and Project Appraisal*, 31:2, pp. 146-157, DOI: 10.1080/14615517.2013.780373.
- Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

- Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention 1989 (No.169), made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union and the Colombian Medical Trade Union Association, Document: GB. 277/18/1, Document: GB. 282/14/4, Geneva, 14 November 2001.
- Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, UN Doc E/C.19/2005/3, endorsed by the UNPFII at its fourth session in 2005 Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38.
- UN, Human Rights Council, Report to the Human Rights Council. Summary of activities. Extractive industries operating within or near indigenous territories. A/HRC/18/35.
- ROESCH R. *The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa*, African Human Rights Law Journal, 2016, Vol.16, No. 2, pp. 505-531. <http://dx.doi.org/10.17159/1996-2096/2016/v16n2a9>
- Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Judgement of 28 November 2007, Series C No. 172.
- Social and Economic Rights Action Centre (SERAC case) & Another v. Nigeria (2001) AHR/LR 60 (ACHPR 2001).
- STAVENHAGEN, R. Etnodesenvolvimento: Uma dimensao ignorada no pensamento desenvolvimentista [Ethno development: an ignored dimension on developmentalist thinking], Anuário Antropológico/1984/1985. Rio de Janeiro. 84: 13-5
- STAVENHAGEN, R. *"Cultural Rights: A social science perspective"*, in H. Niec (ed.), Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights, Paris and Leicester, UNESCO Publishing and Institute of Art and Law
- Inter-American Court of Human Rights, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79.
- PLIEGUE, Thomas y ARRIGO, Mariano, "Historia y desarrollo de los pueblos indígenas. Criterios jurídicos para la definición de «indígena»", BID América (1999)
- UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009.
- UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20.
- UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimina-

- tion of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32.
- UN Convention on Biological Diversity United Nations, Treaty Series, vol. 1760, Pag. 79.
- UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).
- UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV).
- UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
- UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
- UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171
- UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637
- UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295
- UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
- UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989.
- UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1
- UN Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5
- UN Human Rights Council, Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5.
- UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, April 2010, No. 34.
- UN Economic and Social Council: Study of the problem of discrimination against indigenous populations (1982, 1st sess.: New York) (E/1982/34).

- Understanding the Indigenous and Tribal People Convention, 1989 (No. 169) 2013. Handbook for ILO Tripartite Constituents / International Labour standards Department. International Labour Organization – Geneva.
- UN General Assembly –Situation of human rights and fundamental freedoms of indigenous people– Annual Report (2010).
- UN Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
- UN Statute of the International Court of Justice, 18 April 1946.
- UN Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Pag. 331.
- Working paper on the concept of “indigenous people” by the Chairperson/Rapporteur, Erica-Irene A. Daes. E/CN.4/Sub.2/AC.4/1996/2.
- World Bank, Operational Manual 4.10 on Indigenous Peoples. (OP 4.10) July 2005.
- World Bank. 2007. ILO Convention 169 and the private sector: questions and answers for IFC clients (English). IFC Quick Notes; IFC E&S. Washington, D.C.: World Bank Group.
- Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, Judgement of 17 June 2005, Series C No. 125.
- YUPSANIS, Athanasios. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview. *Nordic Journal of International Law* 79 (2010).