DOES INTERNATIONAL LAW ADDRESS THE CONCERNS OF INDIGENOUS PEOPLES IN THE DEVELOPMENT DISCOURSE?

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Abstract: Indigenous peoples have a distinctive and profound relationship with their lands and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities.[1]

Globalization in recent years has directed industries to expand their activities beyond their own countries. The development of natural resources in places until now untouched was triggered by the liberalization of international markets and technological advances. Thus, it is perceived as an excellent opportunity for the developing countries to attract foreign investments, to accelerate their economic growth and at the same time as an incentive for the private sector to increase its profits.[2] Yet, in the vast majority of these areas, the presence of peoples considered to be indigenous is encountered. Their different and special relationship with their lands and their resources, which often Western societies tend either to ignore or underestimate, makes them adopt a distinctive perception of the development of their natural resources in their traditional lands. Simultaneously, by this increasing development of natural resources projects, indigenous peoples' awareness of their existence has increased as well as indigenous identity has been strengthened.[3] Therefore, wherever there is a natural resource management and development, conflicts and disputes are almost inevitable.[4] History has shown that their involvement in the developmental activities is limited. According to Daes '[t]he expropriation of indigenous lands and

[1] Erica-Irene A. Daes, 'Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous peoples and their relationship to land.' UN Doc E/CN.4 /Sub.2/2001/21 (11 June 2001) UN Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights, para.121.

[2] Considerable researches affirm this view. See for instance, William Holden and Allan Ingelson, 'Disconnect between the Philippine Mining Investments Policy and Indigenous People's Rights, 25 *Journal of Energy and Natural Resources Law* (2007), 375; Janeth Warden-Fernandez and Mahmoud Firoozmand, Introduction , Special Issue on 'Indigenous Peoples and the Development of Natural Resources', *23 Journal of Energy and Natural Resources Law (2005)*, 385, 386 ; This special issue through a comparative analysis, provides the reader with an overview of the recognition and affirmation on indigenous peoples rights and the conflicts that can arise between indigenous and other parties; Janeth Warden-Fernandez ,'Indigenous Communities' Rights and Mineral Development' 23 *Journal of Energy and Natural Resources Law* (2005), 395,396.

[3] Fernandez, Firoozmand, ibid.

[4] See for further details about the problem of land and natural resource ownership and development, Victoria E Kalu ' State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria', 26 *Journal of Energy and Natural Resources Law* (2008), 424

natural resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation.'[5]

Keywords: (Globalization, Indigenous People, Liberalization, International Law, Development Discourse, Natural Recourses, Indigenous Lands)

INTRODUCTION

Our topic discourses the contribution of International Law to indigenous peoples' concerns about natural resources management and development. Our research will be restricted to an international level and we will not go through regional instruments[6]. Moreover our discourse does not exhaust this issue. On the contrary, in the global environment there are additional international standard-setting instruments containing provisions for the protection of indigenous peoples[7]. Our aim is to illustrate the main framework[8] within which indigenous peoples could act in order to protect their interests with connection to natural resources. Consultation and participation will consist our main guide.

Part I reviews the current legal regime which specifically addresses indigenous peoples' concern. A definition of indigenous peoples and a brief historical overview are presented at the beginning. We focus on Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries[9] as it is the main binding instrument about this issue. We examine ILO's Convention 169 connection with United Nations Declaration on the Rights of Indigenous Peoples[10] as it expresses the international community' s minimum legal standards to indigenous peoples' survival. Finally we review briefly the Convention on Biological Diversity[11] and its provisions about the special role indigenous peoples' knowledge possesses in the global united effort for conservation and sustainable use of biological resources and Agenda 21[12] which although non binding it contains a whole chapter[13] recognizing the unique relationship between indigenous peoples and their lands and natural resources. Part II indicates the appliance and impact of the regime as it goes through limited case study, examined under both ILO Convention 169 provisions and under other United Nations instruments and specifically under International Covenant on Civil and Political Rights. The consideration of cases related to instruments not referred in the first part helps us both to complete as far as possible the presentation of the global regime which addresses indigenous groups' concern about the management of their resources and also notice the interaction among different instruments in International Law. A reference to World Bank's policy implies the entrenchment that duty of consultation has obtained anymore.

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[5] Daes, note 1 above para. 132

[6] Like the Inter-American System and indigenous peoples, European instruments on human and minority rights, African Charter on Human and Peoples' Rights. For a deeper insight to these instruments, see, *inter alia*, Patrick Thornberry, *Indigenous peoples and human rights*, (Manchester University Press 2002), 244-320; S.James Anaya and Robert A. Williams, The Protection of Indigenous Peoples' Rights Natural Resources Under the Inter-American System, 14 Harvard Human Rights Journal (2001) 33-86.

[7] See United Nations Development Group Guidelines on Indigenous Peoples Issues, February 2008, at http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf 17. The Guidelines are designed to assist UN Country Teams integrate indigenous peoples' issues into country policies and programmes. The Guidelines were drafted by a group on UN organizations and specialized agencies under the aegis of the Inter-Agency Support Group on Indigenous Peoples' Issues; Fernandez and Firoozmand, note 2 above, 387; Marcos A. Orellana, 'Indigenous Peoples, Mining and International Law' (*Finding Common Ground*, A Report based on the work of the Mining Minerals and Sustainable Development Project at the International Institute for Environment and Development 2003) ,47-61.

[8] See for instance http://indigenousissuestoday.blogspot.com/2008/08/indigenous-peoplesdevelopment-natural.html.

[9] Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), adopted by the General Conference of the International Labour Organization, Geneva ,June 27, 1989, in force 5 September 1991.

[10] GA Res 61/295, 13 September 2007 (hereinafter UN Declaration).

[11] Convention on Biological Diversity adopted at The Nairobi Conference, 22 May 1992, opened for signature 5 June 1992 Rio de Janeiro, in force 29 December 1992.

[12] Agenda 21, The Rio Declaration on Environment and Development and the Statement of principles for the Sustainable Management of Forests were adopted by more than 178 Governments at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (Rio Summit), Brazil 3-14 June 1992; for further information see http://www.un.org/esa/sustdev/documents/agenda21/index.htm

[13] Ibid, Chapter 26.

PART ONE

Legal Framework

Definition of Indigenous Peoples

The definition of indigenous peoples is a primarily precondition when dealing with this discourse, both for indigenous and non indigenous stakeholders. Globally, there is no unique definition despite the efforts made from time to time.[14] Spreaded all over the world, each of indigenous communities has its special and unique features, reflected to their internal social organization and affairs and to their external approach and conceptualization for the "outside world". They are distinctive groups living surrounded 'by settler groups born of the forces of empire and conquest'[15]. Today when we are referring to indigenous peoples we mean 'the living descendants of preinvasion inhabitants of lands now dominated by others'[16].

Further and more secure data may be deduced from the international criteria, laid down by international instruments or bodies with respect to this issue[17]. A wider definition, that this article accepts and uses, is the following:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.18

While there was an effort by the international community to end up with a definition regarding the term "indigenous", indigenous groups themselves did not actually want such a definition. International law has not defined minorities either. Self-determination has always been considered the main criterion.

Instead, they insisted on their right to determine their own members.[19]

Historical overview

The solution to indigenous peoples' concerns came through the emerging human rights law and norms some decades ago. Just like many other oppressed peoples, indigenous peoples realized that human rights law has come 'to assume a more authoritative and even constraining role on state actors in the world'.[20] They realized that the international bodies and forums could help them raise their voice against the infringements of their rights suffered all these years.

In the 70s, an indigenous Committee approached the UN asking for some protection. The 80s was of paramount importance for the indigenous peoples' movement. In the beginning of it and reflecting the impact of Indigenous Study, the UN Economic and Social Council approved the Working Group on Indigenous Populations[21] tasked with the development of international legal standards for the protection of their human rights. Because of its experts membership[22] it directly addressed the

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[14] For a comprehensive study on this issue see Thornberry, note 6 above 33-60.

[15] See .James S Anaya, *Indigenous peoples in International Law*, 2nd ed. (Oxford University Press 2004), 3.

[16] Ibid.

[17] See; *inter alia* ILO Convention (No 169) Art.1.

[18] Jose Martinez Cobo, United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Peoples* UN Document E/CN.4/Sub.2/1983/21/Add 8 para 379, Chapter XXI-XXII (hereinafter Indigenous Study)

[19] See Hurst Hanuum, 'New Developments in Indigenous Rights' 28 *Virginia Journal of International Law* (1987-1988) 665.

[20] See Robert A. Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in The World', *Duke Law Journal* (1990) 660-209.

[21] Human Rights Commission Res. 1982/19 (10 March 1982)E.S.C Res 1982/34 (7 May 1982), UN ESCOR 1982, Supp.(No1) at 26,27, UN Doc E /1982/82 (1982) ;See also for deeper insight on the development of this movement Hanuum, note 19 above, 660; Russel Lawrence Barsh 'Indigenous Peoples in the 1990s:From object to subject of International Law?' 7 *Harvard Human Rights Journal*, 33; see also Erica -Irene Daes, *United Nations and Indigenous Peoples from 1969 to 1994*, in http://www.uit.no/ssweb/dok/series/n02/en/102daes.htm

[22] Five members drawn from the select group of international law experts sitting on the United Nations Sub Commission on the Protection of Discrimination and Protection of Minorities, thus were familiar with the doctrine of discovery and the consequent marginalization; for further details and the primarily role that Working Group held with

concerns that have been figured most consistently in the stories of indigenous peoples, like, *inter alia*, the centrality of territorial rights to their survival. The most significant outcome, as a result of more than twenty years of work by indigenous peoples and by the United Nations System[23] is the UN Declaration, finally adopted in 2007. The Eighty's ended with the ILO Convention 169 which recognized Indigenous Peoples' rights to self government and is the main legal binding instrument facing indigenous peoples' issues and specifically addresses their right over land and natural resources. ILO Convention 169 and Convention on Biological Diversity comprise the legal binding instruments address specifically our issue.

Right to Natural Resources Management[24]

Distinctiveness of the Right

. The right to natural resources management and development, as part of land rights, represents the clearest example of collective rights, since land rights is the field where the nature of the relationship of indigenous peoples to lands and resources is best reflected[25]. Moreover the self–determination principle, as a principle one can suggest that it is reflected in the ILO 169, but it has definitely not been recognised by the convention ILO Convention 169[26] and UN Declaration[27], is fundamental when we are dealing with the right to natural resources management. It consists of the base upon which specific indigenous groups assert their right to exercise full control over land and natural resources, whereas for other groups is used to claim full independence and statehood[28]. Other groups do not have a wider right to self-determination; territorial integrity prohibits them as much as it prohibits indigenous peoples. Probably you mean that indigenous have mainly focused on this aspect of the right. Rights to lands and resources are considered to be one category between the international norms concerning indigenous peoples which elaborate upon the requirements of self-determination[29]. Indeed, although it is debatable whether this falls within the principle or the right to self-determination; see Xanthaki, Indigenous rights and UN standards (CUP, 2007)

Principal Provisions

When we are referring to natural resources the concept includes the entire environment: surface and sub-surface, waters, forests, ice and air[30]. Specific provisions are included both in the ILO Convention 169 in Article 15[31] and the UN Declaration in Articles 25-32. However, these Articles do not stand on their own, but are interpreted and used with other relative provisions within the same instruments, as we will examine hereupon. Participation and consultation in decision-making progress as prescribed in the above instruments is the key on indigenous peoples' concern about the development and management of their natural resources. I think that actually ownership may also be within their claims. Participation in the benefits arising from developmental activities as well as compensation for damages they sustain as a result of such activities, ensure their active involvement to these projects.

Participation/Consultation

respect to this initiative, see Williams, note 20 above, 182;

[23] For a brief historical overview, see http://www.un.org/esa/socdev/unpfii/en/declaration.html; for the same issue and the significant role of UN see also, Siegfried Wiessner 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', 12 *Harvard Human Rights Journal* (1999), 101-104.

[24] Although rights to natural resources are an indispensable part of rights in land, we will try to confine our research only to the relative provisions, as far as it is possible, with the specific issue.

[25] See, Thornberry, note 6 above, 346.

[26] ILO Convention, art.2.2.

[27] UN Declaration, art.3.

[28] See Hanuum, note19 above, 671.

[29] See Anaya, note 15 above 97-115, 129; for further details about principle of self determination and its appliance to indigenous see, *inter alia*, Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples,(* Earthscan, London, Sterling VA, 2008), 11-17;Erica-Irene Daes 'Some Considerations on the Right of Indigenous Peoples to Self –Determination' 3:1 *Transnational Law and Contemporary Problems (1993), 1-11*,

[30] See UN Guidelines, note 7 above, 17; see also Thornberry, note 6 above, 352, concluding that '…Articles 15 and 16 includes the traditional use of freshwater areas, as well as "lands" in the narrow sense'.

[31] Article 15 caused the most polemic than any other provision. See Lee Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' 15, *Oklahoma City University Law Review* (1990) 703-704. He states:
The basic argument is simple. The right to the enjoyment of the land in conformity with the customs of many of these peoples necessarily implies the right on the resources pertaining to it. It is the presence of natural resources on their lands, and the presumption by the national powers structures of the right to exploit them without consideration for the presence of these peoples, that is the principal threat to their continued existence.

Before examining details, it is necessary to define that the term 'their lands' in Article 15 of ILO Convention 169 should be read subjectively to Article 13.2 and so include 'the concept of territories, which covers the total environment of the areas which peoples concerned or otherwise use'. This provision enlarges the scope of the Convention, as the rights to natural resources are not confined to land owned or possessed. Similar is the Provision 26.2 of the UN Declaration.

Article 15.1, which is broadly framed, does not define the specific rights to which it is referred, but in the contrary enumerates some in the second sentence of the paragraph[32]. It inserts the notion of participation in the use, management and conservation of natural resources, which was already introduced by the preamble of the Convention when saying '[r]ecognising the aspiration of these peoples to exercise control over…ways of life an economic development…' This article should be read and combined both with article 7.1 of the same Convention which includes power of decision[33], participation[34] and control[35] and article 6.1(b) and 6.1(c). The latter's present the main elements of participation, such as participation during the design of a project, policy or programme and at every step along the way and participation at all levels of decision making, thus local, national and regional and participation through indigenous and tribal peoples' own traditional representative bodies and not through unauthorized organs[36]. UN Declaration affirms this widely accepted view of participation in Article 18, which states that '[I]indigenous peoples have the right to participate fully, if they choose so, at all levels of decision making which may affect their rights' and more specifically in Article 27. According to Anaya '[i]t is evident that this requirement [participation] applies not only to decision making within the framework of domestic or municipal processes but also to decision making within the international realm.'[37]

In this context of indigenous-state relations, this concept of participation has given rise to requirements of consultation[38]. These requirements are to be applied whenever the state makes a decision that affects indigenous peoples. Article 6.1 (a) affirms government's duty to 'consult the people concerned, through appropriate procedures and in particular through their consultative representatives, whenever consideration is being given to legislative or administrative measures witch may affect them directly'. Article 15 clarifies that consultation requirement applies when natural resource projects or other developmental activities are proposed for areas that included in indigenous territories.[39]

Article 15.2 makes clear this is required even if the resources at stake belong to state and are not owned by indigenous. Legally they belong to the state, not always morally. Although it does not go so far as to recognize rights to indigenous peoples with respect of mineral or sub-surfaces resources, obviously because of the principle prevalent in so many countries, that the state retains the ownership of some categories of resources;[40] it does however interpose requirements of consultation even in this case which are strengthen by general provisions.

This Article prescribes what should happen in the case that a company wishes to extract mineral or other resources from indigenous and tribal peoples' land, granted this right by the government as the legal owner of these resources. In such a situation, indigenous peoples are to have a say in any exploitation or exploration regardless the formal ownership of the land or the exclusivity of their occupation. Moreover this 'inquiry (or other appropriate procedure)'[41] must be before the allowing exploration or exploitation, of the natural resources pertaining to these people's lands[42]. This requirement is hardened by the provision in Article 6.2, which states '[t]he consultations… shall be undertaken, in good faith and in a form appropriate to the circumstances, *with the objective of achieving agreement or consent* to the proposed measures' (emphasis added). The UN Declaration in this sense and in a general statement about consultations[43] requires '…prior and informed consent.'[44] and therefore goes beyond simple consultation.

We could remark here a vacuum in the Convention as it 'did not properly recognize the crucial requirement

[32] Ibid.
[33] '…shall have the right to decide their own priorities…'
[34] ' …they shall participate in the formulation, implementation and evaluation of plans and programmes… which may affect them directly'
[35] '…and to exercise control…over their own economic, social and cultural development.'
[36] See ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169) A Manual (hereinafter Manual), International Labour Organization (2003), 19.
[37] Anaya, note 15 above, 153.
[38] Ibid, 154
[39] Ibid.
[40] Swepston , note 31 above, 704
[41] Ibid, 705
[42] ILO Convention 169, art 15.2
[43] UN Declaration, art.19
[44] Ibid.

of indigenous consent'[45]. Indeed we conclude from the grammatical interpretation that there is no demand for consent but an exhortation for it. In other words nothing more than a wishful target is expressed, which of course is not only quite subjective and difficult to figure whether a consultation is leading to this point or not, but also is not binding. Hence there is *no right of veto* (emphasis added) over developments plants[46], however, the second sentence of the Article 15.2 says that '[t]he peoples concerned shall, wherever possible, participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities' seems to balance slightly this shortcoming as we will examine thereafter. The prior and informed consent is a major issue at the moment and has been discussed by the Permanent Forum on Indigenous Issues as much as the last report of Anaya.

What we should underline although with regard to consultations or other appropriate mitigate measures, is the two elements that enforce these measures. Firstly, the collocutors for the consultation must be indigenous and tribal peoples' institutions[47] and organizations and not just unauthorized organs vulnerable to state's wish. Secondly the good faith[48] that focuses on the mutual needs and consultation *in concreto.* Consultations processes 'must be crafted to allow indigenous peoples the opportunity to genuinely influence that effect their interest'[49] thus this procedure should not be perceived as a typical one in order to fulfill the obligation imposed and has to be conducted according to the specific circumstances. It is very important to note that in this line UN Declaration not only reaffirms these points but also goes even further[50] than ILO Convention 169 when stating:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to *obtain their free and informed consent* prior to the approval of any project affecting their lands and territories and other resources particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[emphasis added][51]

So, is the free, prior and informed consent needed? See last report of Anaya on UN website.

Benefits and Compensation

As we discussed ILO Convention 169 does not reserve for indigenous peoples a right of veto over developments plans. Despite the fact that they have the right to express their contradiction to these projects (e.g. environmental deterioration, degradation, loss of subsistence economy etc), they are legalized according to the Convention to participate in the benefits of exploration and exploitation as well as to be compensated[52]. Thus these rights can operate as 'bargaining tools'[53] when negotiating with other stakeholders. They can persuade them, or at least they are entitled to, to adapt their techniques which may have less adverse effects for the environment and themselves and to let them contribute to the restoration of the environment afterwards.[54]

We can indicate at this point an other weakness of the language of this article. The 'participation in the benefits/profits'[55] principle is just 'wherever possible'[56] . There is an obvious vagueness. Apparently this could function as a tool for the part ?? that does not wish to share the benefits. Some argue that the words 'wherever possible' establish an obligation on ratifying states to 'demonstrate that it is *not* possible before denying such participation'.[57] Once again UN Declaration builds upon the foundation laid in the ILO Convention 169. It poses as uppermost priority that the integration of the environment and compensation will be given only in the condition that the restitution is not possible[58]. This compensation must be 'just, fair and equitable'.[59] Furthermore, unless otherwise agreed, 'shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'[60]. Consistently it reaffirms the indigenous peoples' right to 'determine and develop priorities and strategies for the development or use of their lands or territories

[45] See Thornberry, note 6 above, 349 and the very important remarks there.
[46] Ibid; Manual Note 36 above, 40.
[47] ILO Convention 169, art.6.1(a)
[48] Ibid, art.6.2
[49] See Anaya, note 15 above, 154.
[50] See Traci L.McClellan, 'The role of International Law in Protecting The Traditional Knowledge and Plant Life of Indigenous Peoples' 19 *Wisconsin International Law Journal*, (2001) 6.
[51] UN Declaration, art.32.2
[52] ILO Convention 169, art.15.2 second sentence.
[53] Manual, note 36 above, 40.
[54] Ibid.
[55] Thornberry, note 6 above, 356.
[56] ILO Convention 169, art.15.2 second sentence.
[57] See Swepston note 31 above, 705 and his important remarks.
[58] UN Declaration art 28.1
[59] Ibid.
[60] Ibid art.28.2.

and other resources'[61]. Hence they are supposed to be part of the development and not just spectators without interests.

Also see the work of Jeremie Gilbert on land rights; also Luis Pineiro on the ILO No. 169. Also see special issue of Arizona Journal of International Law (2006).

Convention on Biological Diversity and Agenda 21

According to the definition of the concept we attached to natural resources it includes both sub-surface resources and biological resources. Therefore it becomes clear that the contribution of Convention on Biological Diversity towards the management of these resources cannot be underestimated. Having as an uppermost target the conservation and sustainable use of biological resources, Article 8(j) is included in the Convention aiming at ensuring that indigenous peoples' knowledge, innovations and practices will receive the appropriate treatment by the states.

The Convention on Biological Diversity enforces the duty of consultation.[62] It provides for[63] 'wider application' of 'indigenous and local communities knowledge, innovations and practices' with the 'approval and involvement of the holders of such knowledge'. Therefore it becomes essential to allow indigenous peoples to express their deeper feelings about the management of natural resources. As they were able to conserve these resources for innumerable years, they could obviously contribute to their current conservation and hence the management that other parties may seek. In the same sense Agenda 21, strongly encourages the empowerment of indigenous peoples 'through recognition of their values, traditional knowledge and resources management practices with a view to promoting environmentally sound and sustainable development'[64] and urges states to '[d]evelop or strengthen national arrangements to consult with indigenous people…in the field of natural resource management and conservation…'[65]. Finally we should highlight the provision in Article 8(j), which entrusts the task to states to 'encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices'. Convention on Biological Diversity as widely accepted[66] and in total harmony with ILO Convention 169 and UN Declaration similar provisions, offers indigenous peoples a supplementary tool when in negotiations and when they want to 'bring their claims before the nation – state they reside'[67].

PART TWO

Implementation of International Norms

Legal precedents

In the previous section we tried to indicate how International Law led indigenous peoples' concerns to the point that their particular rights and their special connection with land and natural resources are henceforth widely recognized. As we have already noticed, consultation and participation are the basic requirements when dealing with indigenous peoples' issues and the management of their natural resources. 'Ambiguity remains however to the extent and content of the duty of consultation owed to indigenous people'.[68]

In this section we will go through some legal precedents, applied under the regime we examined, specifically under ILO Convention 169 and also under United Nations legal framework and Article 27 of the International Covenant of Civil and Political Rights[69]. Through the following cases we will try to indicate how consultation is perceived and which substantial elements should exist in order to be effective. Although the latter Convention and its specific provision do not refer to indigenous peoples in particular, has nevertheless been interpreted by United Nations Human Rights Committee in a manner that strengthens indigenous peoples' status and involvement in activities that may have an impact on them[70].

[61] Ibid art. 32.1.
[62] See McLellan note 50 above, 6.
[63] Convention on Biological Diversity, art.8 (j).
[64] Agenda 21, Chapter 26.3 (iii).
[65] Ibid, Chapter 26.6 (a)
[66] Up to date 168 Signatories (191 Parties), for additional details, see http://www.cbd.int/convention/parties/list/

[67] McLelan note 50 above, 4.
[68] James Anaya 'Indigenous peoples participatory rights in relation to decisions about natural resource extraction: The More Fundamental Issue of what Rights Indigenous Peoples Have in lands and Natural Resources', 22 *Arizona Journal of International and Comparative Law* (2005), 7
[69] International Covenant on Civil and Political Rights (ICCPR), General Assembly resolution 2200A (XXI) of 16 December 1966, in force 23 March 1976. Article 27 reads 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'
[70] General Comment No. 23: The rights of minorities (Art. 27) 08/04/94.

ILO Convention 169

One of the benefits of ratifying ILO Convention 169 is the access to complaint procedures connected with ILO Conventions[71]. We can separate two distinct complaint procedures. According to article 24 of the ILO Constitution,[72] 'an industrial association' of workers or employers may make a representation to the ILO that 'a country has failed to secure in any effect the effective observance within its jurisdiction of any convention to which it is a party'. What is significant is that the definition of an industrial association is flexible 'including ' trades-unions, local, national or international associations, indigenous peoples' organizations, campesinos' unions that represent farmers, fishers, artisanal workers, or other indigenous workers…'[73]. Representations are reviewed by a committee of three members of ILO Governing Body. Under Article 26 of the ILO Constitution, complaints about a state declining its obligations which arise from an ILO Convention, as the state has ratified, it can be instituted by a delegate of the International Labour Conference[74] or by an ILO member State that has ratified the same Convention. This second procedure is hardly ever used in connection with ILO Convention on indigenous peoples. On the contrary, ILO Convention 169 'has been one of the most invoked instruments in relation to the article 24 procedure'.[75]

U'wa's case.[76]

This case was submitted in November 1999 by the Single Confederation of Workers of Colombia (CUT).[77] They alleged that Colombia, acting through the Ministry of the Environment '…issued an environmental licence for Occidental [US company] to begin petroleum exploration activities in U'wa territory without previously consulting the indigenous community affected…. [w]ithout taking coordinated action to protect the rights of the indigenous peoples concern and without respecting their social and cultural identity, customs, traditions and institutions.[78] In this case a first license was granted on February 3rd 1995, to undertake petroleum exploration activities in particular in a territory known as 'Gibraltar 1'. In this case two meetings took place with the participation of U'wa representatives. One before the license was issued (10 and 11 January 1995) and an other after the license was issued (February 21st 1995).[79] A second environmental license was issued by the Ministry of Environment and permitted exploration in the same region. This time no consultation at all had taken place.[80]

CCPR/C/21/Rev.1/Add.5. Paragraph 7 reads:
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 he 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.

[71] See for further details about ILO Complaint and Oversight Mechanisms Fergus McKay, 'Indigenous Peoples' Rights in the International Labour Organization, Forest Peoples Programme; Anaya note 15 above 217-291.

[72] Constitution of the International Labour Organization, 9 October 1946, article 24.

[73] McKay, note71 above, 22.

[74] 'This most likely would be a representative of a Worker's delegation, who may also be an indigenous person', McKay ibid.

[75] Anaya, note 15 above, 250.

[76] 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 aricle 24 of the ILO Constitution by the Central Unity Worker's Union (CUT) UNDoc GB.276/17/1,GB 282/14/3. submitted 1999 (hereinafter U'wa Report)

[77] Although the case impugned the lack of consultation in three different situations a) the adoption of decree No 1320/1998 on prior consultation b) the improvements to the Troncal del cafe Highway which cuts through the Christiania Indigenous Reservation c) issuing a petroleum exploration license to oil company in indigenous lands, we will focus on the last one.

[78] U wa Report, para 28.

[79] After internal judicial procedures that finally favoured indigenous peoples, the Colombian Council of State ruled in favour of Occidental, finding that prior consultation had taken place and permitted exploration activities to begin. U wa Report, paras. 33-35.

[80] The license was based to an official document sent by Ministry of the Interior few days ago, stated that '…the project's area of operations and the portion of land that has not officially been accorded (protected) status is neither regularly nor permanently occupied by indigenous communities'. U wa Report para. 41

The Committee reached to the conclusion that Colombia was required according to the terms of Article 15.2 of the ILO Convention 169 to consult the U'wa with a view to determine whether their interests would be harmed, before authorizing the exploratory operations. Since 'Gibraltar 1 well is situated within an area that includes ancestral territories of the Uwa and in any case only about 1.7 kilometres from the boundaries of the new U'wa Single Reserve, it is clear to the Committee that the area of operations of the "Gibraltar 1 exploratory well project" would have an impact on the communities in that area, including the U'wa communities'.[81]

Emphasizing to the mutual respect, good faith and sincere desire to reach a consensus, as elements included to the concept of genuine dialogue that should exist to the negotiations, Committee stated that '[a] meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention.'[82] Interpreting the term 'prior' consultation, the Committee indicated that this term 'implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies'[83]. Consequently, in this case the consultations and meetings conducted after the licence's issue 'do not meet the requirements of articles 6 and 15(2) of the Convention' so Colombia was found to have violated the Articles in question because 'due process of prior consultation with the peoples affected' had not been conducted.

Shuar's case[84]

This case was submitted in January 2000, by a trade union on behalf of the Independent Federation of the Shuar People of Ecuador (FIPSE) an indigenous organization. This case also deals with the provisions related to consultation[85]. It is mainly about an agreement made between the US Government and a US oil company (Arco) concerning rights to exploit petroleum in an area known as Block 24 which covers around 70 percent of Shuar territory.[86] As in the U wa's case, Committee reaffirmed the substantial elements of consultation. [87] This case is mentioned so as to demonstrate how essential for the Committee, the principle of representativity is. While FIPSE, had decided 'not to allow any negotiations between individual members or any of its centres and associations'[88], alleged that Arco company 'tried to divide the local organizations and created fictitious committees to coordinate their activities and to denigrate indigenous organizations in the eyes of the public'[89]. Committee found that

the principle of representativity is *a vital component of the obligation of consultation* (emphasis added)… if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention. In this case… not only was the appropriate consultation not carried out with an indigenous organization clearly representative of the peoples concerned in the activities of Arco on Block 24 the FIPSE but that the consultations that were carried out excluded it, despite the public statement issued by the FIPSE in which it determined 'not to allow any negotiation between individual members or any of its centres and associations and the Arco company'.[90]

United Nations Human Rights Committee

The requirement of consultation has also been addressed by the UN Human Rights Committee. Two similar cases[91] were brought before Committee by

[81] Ibid para.87
[82] Ibid para 90.
[83] Ibid.
[84] Report of the Committee of Experts set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention 1989 (No 169) made under article 24 of the ILO Constitution by the Confederacion Equatoariana de Organizaciones Sindicates Libres (CEOSL) UN Doc GB.277/18/4, GB.282/14/2, submitted 2000 (hereinafter Shuar Report).
[85] CEOSL alleged that, 'although oil is a resource to which the Government has inalienable property rights and the oil company acted in the name of the Government, the members of the FIPSE were not informed that an agreement for the mining of hydrocarbons in the territory's subsurface had been signed nor were they at any time consulted in this regard' Shuar Report para.10
[86] For a brief overview of the facts see note71 above, 39.
[87] '[A] genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention' and [t]he 'obligation of prior consultation implies that the peoples concerned should be consulted before finalizing the environmental study and the environment management plan' Shuar Report paras.38-39
[88] Shuar Report, para. 13.
[89] Ibid para 15.
[90] Ibid. para 44.
[91] See Ilmari Lansman et al v Finland, Communication No 511/92 Human Rights Committee 52 Session. UN Doc.

reindeer breeders of Sami ethnic origins for violations of their cultural rights under article 27 of the ICCPR. In these cases, indigenous' interests in cultural integrity and rights of use for certain purposes imposed the duty to consult. [92]Claimants challenged the decision of the Central forestry Board to approve quarrying and logging activities by private companies. In both cases, ownership of the land traditionally used by the Samis remained unsettled[93]. Moreover in support of their contention of violation of Article 27, claimants invoked ILO Convention 169[94] *even though Finland has not ratified it* (emphasis added*)*, and in the second case[95] they invoked UN (Draft then) Declaration. In both cases Sami had expressed their concern, thus some changes to the licenses were made, even though in the Com 671/95 claimants asserted that their association was just informed of the logging plans and neither negotiation process nor real consultation had taken place[96]. Committee[97] posed as a crucial question[98] whether the impact of these activities was so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in the region and recalled paragraph 7 of its General Comment[99]. Relying on the fact of consultation as well as its view of the limited impact quarrying and logging had, reached to the conclusion that the Covenant had not been violated.

Human Rights Committee in this case, according to the author's view, in contrast with ILO Committee, fell short to uphold consultation's value and remark its substantial elements. As long as there was a process appearing as consultation, state had completed its duty[100]. In addition, Human Rights Committee did not consider Sami's property rights on the lands in question. In such case 'a more demanding duty of consultation would at least arguably have applied.'[101].

Influence in international practice

The basic elements of consultation provisions of ILO Convention 169 among with the whole importance attached to them by other relevant instruments have influenced various spheres of international and domestic practice, even in the field of non-state actors.[102] The World Bank Group[103] has, until nowadays, addressed the matter of indigenous people's rights / interests with a number of adopted policies[104] after the publication of a study stating that the Bank should avoid unnecessary or avoidable encroachment onto territories used or occupied by

CCPR /C/52/D/511/1992(1994) (hereinafter Com 511/92); Jouni E .Lansman et all v Finland, Communication 671/1995, Human Right Committee, 58 Session UN Doc. CCPR/C/58/D/671/1995 (1996) (hereinafter Com. 671/1995).

[92] See Anaya 'Indigenous Peoples Participatory Rights…' note 68 above, page 12.

[93] Com 511/92 para 2.2, com 671/95 para 2.2

[94] Ibid para 3.1, Ibid para 3.2

[95] Com 671/95.

[96] Com 671/95 para 7.8

[97] Worth to mention that Committee while recognised that measures whose impacts amounts to a denial of the right [for a member of minority to enjoy his culture] are incompatible with the obligations under article 27' concluded that 'measures that have a certain limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27'. Com 511/92 para9.4, Com 671/95 para 10.3

[98] Ibid para 9.5, Ibid para 10.4

[99] See note 70 above.

[100] The exact statement was: '[t]hat this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities did [sic] go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas.' Com 671/95 para 10.5.

[101] Anaya 'Indigenous Peoples Participatory Rights…'note 68 above. 12.

[102] See Anaya, note15 above, 155.

[103] The World Bank Group comprises the International Bank for Reconstruction and Development, the International Development Association, the international Finance Corporation , the Multilateral Investment Guarantee Agency and the International Centre for settlement of Investment Disputes; (hereinafter WBG). For further details see www.worldbank.org

[104] The first Operational Manual Statement produced from the WBG in 1982 (OMS 2.34); its revision and update was the Operational Directive 4.20, adopted in 1991; this text included a number of new requirements improving the former policy framework (it provided for indigenous peoples' right to express their opinion upon all planned projects and respect of their lands and resources rights) See introductory part of Fergus MacKay's, 'The Draft World Bank Operational Policy 4.10 on indigenous peoples: progress or more of the same?' 22 *Arizona Journal of International and Comparative Law (2005)*, 65-98. For further details: See Westra note 29 above, 86, and 87.

tribal Groups[105]. Given that indigenous peoples' constant demand that their free, prior and informed consent would be a precondition for the inception of any intended project[106], WBG provisions were criticized as they failed to ensure such a preponderant prerogative (at least until 1991).[107]

WBG's Operational Policy 4.10 is the standing framework. Within its preambular paragraphs, indigenous peoples' rights related to traditional lands and resources are recognized as key components for their existing cultures and identities. Hence, prospective borrowers are engaged to free, prior and informed consultation that should lead to broad community consensus and the Bank itself is committed to take all the appropriate actions in order to avoid, minimize or mitigate any potential adverse effects emanating from the projects carried out.[108]

However shortcomings when we deal with non-state actors become more obvious. The above mentioned declarations are undermined due to several factors that influence both their interpretation and implementation. It is worth mentioning that Article. IV, section 10 of International Bank for Reconstruction and Development, states that the Bank and its officers will not interfere in political affairs of any member and that only economic consideration shall be relevant to decisions.[109] Furthermore, WBG's mandate is directly related with efficiency which itself does not favor extended consultations with interested parties that could lead to conflicts or delays. It should also be kept in mind that the requirement for free, prior and informed consultation is only related with the so called «titled lands» that correspond only to the 25% of the lands claimed by indigenous peoples.[110]

Spiliopoulou-Akermann has also published on the World Bank and indigenous peoples, p.e.x. in Ghanea and Xanthaki (eds.) *Peoples, Minorities and Self-determination* (Kluwer, 2005)

CONCLUSION

Undoubtedly, International Law provides several grounds for asserting indigenous peoples' rights to natural resources. During the past thirty years a general movement in international human rights law increasingly led national governments and international bodies to redirect their policies that undermined the integrity of their culture and of their spiritual relationship to land and natural resources. This movement favored their participation in the development of natural resources management. Not only are they entitled to be consulted and to participate during decision making progress in an effective way, as we examined in the Uwa case study, but they assert their right to benefit from developmental activities and compensated for the adverse effects these activities may have. ILO Convention 169, UN Declaration, Convention on Biological Diversity and Agenda 21 are examples of this positive change. It is remarkable that these instruments, treaties and declarations, binding and non binding comprise a multiple net of statutes not only complete each other but also strengthen indigenous communities' claims and demands. This fact was clearly illustrated at the cases examined under Human rights Committee. Although Claimants raised their claims against government of Finland, under Article 27 of ICCPR, they invoked ILO Convention 169 and UN (Draft then) Declaration. Under this fact, we can assume that '[i]ndigenous groups asserting international law claims need not confine them under a single instrument. It is likely that they will need to allege several grounds under various instruments.'[111]

ILO Convention 169 for instance is significant as it creates treaty obligations among its signatories 'in line with current trends in thinking prompted by indigenous people's demands'[112]. It poses duties to governments in conjunction with indigenous peoples, while UN Declaration emphasizes on what indigenous peoples have the right to do.[113] Agenda 21 appeals to states and urges them to include indigenous peoples in the design and implementation of policies and programs. Article 27 of ICCPR about cultural integrity has been read by UN Human Rights Committee to require 'effective participation' of indigenous peoples in any decision that affects them.[114]

[105] Robert Goodland : *Economic Development and Tribal Peoples: Human Ecologic considerations* at www.worldbank.org/ publications.
[106] Indigenous Peoples Statement at the 19th Session of the United nations Working Groups on Indigenous Populations (July 2001), at http://www.forestpeoples.org/documents
[107] See Westra above, note 29 above ,87
[108] Ibid.
[109] See The World Bank, International Bank for Reconstruction and Development, Articles of Agreement, art.IV, section 10, at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS
[110] Westra, note 29 above, 93.
[111] David H.Getches, 'Indigenous Peoples' Rights to Water Under International Norms' 16 *Colorado Journal of International Environmental Law and Policy* (2005), 293
[112] Anaya, note 15 above, 61.
[113] See McClellan note 50 above, 7.
[114] Note **70**, above.

Interestingly some authors argue that indigenous peoples' rights to lands and natural resources have crystallized into norms of customary international law binding on all states. [115] ILO Convention 169, is considered to be [116],… apart of a larger body of developments that can be understood as giving rise to new customary international law…'.Moreover the 'widespread acceptance of the norm of consultation demonstrates that this has become a part of customary international law.'[117]. Even if a conclusion about the emergence of customary international law protecting indigenous peoples' rights over natural resources goes beyond the scope of this research, as it can solely be an issue for examination?, what we could conclude from both the legal framework we examined as well as the limited case study and the example of WBG, is that a general duty on states and private investors to consult with indigenous peoples when they wish to exploit their natural resources indeed exists. In all cases, consultation must meet minimal procedural requirements. It must be conducted in good faith and with the authoritative representatives, who are supposed to have been informed *in concreto* before the approval of any programme or the origination of any project. Indigenous peoples should also be treated as potential stakeholders to these developmental activities.

The ILO 169 has been ratified only by 20 states; the Declaration is a non-binding legal instrument; and the opinions of several international bodies are non-binding. Therefore, why do you say that such a right exists? Maybe you would like to put the other argument forward too.

We should recognize although that there are vacuums to the legal system. In addition host states and transnational companies, aiming at their economical growth and taking advantages of these vacuums, 'are often slow to comply with the guidelines set forth in many international conventions and declarations'.[118] What is however important is that the potential investor wants to ensure the security of their investment on a particular locality. Similarly, host sates need stability in order to attract foreign investments. Therefore, the developer of a natural resource development project, will be reluctant to embark on a project if the project could be disturbed by indigenous peoples' claims and demands based on land titles or on rights which flow from the occupation or use of that land[119]. Exactly these instruments we examined here, as well as the interaction between them, provide indigenous the necessary qualifications to strongly declare their presence.

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[115] ' [T]he relevant practice of States and international institutions establishes that , as a matter of customary international law, States must recognize and protect indigenous peoples' rights to lad and natural resources in connection with traditional or ancestral use and occupancy patterns' S. James Anaya and Robert Williams 'The protection of Indigenous Peoples' Rights ….'note 6 above, 55; see also Wiessner note 23 above, 127 where he concludes that ' Coupled [declarations both on regional and universal level] with the widespread practice of states specially affected by this issue, these efforts at international standard –setting do provide the requisite *opinio juris* for the identification of specific rules of a customary international law of indigenous peoples. They relate to the following areas: … [t]hird indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally occupied and used.'

[116] Anaya, note 15 above, 61.

[117] See Anaya 'Indigenous peoples participatory rights…' note 68 above, 7.

[118] McClellan, note50 above.

[119] See Antonie Gildenhuys 'Current developments in South Africa form a National and International Perspective' 23 *Journal of Energy and Natural Resources Law* (2005), 478; also S K Date-Bah 'Rights of Indigenous People in Relation to Natural Resources Development: an African Perspective' 16, *Journal of Energy and Natural Resources Law* (1998), 409.

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