CONSULTATION AND CONSENT NORMS UNDER ILO CONVENTION NO. 169 AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES COMPARED

Free, prior and informed consent is closely related to indigenous peoples' rights to participation, consultation and self-determination and as such is invaluable for effectively protecting indigenous peoples' rights to lands, resources and cultures. This report to the EMRIP expert seminar on FPIC hopes to contribute to a better understanding of FPIC by offering a legal analysis of scope and content of the norms related to consent and consultation included in C169 and UNDRIP – in particular those related to land and resource rights - by examining the provisions enshrined in both instruments and subsequently the interpretations, decisions and reports of their supervisory mechanisms.[1]

Finding proper solutions to the abundant conflicts, especially those over the distribution of the world's remaining natural resources, is not only important for indigenous communities, but for all stakeholders involved – such as corporations and governments - and the global environment in general. In addition to generic norms under human rights law, two international instruments focus specifically on indigenous peoples' participation in decision-making processes of their concern: the UNDRIP and C169 of the ILO.[2]

Both ILO Convention 169 and the UNDRIP entail numerous consultation and participation rights which overlap to a large extent. Nevertheless, they also diverge in terms of the content of those provisions and regarding the interpretations by their respective supervisory mechanisms. The UNDRIP for instance, contains the norm of free, prior and informed consent (FPIC) while C169 uses different words. Consent requirements are nonetheless present in C169. Furthermore, both instruments differ significantly in terms of their nature, legal effect and support.

C169 remains the only legally binding instrument dealing explicitly with indigenous peoples' rights. The UNDRIP however, is the most widely supported (endorsed) document. Its voluntary character, however, does not mean that it has no legal value. Both documents are, for instance, cited by the Inter-American Court of Human Rights in its growing body of jurisprudence on consultation and consent rights.[3] The organization of the supervisory mechanisms attached to C169 and the UNDRIP also differs substantially.

The report is structured as follows. First, the consultation and consent norms included in C169 are examined. Secondly, the interpretations of the ILO's supervisory bodies are analyzed, especially two 'general observations' from the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Thirdly, the consultation and consent provisions in the UNDRIP are inspected, with an emphasis on those entailing FPIC requirements. Fourthly, a number of studies and reports from the monitoring mechanisms of the Declaration are examined, mainly those of the EMRIP and the Special Rapporteur. Some final remarks and observations conclude this legal analysis.

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[1] This report is largely derived from - and partly reproduces - key sections of a broader research project published in 2017, see: Rombouts SJ, The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and UN Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in IlO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments. (2017). 53 Stan. J. Int'L L. 169 (2017) (Rombouts, 2017). Available at SSRN: https://ssrn.com/abstract=3010261. For the author's further work on Free, Prior and Informed Consent, see: Rombouts SJ, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*, PhD Thesis, Wolf Legal Publishers, 2014.

[2] ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organization (June 27, 1989); G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (Sept. 13, 2007).

[3] See in particular: Saramaka, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012).

CONSULATION AND CONSENT IN ILO CONVENTION NO. 169

C169 differs substantially from its predecessor, C107 of 1957, in that the newer Convention renounces the previous assimilationist/integrationist approach and enshrines a series of provisions that are to be implemented with the participation of indigenous peoples themselves.[4] Moreover, indigenous peoples themselves were involved – to some extent – in the drafting process.[5] This participatory approach is most clearly reflected in paragraph 1 of Article 7 of C169 which states that: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[6]

The general framework of consultation and participation is enshrined in Article 6 and 7. Article 7(3) Explains that when development projects are planned that may affect indigenous peoples, governments should ensure proper social, cultural, spiritual, and environmental impact assessments in cooperation with the peoples concerned.[7]

Article 6 of ILO Convention 169 includes a broad requirement to consult with indigenous peoples whenever legislative or administrative measures affect them directly.[8] Paragraphs 6(1)(b) and (c) call on governments to establish the means for participation. Article 6(2) sets out the parameters for all consultations. Those must be "in good faith and in a form appropriate to the circumstances" and undertaken with the "objective of achieving agreement or consent to the proposed measures."[9]

In addition to the general participatory requirements, the Convention includes a number of more specific consultation norm. Article 2 deals with "coordinated and systemic action" to protect indigenous peoples' rights. Closely linked is Article 33, which requires cooperation in the formation of "agencies or other appropriate mechanisms" in the administration of government programs.[10]

Consultation and participation requirements figure in a large number of other provisions on vocational training programs,[11] the establishment of educational facilities and institutions,[12] indigenous languages,[13] traditional activities,[14] and plans for improving "conditions of life, work, and levels of health and education".[15] More generally, Article 4 stipulates that special measures "for safeguarding the persons, institutions, property, labour, cultures and environment" shall not be "contrary to the freely-expressed wishes of the peoples concerned."[16]

Most importantly, C169 includes a number of consultation requirements in Part II, which contains land and resource rights. Article 13 emphasizes the special spiritual relation that indigenous peoples

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[4] *For an excellent overview, see:* Athanasios Yupsanis, *The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples*, 49 Canadian Yearbook of International Law, (2011).

[5] A comprehensive description of the transition process from C107 to C160 is found in: Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 Okla. City U.L. Rev. (1990).

[6] C169, Article 7(1).

[7] C169, Article. 7(3). This requirement can also be found in the UNDRIP (Article 32(3)), and the jurisprudence of the IACtHR (Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007)), and is the general purpose of the *Akwé: Kon Guidelines: Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Development 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*, Convention on Biological Diversity, 7th Sess., U.N. Doc. UNEP/CBD/COP/7/21 (Feb. 20, 2004).

[8] C169, Article 6.

[9] C169, Article 6(2).

[10] C169, Article 2 and 33.

[11] C169, Article 22.

[12] C169, Article 27.

[13] C169, Article 28.

[14] C169, Article 23.

[15] C169, Article 7(2).

[16] C169, Article 4(1) and 4(2).

have with their lands including its "collective aspects" and that the term 'lands' covers "the total environment of the areas of the areas which the peoples concerned occupy or otherwise use."[17] Article 14 contains the most central provision on land rights and calls for recognition of both ownership and possession as well as for special attention for non-exclusive ownership and nomadic peoples.[18] Article 15 describes the right of indigenous peoples to the natural resources on their lands which includes "rights to participate in the use, management, and conservation of those resources."[19] Paragraph 2 of Article 15 deals exclusively with sub-surface and mineral resources.[20] Without any doubt, concerns about indigenous peoples involvement in relation to decisions about resource extraction remain at the center of attention present day.

Article 16 deals with relocation and is the only place in the Convention in which an explicit requirement of consent is mentioned: "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."[21] However, "Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."[22] Finally, Article 17 refers to consulting indigenous peoples whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community."[23]

The cornerstones of ILO Convention 169 are the concepts of participation and consultation which is reflected in many of its provisions, especially when it comes to protection of indigenous peoples' lands and resources.[24] The supervisory bodies of the International Labour Organisation have devoted much of their attention to precisely these concepts.

ANALYSIS OF CONSULTATION NORMS IN C169 BY THE ILO SUPERVISORY BODIES

The following section will analyze the consultation and consent provisions included in C169 by examining the interpretations of the ILO's supervisory bodies in order to come to a better informed understanding of their scope and content. The ILO's supervisory system is unique among international organizations. It is also complex and consists of a regular supervisory procedure in which country reports are examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards (CAS). Additionally, there are three special procedures, which are complaint based: the representations procedure, the complaints procedure and a special procedure dealing with alleged violations of freedom of association. An examination of the numerous country specific observations by the CEACR about consultation of indigenous peoples and a number of representation procedures dealing with consultation and consent falls outside the scope of this short report and can be found elsewhere.[25] The following section will concentrate on two important general observations issued by the CEACR.

In addition to country specific observations, the CEACR may issue general observations on topics that are in need of more clarification. Because of the controversy surrounding the consultation requirements, which were already subject to much debate in the drafting stages of the Convention, the

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[17] C169, Article 13.

[18] C169, Article 14(1). I The language use related to lands and territories has been subject of intense debate during the drafting stages, see: ILO, *Partial Revision of the Indigenous and Tribal Populations Convention*, *1975 (No. 107)*, at 4, Report IV(1), International Labour Conference (1989)

[19] C169, Article 15(1).

[20] C169, Article 15(2).

[21] C169, Article 16(1).

[22] C169, Article 16(2).

[23] C169, Article 17.

[24] Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview,* 79 Nordic J. Int'L L. p. 438. (2010).

[25] Rombouts SJ, The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and UN Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in IlO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the Saramaka and Sarayaku Judgments. (2017). 53 Stan. J. Int'L L. 169 (2017), pp. 197-200.

Committee of Experts found it necessary to produce two general observations on this matter in 2008 and 2010.[26] The 2008 observation deals mostly with the general framework of consultation and participation while the later observation focusses more on consultation requirements in relation to land rights. The first observation relates more to the broad, general concepts of participation and consultation, while the second one deals more with the specific consultation requirements in relation to land rights.

In the 2008 observation the CEACR notes that: "the establishment of appropriate and effective mechanisms for the consultation and participation of indigenous and tribal peoples regarding matters that concern them is the cornerstone of the Convention, yet remains one of the main challenges in fully implementing the Convention in a number of countries."[27] The Committee further states that considering the enormous challenges that indigenous and tribal peoples face—including conflicts over land titles, health, education and the increased exploitation of natural resources—involving them in these matters is "an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue."[28]

The CEACR states that there are three interrelated processes central to the Convention: "coordinated and systemic government action, participation, and consultation". Furthermore, "these efforts have not always met the expectations and aspirations of indigenous and tribal peoples." This is especially so when key decisions that affect them are taken by ministries on mining or finance, without proper coordination. As a result, indigenous communities are often left without a real say in the policies that may affect them.[29]

While the aim of the Convention is not to enact "a specific model of participation, it does require the existence or establishment of agencies or other appropriate mechanisms, with the means necessary for the proper fulfilment of their functions." Effective and meaningful consultation and participation, especially when development activities are debated and planned is considered essential by the CEACR.[30]

With regard to consultation in particular, the Committee argues that there are two central issues: "(i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and tribal peoples directly; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted."[31] A number of more specific guidelines are mentioned by the CEACR:

> The form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties. If these requirements are met, consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict.[32]

The Committee of Experts calls on governments to develop mechanisms for participation, include the requirement of prior consultation in domestic legislation on natural resource management, engage in systematic consultations as provided for in Article 6, and establish effective consultation mechanisms that take into account government and indigenous views about which procedure should be followed.[33]

While the 2008 observation explains the general purpose of the participation and consultation requirements of C169 and emphasizes the most important societal issues, it does not clarify the scope

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[26] Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, Int'l Lab. Conference, 98th Sess. (2009); Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, Int'l Lab. Conference, 99th Sess. (2011). Both of these general comments were issued after the adoption of the UNDRIP.

[27] Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, Int'l Lab. Conference, 98th Sess. (2009).

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

and meaning of consultation in much detail. This is why in 2010 the Committee produced a second, more extensive general comment in which it analyses the specific consultation requirements related to land rights and discusses the difficult and hotly debated topic of the distinction between consultation and consent norms in the context of ILO Convention 169. In this second general observation the CEACR draws on the preparatory work to the Convention[34] and a number of recommendations by tripartite committees in representation procedures under Article 24 of the ILO Constitution concerning indigenous peoples' rights (against Ecuador, Colombia, Argentina, and Brazil[35]).

In relation to the subject matter, the Committee reiterates that consultation is a specific requirement in relation to Article 6(1)(a), Articles 15(2), and 17(2), that deal with exploitation of mineral or sub-surface resources and alienation of lands, and 27(3) and 28(1).[36] As discussed above, free and informed consent is only an explicit requirement in relation to Article 16, which deals with relocation of indigenous peoples. The CEACR states that the responsible authority for carrying out the consultations is the government, as is specified by Article 2 and 6 of the C169. With regard to the nature or character of consultation, the Committee build on its previous guidelines and considers four essential elements:

> (1) consultations 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;
> (2) appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
> (3) consultations have to be undertaken through indigenous and tribal peoples' representative institutions as regards legislative and administrative measures;
> (4) consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.[37]

The Committee stresses that merely pro forma consultations or only the provision of information does not meet the requirements of the Convention. Importantly, the Committee also notes that such consultations "do not imply a right to veto, nor is their result necessarily the reaching of agreement or consent."[38] In broader international law however, there seems to be an emerging consensus in broader that in certain situations—in which large scale development projects have a major impact on indigenous peoples— a more mandatory form of FPIC is in fact required.[39] According to the CEACR, this more

[34] For the preparatory works, see Int'l Lab. Conference, Rep. VI, 75th Sess. (1988); Int'l Lab. Conference, Provisional Record No. 32, 75th Sess. (1988); Int'l Lab. Conference, Rep. IV, 76th Sess. (1989); Int'l Lab. Conference, Provisional Record No. 25, 76th Sess. (1989).

[35] See: Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (2001) (made under art. 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL); 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) (2001) (made under art. 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)); Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (2008) (made under art. 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER); local section was affiliated to the Confederation of Education Workers of Argentina (CTERA)); Report Of the Committee Set up to Examine the Representation Alleging Non-Observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (2009) (made under art. 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF)).

[36] Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, 787 Int'l Lab. Conference, 100th Sess. (2011).

[37] Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, 787–88 Int'l Lab. Conference, 100th Sess. (2011).–

[38] Ibid. at 788.

[39] Rombouts SJ, Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent, Wolf Legal Publishers, 2014, pp. 414-415.

progressive view does not follow from the letter and spirit of the Convention.[40] Nevertheless, the more severe the potential consequences are for the indigenous community, the greater the importance of obtaining agreement or consent becomes. This is in line with the position taken by the Inter-American Court of Human Rights and the Human Rights Committee: the impact of the project should determine the scope of the consultation process, and this may amount to an obligation to obtain FPIC.[41]

In short, an accurate implementation of the right to consultation "implies a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible."[42] Consultation requirements under the Convention do not entail strict obligations to reach agreement, except for a qualified right to consent in cases of relocation. They do, however, offer indigenous peoples a "real possibility of influencing decisions affecting their interests."[43] The CEACR emphasized on various occasions that both the broad and specific requirements of consultation must include full, formal, and good faith negotiations and should entail a genuine dialogue with proper communication, understanding, mutual respect, and the sincere desire to reach a common understanding. The following sections will explore the standard-setting in relation to the consultation and consent requirements in the framework of the UNDRIP.

CONSULTATION AND CONSENT NORMS IN UNDRIP

Similar to ILO Convention 169, the UNDRIP contains numerous references to consultation and participation rights. In a number of areas, UNDRIP goes even further and additionally calls for free, prior, and informed consent. This right to FPIC is rapidly gaining ground as one of the key concepts in international law and policy pertaining to indigenous peoples. UNDRIP provides for the right to self-determination – which is the basis for FPIC – while Convention 169 does not explicitly include this right, apparently out of fear of secessionist movements.[44]

However, self-determination for indigenous peoples is generally perceive as a right to self-governance within the framework of the state in addition to a right to participate effectively in that framework.[45] This internal, relational form of self-determination is the cornerstone of the UNDRIP and proclaims, almost identically to common Article 1(1) to the 1966 Human Rights Covenants, that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[46]

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[40] Comm. of Experts on the Application of Conventions and Recommendations, *General Observation, Indigenous and Tribal Peoples*, 788, Int'l Lab. Conference, 100th Sess. (2011).

[41] See, Saramaka People v. Suriname, Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 185, ¶ 134 (Aug. 12, 2008) ; Poma Poma v. Peru, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006, ¶ 9.6 (Mar. 27, 2009) (referring to the principle of proportionality). Also see: Rombouts SJ, Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent, Wolf Legal Publishers, 2014, p 411.

[42] International Labour Office, Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), 2013, p. 16.

[43] Athanasios Yupsanis, *The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples*, 49 Canadian Yearbook of International Law, (2011), pp. 143–44.

[44] *See* C169, Article 1(3) ("The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."). Since peoples are the subjects of the right to self-determination under the 1966 human rights covenants, Convention 169 explicitly provides for a "disclaimer" in this respect. *See* S James Anaya, Indigenous Peoples in International Law (2004), p. 60.

[45] *See* S James Anaya, Indigenous Peoples in International Law (2004), pp. 104–06 (distinguishing between constitutive and ongoing self-determination); *see also* B. Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U J. Int'L & Pol. P. 189 (2001–2002) (emphasizing the relational aspects of indigenous self-determination).

[46] UNDRIP, Article 3.

To operationalize self-determination, the UNDRIP proclaims a large number of provisions that grant indigenous peoples rights to participation, consultation, and consent in relation to decision-making processes that affect them.[47]

Similar to ILO Convention 169, the UNDRIP includes a general requirement of participation and consultation in Articles 18 and 19. Article 18 states that indigenous peoples have the right to participate in decision-making in matters which would affect their rights and to strengthen their own decision-making structures.[48] Article 19 entails the general duty to consult: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[49] The chosen words "in order to obtain" are not to be understood as giving indigenous peoples an unqualified right to veto national legislation, which was one of the fears of the United States, Canada, New Zealand, and Australia when the UNDRIP was adopted in 2007.

Different types of more specific participatory standards feature in the UNDRIP's provisions.[50] The standard "in conjunction with" is used in the UNDRIP in Article 11(2) on redress; Article 12(2) on access and repatriation of ceremonial objects and human remains; Article 14(3) on education in the indigenous language; Article 22(2) on economic and social development; Article 27 on the recognition of indigenous laws, traditions, customs, and land tenure systems; and in Article 31(2) on cultural heritage, traditional knowledge, and other cultural or indigenous ways of expression, like science, technology, medicine, and knowledge on flora and fauna. These provisions lay down positive obligations for the state.[51]

The distinction between "in conjunction with" and "in consultation and cooperation with" is not entirely clear. This standard is included in Article 15(2) on the promotion of tolerance and the elimination of discrimination; Article 36(2) on maintaining and developing contacts, relations and cooperation with own and other peoples' members; and Article 38 on legislative measures in general with the aim of achieving the ends of the UNDRIP.[52] In Article 30 of the UNDRIP, which deals with the regulation of military activities on indigenous lands and territories, the requirement of "prior effective consultations" is embedded.[53]

The strongest participatory norm—free, prior, and informed consent—is included in a large number of provisions. Article 10 deals with relocation; Article 11 with cultural, intellectual, religious and spiritual property; Article 28 with possible redress for confiscated lands; Article 29 with storage of hazardous waste or other materials and Article 19 with legislative matters that may affect indigenous peoples. Article 32— one of the most important provisions of the UNDRIP—requires FPIC when certain projects affect their lands, territories and resources.[54] These provisions should be seen in light of Articles 25 and 26, which emphasize that indigenous peoples have the right to their lands, territories and resources[55] and that they "have the right to maintain and strengthen their distinctive spiritual relationship"[56] with those lands. Altogether, the UNDRIP contains over twenty provisions that concern the right of indigenous peoples to participate in decision-making processes on matters of their concern.[57]

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[47] *See* UNDRIP, Article 4. Also see, Helen Quane, *The U.N. Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?*, in Reflections on the U.N. Declarationa on the Rights of Indgigenous Peoples, (S. Allen & A. Xanthaki eds., 2011), *pp.* 272–73.
[48] UNDRIP, Article 18.
[49] UNDRIP, Article 19.
[50] *See* Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 Am. Indian L. Rev (2006-2007), p. 341,366. Miller describes these as a varying range of discursive requirements—that is, provisions that "map the 'terms and dynamics' of the discourse between indigenous peoples and the states in which they reside."
[51] UNDRIP, Articles 11(2), 12(2), 14(3), 22(2), 27, 31(2).
[52] UNDRIP, Articles 15(2), 36(2), 38.
[53] UNDRIP, Article 30.
[54] UNDRIP, Articles 10, 11, 19, 28, 29, 32.
[55] UNDRIP, Article 26.
[56] UNDRIP, Article 25.
[57] Expert Mechanism on the on the Rights of Indigenous Peoples, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, Par. 8, U.N. Doc. A/HRC/15/35 (Aug. 23, 2010).

ANALYSIS OF UNDRIP NORMS BY ITS MONITORING MECHANISMS

The main monitoring mechanisms of the UNDRIP are the UNPFII, the Special Rapporteur and the EMRIP.[58] During the UNPFII annual sessions, indigenous representatives get the chance to voice their concerns and allege possible violations of their rights. Often these relate to their rights to participation, consultation, and consent in relation to plans, policies, or projects that affect them. The Special Rapporteur and the EMRIP however, have devoted a number of studies and reports to these concepts. Those findings that are relevant to the EMRIP's current thematic study on free, prior and informed consent, are discussed here.[59]

Indigenous peoples' participation in decision-making processes on the full spectrum of matters that affect their lives is seen as the fundamental basis for the enjoyment of the full range of human rights. The Declaration "distinguishes between internal and external participation" since it "affirms the right of indigenous peoples to develop and maintain their own decision-making institutions" while they also have the right to participate—externally—in decision-making processes of their states of residence.[60]

In his 2010 Interim Report, James Anaya, described that the internal aspect of the right to participation concerns indigenous peoples' autonomy and self-government: "in order that they may genuinely take control of their own affairs in all aspects of their lives and to ensure that matters affecting them are aligned with their own cultural patterns, values, customs and world-views."[61]

The external dimension is connected to decision-making by actors that are external to indigenous communities.[62] Anaya identified three main areas in which external participation is relevant. Firstly, it is important in relation to participation of indigenous peoples in public life, although this area concerns mainly individual rights.[63] Secondly, Anaya emphasizes effective participation of indigenous peoples at the international level.[64] Thirdly, and most importantly, Anaya explains that external participation relates to the participation of indigenous peoples in decision-making by state actors about measures that affect indigenous peoples' rights or interests in particular.[65] The Special Rapporteur noted that:"In this regard article 18 of the UN Declaration states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights." This right includes a corollary duty of States to consult with indigenous peoples in matters that affect their rights and interests in order to obtain their free, prior and informed consent, as recognized, especially, by article 19 of the Declaration."[66]

Anaya maintains that "it is evident that adequate consultation mechanisms are lacking throughout the world and that […] indigenous peoples do not adequately control their territories in many cases."[67] Moreover, in nearly all the countries he visited as Special Rapporteur, he heard "reports of a lack of

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[58] For this contribution, it seems unnecessary to go into the details of their mandates and functioning.

[59] *See* Expert Mechanism on the on the Rights of Indigenous Peoples, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/15/35 (Aug. 23, 2010). Expert Mechanism on the Rights of Indigenous Peoples, Final Study on Indigenous Peoples and the Right to Participate in Decision-Making, U.N. Doc. A/HRC/EMRIP/2011/2 (May 26, 2011) (Focusing on examples of good practices of indigenous participation in decision making); Expert Mechanism on the Rights of Indigenous Peoples, Report of the Expert Mechanism on the Rights of Indigenous Peoples on its Fourth Session (Geneva, July 11–15, 2011), U.N. Doc. A/HRC/18/43 (Aug. 19, 2011) (Studying the right to participate in decision-making). Special Rapporteur (Interim) Reports: A/HRC/12/34 (July 15, 2009), A/HRC/15/37 (July 19, 2010), A/65/264 (Aug. 9, 2010), A/HRC/33/42 (11 August, 2016), A/HRC/36/46 (1 November 2017).

[60] A/HRC/15/35, par. 3.

[61] A/65/264, par. 46.

[62] A/65/264, par. 42–45.

[63] A/65/264, par. 43.

[64] A/65/264, par. 44.

[65] A/65/264, par. 45.

[66] Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya (July 12, 2010), *available at* unsr.jamesanaya.org/statements/statement-of-special-rapporteur-on-the-right-to-participation-to-the-emrip-2010.

[67] A/65/264, par. 49.

adequate participation of indigenous peoples in the design, delivery and monitoring of programmes and policies that specifically affect them, at all levels."[68]

The current Special Rapporteur, Victoria Tauli-Corpuz, emphasizes the important role of indigenous peoples' rights to participation and free, prior and informed consent in relation to the environment in her 2017 annual report.[69] In her 2016 report, she already exposed the strong link between international development and investment plans and the need for indigenous consultation, participation and consent: "international human rights law standards require good-faith consultations to obtain their free, prior and informed consent. This requirement applies prior to the enactment of legislative or administrative measures, the development of investment plans or the issuance of concessions, licenses or permits for projects in or near their territories."[70] In relation to corporate commitments, she concedes that: "implementation of those commitments remains poor, and issues remain surrounding the interpretation of indigenous peoples' rights, in particular the right to give or withhold free, prior and informed consent."[71]

The EMRIP itself has clearly articulated the fact that effective participation is closely connected to self-determination and FPIC:

> The principle of participation in decision-making also has a clear relationship with the right of indigenous peoples to self-determination, including the right to autonomy or self-government, and the State obligation to consult indigenous peoples in matters that may affect them, based on the principle of free, prior and informed consent. These legal concepts form an inherent part of any discussion of the right of indigenous peoples to participate in decision-making, and will be considered throughout the report as important aspects of that right.[72]

These three legal concepts—participation, self-determination, and FPIC—and their interrelation are closely studied by the Expert Mechanism. Self-determination is considered to be the normative basis for the right to participation and concerns an ongoing process of participation that enables indigenous peoples to control their destinies and their own chosen pace of economic, cultural, and social development. Indigenous peoples themselves also see "free, prior, and informed consent as a requirement, prerequisite, and manifestation of the exercise of their right to self-determination."[73] The EMRIP identifies FPIC as being of fundamental importance for indigenous peoples' right to effective participation since it establishes the framework for all consultations relating to the acceptance of projects affecting them.[74] In other words, for consultations to be successful, they will have to be free, informed, and prior to the decision.[75] This right may include the option to give or withhold consent.[76] The Inter-American Court of Human Rights has further clarified this reasoning in – at least – two landmark cases: Saramaka v. Suriname and Sarayaku v. Ecuador.[77]

More research on the elements of FPIC was conducted longer ago in the framework of the WGIP and the UNPFII.[78] FPIC is not a new right in international law, but it is increasingly seen as one of the

[68] A/65/264, par. 50.
[69] A/HRC/36/46 (2017), par. 35, 45, 46.
[70] A/HRC/33/42 (11 August, 2016), par. 17.
[71] A/HRC/33/42 (11 August, 2016), par. 24.
[72] A/HRC/15/35 (Aug. 23, 2010), par. 5.
[73] A/HRC/15/35 (Aug. 23, 2010), par. 34.
[74] A/HRC/15/35 (Aug. 23, 2010), par. 34–36.
[75] *See* Econ. and Soc. Council, Permanent Forum on Indigenous Issues, Fourth session, New York, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, E/C.19/2005/3, at par. 46–47 (providing the "[e]lements of a common understanding of free, prior, and informed consent" and stating that "[c]onsultation and participating are crucial components of a consent process").
[76] Ibid*.*, par. 47.
[77] Saramaka, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012).
[78] *See* Antoanella-Iulia Motoc, Working Group on Indigenous Populations, Standard Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1 (July 14, 2005); UNPFII, Rep. of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and

most important standards to protect indigenous peoples' right to self-determination. In relation to the different elements of FPIC, "free" or "freely" implies that consent is obtained without coercion, intimidation, or manipulation.[79] However, at least some form of coercion will often be present when governments or companies want to commence a certain activity, so it is essential that offers, pleas, or bids do not turn into forms of more "hostile" coercion like very subtle forms of bribery.[80] "Prior" should imply consent is sought "sufficiently in advance of any authorization or commencement of activities" and in a manner that respects time requirements for internal deliberation and debate within communities.[81]

"Informed" implies a number of different things depending on what kind of project is being proposed. But generally it should include information that covers: "The nature, size, pace, reversibility and scope of any proposed project or activity," the reasons for the project, accurate timeframes, and which areas will be affected by the project. Additionally, it also includes social, environmental, and cultural impact assessments and information on what kind of compensation or benefit sharing schemes are involved in case of development projects.[82] Effective communicative transactions in which indigenous peoples understand what is proposed and, conversely, are themselves properly understood, are essential for successful FPIC processes.[83]

With regard to its scope, the EMRIP noted: "As the right to free, prior and informed consent is rooted in self-determination, it follows that it is a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes."[84] The Expert Mechanism Progress report emphasizes the need for clarity concerning the implementation of FPIC in relation to projects affecting indigenous livelihoods. It underlines that "pro forma consultations" are not enough and that effective participation involves real influence in the decision-making processes. This line of reasoning is very much in line with the views of the CEACR explored earlier.

The right to effective participation also includes a corresponding duty of the state to consult indigenous peoples. The former Special Rapporteur closely studied the relation between the duty to consult, the right to effective participation and other universal human rights. In his 2009 report to the Human Rights Council, Anaya explained that often, and in a wide variety of situations, there is "a lack of adequate implementation of the duty of States to consult with indigenous peoples in decisions affecting them."[85] According to Anaya, involvement of indigenous peoples at the earliest stages of such decision-making processes is vital. Absence of such involvement "leads to conflictive situations, with indigenous expressions of anger and mistrust, which, in some cases, have spiraled into violence."[86]

The Special Rapporteur highlighted two areas in which the duty to consult is important: in the framework of constitutional and legislative reforms that affect indigenous peoples and in relation to development projects concerning resource extraction. Anaya argues that the "duty [to consult] is a corollary of a myriad of universally accepted human rights," like the rights to cultural integrity, equality, and property.[87] Further, he states, "more fundamentally, [the duty to consult] derives from the overarching right of indigenous peoples to self-determination and related principles of democracy and

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Indigenous Peoples, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005) (presented at the fourth session of the United Nations Permanent Forum on Indigenous Issues in New York on May 16–27, 2005).

[79] E/C.19/2005/3, par. 46.

[80] Rombouts SJ, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*, Wolf Legal Publishers, 2014, p. 138-139, drawing on P Pettit, A Theory of Freedom: From the Psychology to the Politics of Agency (2001).

[81] E/C.19/2005/3, par. 46.

[82] See *Saramaka People v Suriname*.

[83] Rombouts SJ, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*, Wolf Legal Publishers, 2014, pp. 164-166, drawing on N Manson, O O'Neill, Rethinking Informed Consent in Bioethics (2007).

[84] A/HRC/15/35 (Aug. 23, 2010), par. 41.

[85] A/HRC/12/34 (July 15, 2009), par. 36.

[86] A/HRC/12/34 (July 15, 2009), par. 36.

[87] A/HRC/12/34 (July 15, 2009), par. 41.

popular sovereignty."[88] Consultation and consent rights are therefore no special rights for indigenous communities, but basic democratic principles.

Self-determination responds to "aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them."[89] These principles imply a duty to consult indigenous peoples in decisions affecting them, with the aim to "reverse the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached."[90]

For indigenous peoples, this may require special, differentiated consultation procedures when certain activities affect them.[91] Anaya explains that the justification of such differentiated procedures arises from the nature of the interests involved. These interests are specific for indigenous peoples considering their "distinctive cultural patterns and histories, and because the normal democratic and representative processes usually do not work adequately to address the concerns that are particular to indigenous peoples, who are typically marginalized in the political sphere."[92] They are often marginalized in the political sphere, and therefore there is a need for special measures to address their disadvantaged position.[93]

"It would be unrealistic to say that the duty of States to consult directly . . . applies literally, in the broadest sense, whenever a State decision may affect" indigenous peoples, since those may affect them in a variety of ways very often.[94] Nevertheless, "a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence" leads to the following assessment of the scope of the duty to consult:[95]

> It applies whenever a state decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation.[96]

In relation to lands and resources, Anaya noticed that this duty does not only arise when rights to land or other legal entitlements are already recognized, but whenever indigenous peoples' particular interests are at stake.[97] This broad and general view on the duty to consult is similar to how the consultation requirements in C169 are understood, as was explored above.

In summary, the duty to consult and the duty to obtain FPIC of indigenous peoples are corollaries to the right to effective participation. However, the lack of indigenous peoples' participation, consultation, and consent remains a major problem, especially in relation to development projects and resource extraction activities on indigenous territories.[98] Without effective participation in decision making on matters concerning their livelihoods, indigenous peoples will not be able to fully enjoy their rights to lands and resources or to activate their right to self-determination. The UNDRIP focuses even

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[88] A/HRC/12/34 (July 15, 2009), par. 41.
[89] A/HRC/12/34 (July 15, 2009), par. 41.
[90] A/HRC/12/34 (July 15, 2009), par. 41.
[91] Will Kymlicka has explored the need for "special groups specific measures for accommodating national and ethnic differences" in his well-known research: W Kymlicka, Multicultural Citizenship: A Liberal Theory on Minority Rights (1995).
[92] A/HRC/12/34 (July 15, 2009), par. 42.
[93] A/HRC/12/34 (July 15, 2009), par. 42.
[94] A/HRC/12/34 (July 15, 2009), par. 43.
[95] A/HRC/12/34 (July 15, 2009), par. 43.
[96] A/HRC/12/34 (July 15, 2009), par. 43.
[97] A/HRC/12/34 (July 15, 2009), par. 44. Anaya notes with concern that some States "have effectively or purposefully taken the position that direct consultation with indigenous peoples regarding natural resource extraction activity or other projects with significant environmental impacts, such as dams, is required only when the lands within which the activities at issue take place have been recognized under domestic law as indigenous lands.").
[98] A/HRC/15/37 (July 19, 2010), par. 82.

more on consultation and participation than ILO Convention 169 does. In addition to consultation duties, the UNDRIP also includes the explicit requirement of FPIC.

The studies carried out by the EMRIP and Special Rapporteur shed light on the reasons for the emergence of the consultation norms embedded in the UNDRIP as well as on their content. Nevertheless, they also make clear that more research is needed in order to effectively implement consultation and consent requirements.

CONCLUDING OBSERVATIONS

In both C169 and the UNDRIP, consultation, participation and consent rights have a central place. The scope of the consultation, participation, and consent requirements broadened significantly with the adoption of the UNDRIP. While ILO Convention 169 and the UNDRIP differ in terms of their scope, legal nature, and support, they also overlap and complement each other. Both sets of standards contain a broad, general framework of consultation and participation provisions, and a number of specific consultation rights, most importantly in relation to lands and resources.

These rights are vital in order to realize indigenous peoples' right to self-determination, which is based on the idea that control over lands and resources will enable them to strengthen their institutions and identities and will help them determine their own futures and relationships with the states in which they live. However, international law is not sufficient: without some form of domestic recognition of land entitlements, the right to consultation easily becomes meaningless.

ILO Convention 169 includes consultation and participation rights in a large number of provisions. Consent is only explicitly required in relation to relocation of indigenous communities. The CEACR and other supervisory mechanisms of the ILO have explained that these consultation requirements must be formal, full, and exercised in good faith. There must be a genuine dialogue characterized by communication, understanding, mutual respect, and the sincere wish to find common ground. Furthermore, appropriate procedural mechanisms need to be in place, and indigenous peoples should be able to participate through their own representative institutions. The goal of consultations should always be to reach agreement or consensus, but this does not imply that indigenous peoples have veto powers over national legislation.

The UNDRIP includes similar provisions, but goes beyond the consultation requirements of ILO Convention 169 in requiring FPIC in a number of situations, in particular when it comes to large-scale development projects that affect indigenous peoples' lands, territories, and resources. The UNPFII, the EMRIP, and the Special Rapporteur have analyzed these central concepts of effective participation, consultation, and consent in their studies and reports. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, which includes a corollary duty of states to consult with indigenous peoples. The right to FPIC is rooted in the overarching right of self-determination, and therefore denotes a right of indigenous peoples to effectively determine the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes.

The Inter-American Court of Human Rights has applied the provisions on consultation and FPIC in different cases. Especially the Saramaka People v. Suriname and Sarayaku v. Ecuador cases are instructive.[99] In Saramaka, the Court relied on the UNDRIP in applying and interpreting FPIC while in Sarayaku, the Court applied the consultation provisions from C169, since Ecuador is a party to the Convention, and explained how these should be implemented in a free, prior and informed way. Both cases shed light on how to apply consent and consultation norms in cases of development projects but also reveal the need for better implementation on the ground.[100]

Free, prior and informed consent, consultation and participation are interrelated and interdependent tools to operationalize indigenous peoples' right to self-determination. Both the UNDRIP and C169 are important and complementary instruments in this respect. While FPIC is gaining ground as a key instrument to involve indigenous peoples in decision-making processes, more work and research is needed in order to improve its effective implementation.

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[99] Saramaka, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012).

[100] For the analysis, see, Rombouts 2017, pp. 211-222.