Rights of Indigenous Peoples under the Light of Energy Exploitation

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ABSTRACT: This article discusses how energy exploitation impacts on indigenous peoples' rights. The article argues that the current focus in the international arena and the literature on indigenous rights of participation and consultation and the special attention that the free, prior and informed consent attracts may minimise the importance that States and companies pay to the other rights that indigenous peoples have in these circumstances. After analysing the current standards relating to participation and consultation and looking closely to the free, prior and informed consent, the article uses international human rights law, and especially ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples, as well as jurisprudence coming from the Inter-American and the African system of human rights as well as the interpretation of United Nations bodies, in order to identify the specific other obligations that States have *vis-à-vis* indigenous peoples when they initiate or permit energy projects on or near the lands they live on.

KEYWORDS: Indigenous Rights, UN Declaration on the Rights of Indigenous Peoples, Free, Prior and Informed Consent, Participation, Natural Resources, Land Rights, Development, Environment

I. Introduction

Although the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[1] has been one of the major breakthroughs of international law in the last decade, there is a well-accepted need to ensure that the newly-recognised standards, as imprinted in the provisions of the Declaration, do not remain on paper only but become part of further international and national legislation, policies and realities. This is particularly important with respect to energy-related projects, as all

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[1] UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007 (UNDRIP).

around the world indigenous peoples are constantly victims of such projects and the promised economic development they carry with them. Indigenous lands encompass up to 22 % of the world's land surface.[2] A 2013 study claimed that over 30 % of the global production of oil and gas was sourced either on or near indigenous lands.[3] In some areas energy production, a very important income-generator for the State, comes almost wholly from energy projects on indigenous lands: for example, in Russia 92 % of gas is extracted from the territory of the Nenets indigenous peoples.[4] Unfortunately, such projects have dire effects on the indigenous communities living in the area. From the Chan 75 and Bonyic dams in Panama[5] and the oil-licensing in Ecuador,[6] the Gibe III dam in Ethiopia,[7] the Murum Dam project in Sarawak,[8] to the oil projects in Siberia[9] energy exploitation is wreaking havoc on indigenous peoples' lives. In 2006, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises noted:

> the extractive sector – oil, gas and mining – utterly dominates this sample of reported abuse with two thirds of the total [and] accounts for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially indigenous people.[10]

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[2] Permanent Forum on Indigenous Issues, Indigenous People's Rights and Safeguards in Projects related to Reducing Emissions from Deforestation and Forest Degradation (REDD+), 5 February 2013, UN Doc. E/C.19/2013/7 (2013), para. 9.

[3] First Peoples Worldwide, Indigenous Rights Risk Report for the Extractive Industry (U.S.), Preliminary Findings, 28 October 2013, 10, available at: http://www.firstpeoples.org/images/uploads/R1KReport2.pdf (accessed on 11 February 2014).

[4] Permanent Forum on Indigenous Issues, Consolidated Report on Extractive Industries and Their Impact on Indigenous Peoples, 20 February 2013, UN Doc. E/C 19/2013/16 (2013), para. 11.

[5] *Mary Finley-Brook/Curtis Thomas,* Renewable Energy and Human Rights Violations: Illustrative Cases from Indigenous Territories in Panama, Annals of the Association of American Geographers 101 (2011), 863.

[6] *Jane Monahan,* Showdown in the Amazon, New Internationalist 459 (2013), 58, 58–59.

[7] *Jon Abbink,* Dam Controversies: Contested Governance and Developmental Discourse on the Ethiopian Omo River Dam, Social Anthropology 20 (2012), 125–144.

[8] *Benjamin Sovacool/L. C. Bulan,* Behind an Ambitious Megaproject in Asia: The History and Implications of the Bakun Hydroelectric Dam in Borneo, Energy Policy 39 (9) (2011), 4842.

[9] *Natalia Yakovleva,* Oil Pipeline Construction in Eastern Siberia: Implications for Indigenous People, Geoforum 42 (2011), 708.

[10] Commission on Human Rights (CHR), Promotion and Protection of Human Rights, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and

International human rights law has recently started paying special attention to human rights issues related to energy exploitation projects. The detrimental effects of energy-related projects on local communities and the social unrest they often carry make human rights considerations of such projects paramount. Furthermore, claims that such projects are necessary to fulfil – a State-centred interpretation of – the right to development are not adequate anymore to quieten the human rights concerns.[11] This article argues that to the degree that the energy industry's effects on indigenous peoples is being discussed, the emphasis has been on the participation and consultation rights that indigenous peoples have, especially on the free, prior and informed consent (FPIC). Notwithstanding the need and urgency of implementing FPIC and the safeguards that such standard offers when implemented correctly, the article argues that the focus on FPIC through the efforts on understanding and implementing it may put across the idea that procedural rights are the essence of States' obligations towards indigenous peoples when faced with energy exploitation. The article aims at demonstrating that this is not the case.

II. Consultation and Participation

The requirement of consultation with indigenous peoples and their participation in decisions that affect them has been recognised in international law, even though it is often still not respected at the national level. The obligation is included in minority rights and specifically in the right of minorities and indigenous peoples for *effective* participation, as explicitly stated in the UN Declaration on the Rights of Persons belonging to Ethnic or National, Religious and Linguistic Minorities,[12] viewed as an interpretative tool of Article 27 International Covenant on Civil and Political Rights

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Transnational Corporations and Other Business Enterprises, 22 February 2006, UN Doc E/CN.4/2006/97 (2006), para. 25.

[11] Report of the Global Consultation on the Right to Development as a Human Right: The Challenge of Implementing the Right to Development in the 1990s, in: United Nations Office of the High Commissioner for Human Rights (ed.), Realising the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development (2013), 49, 49–50, available at: http://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf (accessed on 20 February 2014).

[12] UN Declaration on the Rights of Persons belonging to Ethnic or National, Religious and Linguistic Minorities, GA Res. 47/135 of 18 December 1992.

(ICCPR).[13] Even ILO Convention No. 107,[14] adopted as far back as 1957 and highly criticised for its integrationist attitude towards indigenous peoples, requires in Article 5 that governments seek the collaboration of indigenous populations and their representatives. Although the text does not link consultation with development projects *per se,* the International Labour Organisation (ILO) supervisory body, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has done this by insisting on the "involvement of indigenous leadership before development projects affecting their situation have been undertaken."[15] The CEACR has elaborated on the scope of Article 5 (a) noting that consultation with indigenous peoples should not be carried out "only at [the] inception" of the project in question;[16] that "tribals should be made partners in the large development projects,"[17] and has requested the formal participation of indigenous representatives in decision-making bodies.[18] Participation in non-decision-making bodies was found not to satisfy Article 5 ILO Convention No. 107. Still, the Convention, which is still in force in seventeen States, does not require indigenous consent before the start of a development project.

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[13] International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999, 171 (ICCPR).

[14] ILO Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, UNTS 328, 247.

[15] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Individual Observation concerning Convention No. 107, Indigenous and Tribal Populations, Bangladesh, 2005, para. 11; and also Individual Observation concerning Convention No. 107, Indigenous and Tribal Populations, Bangladesh, 2002.

[16] *Id.,* Report of the Committee of Experts on the Application of Conventions and Recommendations, Individual Direct Request concerning Convention No. 107, Indigenous and Tribal Populations, Brazil, 1990, para. 13.

[17] *Id.,* Report of the Committee of Experts on the Application of Conventions and Recommendations, Individual Observation concerning Convention No. 107, Indigenous and Tribal Populations, India, 2003, para. 11.

[18] *Id.,* Report of the Committee of Experts on the Application of Conventions and Recommendations, Individual Direct Request Concerning Convention 107 Indigenous and Tribal Populations, Panama, (1991), para. 7.

ILO Convention No. 169[19] is stronger concerning obligations regarding development projects. Article 6, arguably the corner-stone of the Convention,[20] recognises the right of indigenous peoples to be consulted "through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly" and to freely participate at all levels of decision-making when policies and programmes affect them. Article 6 (2) specifically requires that the 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). For energy related projects, this provision must be read together with Article 7 which recognises in paragraph 1 the right to indigenous peoples to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly." Article 7 (1) also recognises the right of indigenous peoples "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." Relevant is also Article 15 ILO Convention No. 169 which recognises the rights of indigenous peoples "to participate in the use, management and conservation" of the natural resources in their lands. Governments should consult with indigenous peoples "with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." In case of relocation, the Convention goes as far as requiring indigenous consent, but even then it includes clauses and exceptions (Article 16). The CEACR has noted that consultations should be conducted with the objective to find "appropriate solutions in an atmosphere of mutual respect and full participation."[21]

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[19] ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, UNTS 1650, 383.

[20] "The spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based.", Confederación Ecuatoriana de Organizaciones Sindicales Libres, 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), para. 31.

[21] ILO Governing Body, Second Supplementary Report: Representation Alleging Non-Observance by Ecuador on the Indigenous and Tribal Peoples Convention, November 2001, GB.282/14/2, para. 36.

Unfortunately, very often decisions regarding development projects are taken centrally and not at the local level where indigenous peoples are better represented.[22] Still, one should not easily put aside the legally binding obligations that the 22 States parties to the Convention have with respect to development projects. The generally accepted principle that indigenous peoples should be consulted "as to any decision affecting them" is by many, including the UN Special Rapporteur on Indigenous Issues, viewed as a norm of customary international law.[23]

International environmental law has also been increasingly vocal on the need for such consultations to take place before any such project goes ahead.[24] Principle 22 Rio Declaration on Environment and Development (Rio Declaration)[25] asks States to "recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." The World Bank Operational Directive 4.10[26] adopted in July 2005 recognises the importance of the indigenous lands for their cultures and identities and stipulates that the borrower, before embarking into a project, must engage in a process of free, prior, and informed *consultation* with indigenous peoples that aims at "broad support for the project."[27] *Barelli* notes that although such a requirement could be quite stringent as the project

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[22] *Rune S. Fjellheim,* Arctic Oil and Gas: Corporate Social Responsibility, Gáldu Čála Journal of Indigenous Peoples Rights 4 (2006), 8, 11.

[23] See *James S. 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 Resources, Arizona Journal of International and Comparative Law 22 (2005), 8, 8.

[24] *Mauro Barelli,* Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead, International Journal of Human Rights 16 (2012), 1, 3.

[25] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I) (1992), Annex 1.

[26] World Bank, Operational Policy 4.10 on Indigenous Peoples (July 2005), available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed on 20 February 2014).

[27] World Bank Group Management Response, Striking a Better Balance – The World Bank and Extractive Industries: The Final Report of the Extractive Industries Review, 17 September 2004, available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/09/21/000160016_20040921111523/Rendered/PDF/300010GLB.pdf (accessed on 20 February 2014).

must secure wide support among the affected community,[28] it is diluted by the use of terms such as 'consultation' and 'support' rather than 'consent.'[29] The World Bank is currently reviewing its policy towards indigenous peoples.

III. Free Prior and Informed Consent

Rights to participation and consultation do not go far enough to protect indigenous peoples in situations of energy exploitation. Cases such as Bolivia demonstrate that the requirements of participation and consultation are not adequate: Even though the participation of indigenous peoples is promoted, permits for energy production are judged on the basis of referendums at the municipal and departmental levels where the voices of the indigenous communities, who are much more affected than other local populations, are obscured by the majority views.[30]

A. UNDRIP

It was the elaboration and adoption of the UN Declaration on the Rights of Indigenous Peoples that has pushed for a shift from the principles of consultation and participation to that of the free, prior and informed consent of indigenous peoples in development projects.[31] In 1997 the Committee on the Elimination of Racial Discrimination (CERD) had already stated that "no decisions directly relating to [indigenous peoples'] rights and interests [should be] taken without their informed consent."[32] During the discussions of the UNDRIP, it became obvious that FPIC

[28] World Bank (note 26), para. 11.

[29] *Barelli* (note 24), 5.

[30] Secretariat of the Convention on Biological Diversity, Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities, Global Overview and National Case Studies, CBD Technical Series No. 64 (2012), 30, available at: http://www.cbd.int/doc/publications/cbd-ts-64-en.pdf (accessed on 2 March 2014).

[31] *Cathal Doyle/Jill Cariño,* Making Free, Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector, May 2013, 7, available at: http://www.piplinks.org/system/files/Consortium+FPIC+report+-+May+2103+-+web+version.pdf (accessed on 20 February 2014).

[32] Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 23 on Indigenous Peoples, GAOR, 52nd Sess., Suppl. 18, 122, para. 4 (d).

must be seen under the light of the indigenous right to self-determination, explicitly recognised in Article 3 UNDRIP. FPIC is included in seven articles of the Declaration, including Article 19 which recognises a collective right to giving or withholding consent by the indigenous peoples, according to the rules and procedures determined by the group itself. According to Article 27 UNDRIP,

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

The most focussed provision of the UNDRIP regarding energy projects comes from Article 32 (2) requiring States to

> consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, *particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*[33]

It is noteworthy that the text does not recognise explicitly a *right* to free, prior and informed consent. Consent, however, must be *free,* hence given without any form of coercion or undue influence; *prior,* so given *before* the adoption or implementation of the relevant measure; and *informed,* so the community concerned is *effectively aware* of the possible effects that the measure to be taken is suitable of producing with respect to its interests. Indigenous communities must have all information that is necessary to arrive at a position on the project, made available in a form and language they can understand before they give their consent.[34]

B. Human Rights Bodies

UN bodies have been instrumental in promoting the implementation of FPIC and clarifying the scope of the standard. In 2009, the Human Rights Committee noted in

[33] Art. 32 (2) UNDRIP (emphasis added).

[34] *Barelli* (note 24), 2.

Angela Poma Poma v. Peru,[35] which involved the impact on water beneath indigenous peoples' lands, that "participation in decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."[36] CERD has also repeatedly emphasized the importance of participation of indigenous peoples' freely chosen representatives in negotiations[37] and has asked States to "seek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities."[38] In the context of its Early Warning Urgent Action procedure CERD has examined cases in Brazil, Canada, the Philippines, Peru and India on the States' failure to obtain the FPIC of the affected indigenous peoples.[39] The Committee on Economic, Social and Cultural Rights also affirmed in 2009 the duty of States "to respect the principle of free, prior and informed consent of indigenous peoples in all matters that affect them."[40] The Committee has repeated that the right of indigenous peoples to free, prior and informed consent should be respected before any project that affects indigenous peoples is implemented and that legislation must be enacted to ensure the respect of this indigenous right.[41]

Further clarification of the contours of FPIC is currently being generated by the various UN bodies concerned with indigenous peoples. Of particular importance is how strong the requirement for consent is in energy related projects. Being squashed

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[35] Human Rights Committee, Communication No. 1457/2006, *Ángela Poma Poma v. Peru,* 24 April 2006, UN Doc. CCPR/C/95/D/1457/2006 (2006).

[36] *Ibid.,* para. 7.6.

[37] Office of the High Commissioner for Human Rights (OHCHR), Letter to Nepal, 13 March 2009, available at: http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Nepal130309.pdf (accessed on 21 February 2014). See CERD, Concluding Observations on the Russian Federation, 20 August 2008, UN Doc. CERD/C/RUS/CO/19 (2008).

[38] *Ibid.*

[39] CERD, Summary Record of the Fist Part (Public) of the 1901st Meeting, 26 September 2008, UN Doc. CERD/C/SR.1901 (2008).

[40] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life, 21 December 2012, UN Doc. E/C.12/GC/21 (2009), paras. 36–37.

[41] *Id.,* Concluding Observations on Colombia, 21 May 2010, UN Doc. E/C.12/COL/CO/5 (2010); *id.,* Concluding Observations on New Zealand, 30 May 2012, UN Doc. E/C.12/NZL/CO/3 (2012).

between States pushing for a negative answer and indigenous activists pushing for a positive answer, the former Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, *Rodolfo Stavenhagen,* has taken the second option and has referred to the "right to free prior informed consent by indigenous peoples" which includes their 'right to say no' describing it as being of 'crucial concern' in relation to large-scale or major development projects and 'essential' for the protection of their human rights.[42] His successor, *James Anaya,* has also adopted this line explaining it further. *Anaya* has adopted a nuanced approach emphasising that the strength of the requirement for FPIC would vary according to "the circumstances and the indigenous interests involved."[43] He noted that a "direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent," and that "in certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent."[44] The Special Rapporteur has recognised the development of an international norm requiring the consent of indigenous peoples when their property rights are impacted by natural resource extraction.[45] He has confirmed that the

> general rule [is] that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices. Indigenous consent may also be required when extractive activities

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[42] CHR, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 21 January 2003, UN Doc. E/CN.4/2003/90 (2003), paras. 13 and 66. He points out that FPIC is necessary as too many major developments do not respect the consultation and participation criteria that are laid out in ILO Convention No. 169.

[43] Human Rights Council (HRC), Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur, 15 July 2009, UN Doc. A/HRC/12/34 (2009), para. 47.

[44] *Ibid.*

[45] The Special Rapporteur qualified this requirement by adding that FPIC may not be essential for projects that do not have these potential impacts as long as this was in line with the requirements of Arts. 46 and 32 (3) UNDRIP, *James S. Anaya,* Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction, Arizona Journal of International and Comparitive Law 22 (1) (2005), 7, 8. HRC, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Rigth to Development, Report of the UN Special Rapporteur, 11 August 2008, UN Doc. A/HRC/9/9/Add. 1 (2008).

> otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights. In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought, even if consent is not strictly required.[46]

In other words, the consent of indigenous peoples is required when energy projects are situated on their own lands; or when they are near their lands and indigenous communities are seriously affected by them. The UN Expert Mechanism on the Rights of Indigenous Peoples recommended in 2008 that the 2001 Durban Declaration and Programme of Action[47] be revised to "acknowledge that both the right to self-determination and the principle of free, prior and informed consent are now universally recognized through the adoption of the Declaration."[48] The Special Rapporteur on the Right to Food,[49] the Special Rapporteur on Adequate Housing[50] and the Independent Expert on the Rights of Minorities[51] have all referred to the FPIC of indigenous peoples.

Clarification on the specifics of the FPIC standard has also come from the Inter-American system of human rights protection. The Inter-American Commission on Human Rights has confirmed the need for consultation in cases of natural resource extraction since 2001,[52] but only in 2007 the Court held in *Saramaka People v.*

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[46] HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive Industries and Indigenous Peoples, 1 July 2013, UN Doc. A/HRC/24/41 (2013), para. 27.

[47] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban Declaration and Programme of Action, 8 September 2001, UN Doc. A/CONF.189/12 (2001), 5 and 26.

[48] HRC, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 8 January 2009, UN Doc. A/HRC/10/56 (2008), Proposal No. 2, para. 4. See also Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, UN Doc. E/C.19/2005/3 (2005).

[49] HRC, Report of the Special Rapporteur on the Right to Food, 21 July 2009, UN Doc. A/HRC/12/31 (2009), para. 21 (j).

[50] HRC, Report of the Special Rapporteur on Adequate Housing, 14 March 2006, UN Doc. E/CN.4/2006/41 (2006), para. 56 (e).

[51] UN Independent Expert on Minority Issues, Statement on the conclusion of the official visit to Colombia, 1–12 February 2010, para. V, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9821&LangID=E (accessed on 18 March 2014).

[52] Inter-American Commission of Human Rights, *Marie and Carrie Dann v. United States* Case 11.140, Report 75/02 (2002), para. 130; Inter-American Court of Human Rights (IACtHR), *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of 31 August 2001, Merits, Reparations and Costs, Series C No. 79, para. 25.

Suriname[53] that in the case of large scale development or investment project that would have an impact on indigenous communities, the State "has the duty, not only to consult with the [indigenous group], but to obtain their free, prior and informed consent, according to their customs and traditions."[54] The Court was asked to decide on whether logging and mining concessions awarded by the State to third parties on indigenous lands violated indigenous rights and affirmed that in some cases the scope of Article 21 American Convention on Human Rights (ACHR)[55] may comprise the exploitation of indigenous sub-soil resources.[56] The 2012 case of *Kichwa v. Ecuador* does not refer to the right to free, prior and informed consent as such, but discusses instead the right to consultation "with the aim of reaching an agreement or obtaining consent."[57] The Court held that "the State did not conduct an appropriate and effective process that would guarantee the right to consultation of the *Sarayaku* People before undertaking or authorizing the program of exploration or exploitation of resources on their territory."[58] The more nuanced discussion of "good faith and the aim of reaching agreement"[59] may be explained by the fact that Ecuador is party to the ILO Convention No. 169, which as seen above focuses on the right to consultation. The African Commission on Human and Peoples Rights recognised in the 2010 *Endorois* case that the State

> has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions [in relation to] any development or investment projects that would have a major impact within [their] territory.[60]

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[53] IACtHR, *Saramaka People v. Suriname,* Judgment of 28 November 2007, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 172.

[54] *Ibid.,* 40, para. 134.

[55] American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36 (ACHR).

[56] IACtHR, *Saramaka People v. Suriname* (note 53), para. 126.

[57] *Id., Pueblo Indigena Kichwa de Sarayaku v. Ecuador,* Judgment of 27 June 2012, Merits and Reparations, Series C No. 245, para. 185.

[58] *Ibid.,* para. 211.

[59] *Ibid.,* para. 185.

[60] African Commission on Human and Peoples' Rights, Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council/Kenya,* Decision of 25 November 2009, para. 291, available at: http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (accessed

C. Development Actors

In addition to human rights bodies, all multilateral development banks with the exception of the World Bank, which is currently reflecting on its policy, and the African Development Bank have adopted the principle of FPIC.[61] The International Finance Corporation, the private sector branch of the World Bank, also adopted the principle in 2011.[62] Moreover, documents such as the Rio Declaration and Agenda 21[63] are currently being re-interpreted to include the need for consent and support of indigenous peoples, while the Akwé: Kon Guidelines[64] for the implementation of Article 8 (j) Convention on Biological Diversity[65] also recognise the importance of consent for the protection of traditional knowledge of indigenous peoples. Reviews on FPIC have also been issued by other bodies, notably the Extractive Industry Review[66] and the Report of the World Commission on Dams,[67] and by NGOs.[68] Several States have changed their policies requiring now consultations with

on 22 February 2014).

[61] Permanent Forum on Indigenous Issues, Review of World Bank Operational Policies, Note by the Secretariat, 20 February 2003, UN Doc. E/C.19/2013/15 (2013), para. 44.

[62] *Ibid.*

[63] Agenda 21, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (1992), also available at: http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (accessed on 20 February 2014).

[64] Secretariat of the Convention on Biological Diversity, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous or Local Communities, 2004, para. 60, available at: https://www.cbd.int/doc/publications/akwe-brochure-en.pdf (accessed on 18 March 2014).

[65] Convention on Biological Diversity, 5 June 1992, UNTS 1760, 79.

[66] Extractive Industries Review, Striking a Better Balance: The World Bank Group and Extractive Industries (Vol. I) (December 2003), available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/02/20/000442464_20140220114614/Rendered/PDF/842860v10WP0St00Box382152B00PUBLIC0.pdf (accessed on 13 March 2014).

[67] World Commission on Dams, Dams and Development: A New Framework for Decision-Making: The Report of the World Commission on Dams (November 2000), available at: http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf (accessed on 22 February 2014).

[68] For example *Doyle/Cariño* (note 31), 7.

indigenous peoples,[69] and several mining companies have made new policies endorsing FPIC[70] and/or have reached agreements with indigenous peoples on development projects.[71]

IV. Substantive Indigenous Rights

With such spotlight currently on FPIC, one would be forgiven to believe that the obligations of States end with its correct implementation. And one cannot ignore that if applied correctly, FPIC is indeed a solid guarantee of indigenous peoples' rights, as they themselves give their informed consent at every stage of the energy project to the restrictions of their rights that such projects entail.[72] If they agree with such restrictions of their rights, one has to respect their wishes.

However, a deeper look at the reality of energy projects reveals that the FPIC on its own is an insufficient guarantee of indigenous rights. First of all, very often FPIC is not applied. The recent report by First Peoples Worldwide reveals that of 52 large US-based extractive companies, only one had an explicit policy of respecting indigenous FPIC, while only four had company-wide indigenous policies.[73] Even when it is applied, very often the processes put in place to satisfy its requirements are superficial at best and dubious at worse. The energy private investment sector is very powerful and the imbalance of power between the industry and indigenous communities often results in the agreement of indigenous peoples being obtained through manipulation, intimidation, repression and even reprisals. Reports have surfaced of companies getting the indigenous communities' agreement for large energy projects with the promise of sums of money which are much less than the rightful compensation; or by dividing the community and focussing on the consent

[69] HRC, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 30 June 2013, UN Doc. A/HRC/24/51 (2013), 9–11.

[70] International Council on Mining and Metals, Indigenous Peoples and Mining: Position Statement, May 2013, available at: http://www.icmm.com/document/5433 (accessed on 6 April 2014). See also First Peoples Worldwide (note 3), 7.

[71] HRC, Report of the Expert Mechanism on the Rights of Indigenous Peoples, 17 August 2011, UN Doc. A/HRC/18/42 (2011), para. 64.

[72] *Cathal Doyle,* Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent (forthcoming 2014). See also *Doyle/Cariño* (note 31), 69–79.

[73] First Peoples Worldwide (note 3), 4.

of the part that agrees with their project; by reminding indigenous communities of the industry's influence in the political sphere or the weak position of indigenous peoples in the social ladder; even by getting their signatures by tricking them into signing. There has been ample evidence of such practices. For example, a 2013 study by the Permanent Forum on Indigenous Issues reported how a Canadian company got the agreement of indigenous peoples by intimidating them and by supporting the creation of a union of farmers that voted in favour of its energy project.[74] Similarly, the judgment in *Kichwa Indigenous Peoples of Sarayaku v Ecuador* explains how the private oil company tried to get the indigenous community's formal support by giving money to individuals, promising health care in exchange of agreeing to the continuation of the oil exploration project, forming support groups and offering jobs and gifts to indigenous individuals.[75] The Special Rapporteur has also discussed such tactics[76] and the UN bodies have expressed their concerns: In 2008, the UN Committee on Economic, Social and Cultural Rights highlighted that in Panama consultations with indigenous peoples were left "in the hands of the private firms carrying out such projects" and that the agreements reached were not in conformity with the international standards and cited as an example the Chan 75 hydroelectric project.[77] The Committee recommended 'a careful examination' of these agreements to check whether they comply with international standards and, if this is not the case, to "seek mechanisms in order to negotiate appropriate agreements for those communities."[78] The Committee on the Elimination of Racial Discrimination has expressed its "deep concern at the growing tensions between outsiders and indigenous peoples over the exploitation of natural resources, especially mines"[79] and has criticised draft legislation that falls below international law standards.[80]

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[74] Permanent Forum on Indigenous Issues, Study on the extractive industry in Mexico and the situation of indigenous peoples in the territories in which the industries are located, 14 February 2013, UN Doc. E/C.19/2013/11 (2013), 11.

[75] IACtHR, *Kichwa v. Ecuador* (note 57), paras. 73–74.

[76] HRC (note 46), 7–8.

[77] CERD, Concluding Observations on Panama, 19 May 2010, UN Doc. CERD/C/PAN/CO/15-20 (2010), paras. 13–14.

[78] *Ibid.,* para. 16.

[79] *Id.,* Concluding Observations on Mexico, 4 April 2012, UN Doc. CERD/C/MEX/CO/16-17 (2012), para. 17.

[80] *Id.,* Concluding Observations on Guatemala, 15 May 2006, UN Doc. CERD/C/GTM/CO/11 (2006), para. 19.

In addition, FPIC is not yet an obligation included expressly in a legally binding instrument so far, so many States can avoid it. Even more so, at times, it is not an obligation that is required, because the project's effects on indigenous peoples do not pass the threshold needed for FPIC, either because the project is not on indigenous lands or because the project does not affect mainly indigenous rights. Finally, even when the standard of FPIC is applied correctly and in principle does cover indigenous rights, both FPIC and indigenous rights should be looked at individually, as it is not axiomatic that the rightful application of FPIC will give adequate protection to all indigenous rights.

Within this context, it is important to remember that the right to FPIC is only *one* of the obligations that States and industries have when it comes to energy projects. In addition to procedural guarantees and besides them, indigenous peoples also have other rights, substantive ones, regarding the lands they own and occupy. *Doyle* notes that FPIC should not be decoupled from rights to resources, development and self-determination, as otherwise they could potentially undermine those very rights.[81]

This line of thought was followed in the *Saramaka* case, where the Court looked at the State's obligations beyond the principle of FPIC. The Court held that a State which intends to launch or authorise a project affecting the natural resources found within indigenous ancestral lands needs to ensure both the effective participation of the members of the community in the project and also that indigenous peoples have a reasonable share of the benefits; the State performs or supervises prior environmental and social impact assessments; and implements adequate safeguards and mechanisms to minimise the effect of the project to indigenous lands and natural resources.[82] In *Kichwa v. Ecuador,* the Court's judgment also implies this duality of obligations that includes consultation and the protection of other indigenous rights: According to the judgment, the State must "guarantee these rights to consultation and participation at all stages of the planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people."[83]

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[81] *Doyle* (note 72) and *Doyle/Carino* (note 31), 11, 17, 22, 25, 35, 49 and 70, where FPIC is linked to rights to resources.

[82] IACtHR, *Saramaka People v. Suriname* (note 53), para. 158.

[83] *Id., Kichwa v. Ecuador* (note 57), para. 167.

The Special Rapporteur on the situation and rights of indigenous peoples has also noted the importance of other human rights safeguards *in addition to* the properly implemented consent:

> it must be emphasized that the consent is not a free-standing device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a yes to a predetermined decision, or as a means to validate a deal that disadvantages affected indigenous peoples. When consent is given, not just freely and on an informed basis, but also on just terms that are protective of indigenous peoples rights, it will fulfil its human rights safeguard role.[84]

However, the Special Rapporteur accepts that "when indigenous peoples freely give consent to extractive projects under terms that are aimed to be protective of their rights, there can be a presumption that any limitation on the exercise of rights is permissible and that rights are not being infringed."[85] The analysis above would bring doubts in accepting such a presumption. An emphasis on the procedural requirement of FPIC of indigenous peoples may give the wrong impression that the State's obligations stop with the agreement of indigenous peoples to the energy project. Also, the agreement of indigenous peoples does not waive the human rights they have as a whole; hence, the monitoring of their human rights continues to be as relevant as ever.

In addition to rights of consultation and participation, including their FPIC, indigenous peoples also have the following substantive rights.

A. Land Rights

International law has recently clarified the need to protect indigenous land rights. The Inter-American Court of Human Rights (IACtHR) has firmly established in the *Awas Tingni* case,[86] *Yakye Axa v. Paraguay,*[87] *Sawhoyamaxa v. Paraguay*[88] and

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[84] HRC (note 46), para. 30.

[85] *Ibid.,* para. 33.

[86] IACtHR, *Tingni Community v. Nicaragua* (note 52), para. 149.

[87] *Id., Yakye Axa Indiginous Community v. Paraquay,* Merits, Reparations and Costs, Judgment of 17 June 2005, Series C No. 125, paras. 124, 137.

[88] *Id., Sawhoyamaxa Indigenous Community v. Paraguay,* Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No. 146, paras. 118–121.

Saramaka People v. Suriname[89] that the right of indigenous peoples to collectively own their ancestral lands stems from Article 21 ACHR interpreted in the light of their special spiritual relationship to their lands. Article 25 UNDRIP also recognises the special relationship of indigenous peoples with their land, while Article 26 UNDRIP recognises their right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired in the past; and their right to own, use, develop and control the lands, territories and resources they possess currently. States are under the obligation to "give legal recognition and protection to these lands, territories and resources" and this should be done "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[90] ILO Convention No. 169 also recognises the special relationship of indigenous peoples with their lands and "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy."[91] The Convention also asks for measures "to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[92] The jurisprudence of the African Commission on Human and Peoples' Rights,[93] statements in support of indigenous land rights from the Human Rights Committee,[94] the CERD,[95] UN

[89] *Id., Saramaka People v. Suriname* (note 53), paras. 87–96.

[90] Art. 26 (3) UNDRIP.

[91] Art. 14 (1) ILO Convention No. 169.

[92] *Ibid.*

[93] See, *e.g.,* African Commission on Human and Peoples' Rights, *Endorois* (note 60).

[94] See especially Human Rights Committee, Communication No. 167/1984, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada,* 26 March 1990, UN Doc. CCPR/C/38/D/167/1984 (1990); see also *id.,* Concluding Observations on the United States of America, 15 September 2006, UN Doc. CCPR/C/USA/CO/3 (2006).

[95] See CERD (note 32); see also CERD, Decision 1 (53) on Australia, GAOR, 53rd Sess., Suppl. 18, 18; *id.,* Concluding Observations on Brazil, 28 April 2004, UN Doc. CERD/C/64/CO/2 (2004), paras. 15–16; *id.,* Decision 1 (66): New Zealand Foreshore and Seabed Act 2004, 11 March 2005, UN Doc. CERD/C/66/NZL/Dec.1 (2005); *id.,* Decision 1 (69) on Suriname, 18 August 2006, UN Doc. CERD/C/Dec/Sur/3 (2006).

experts,[96] UN Special Rapporteurs on indigenous peoples' related issues,[97] opinions of the ILO adjudicatory bodies and, in many cases, domestic law have all pushed the International Law Association to conclude that the rights of indigenous peoples to their lands "can be reasonably considered as being part of customary international law, as evidenced by extensive and consistent state practice as well as *opinio juris,* especially in Latin America, but also in former Anglo-Commonwealth colonies."[98]

In protecting indigenous land rights in cases of extractive projects, international jurisprudence has set up the following three obligations on the part of the State.

1. Impact Assessments

Human rights impact assessments (HRIAs) are a rather new issue in human rights law.[99] The UN Special Rapporteur on the Right to Food noted in 2010: "For over ten years, the human rights treaty bodies and independent experts have called on governments to assess the impact of trade and investment agreements on the enjoyment of human rights, but without success."[100]

Impact assessments are of particular importance for indigenous peoples, as their connection to the land puts them in a position even more vulnerable than the rest of the population with regard to energy projects. Impact assessments must be comprehensive, be published before the decision to start with the energy project is

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[96] For example, see CHR, Report on the Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and Their Relationship to Land, 5 May 2006, UN Doc. E/CN.4/Sub.2/AC.4/2006/3 (2006).

[97] *E.g.* CHR, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mission to Guatemala, 24 February 2003, UN Doc. E/CN.4/2003/90/Add.2 (2003).

[98] International Law Association, The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report, 23, available *via:* http://www.ila-hq.org/en/committees/index.cfm/cid/1024 (accessed on 24 February 2010).

[99] *Gauthier de Beco,* Human Rights Impact Assessments, Netherlands Quarterly of Human Rights 27 (2009), 139.

[100] Human Rights Impact Assessments for Trade and Investment Agreements, Report of the Expert Seminar, 23–24 June 2010, 2, available at: http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf (accessed on 24 February 2014).

taken,[101] include a gender perspective as sometimes the effects of energy projects are different for indigenous women, and must include empirical data, maybe in the form of indicators, to substantiate their conclusions. Human rights assessments have been found to have added value to social impact assessments, as they have a clear normative framework and are more appropriate to address indigenous concerns than environmental impact assessments, since the latter may not address directly all aspects of indigenous rights to be affected by the project in question.[102]

The UN Guiding Principles for Business and Human Rights[103] have stressed the importance of impact assessments and in 2012–2013, the European Commission, the Organisation for Economic Co-operation and Development and the Food and Agriculture Organisation have incorporated the assessment of human rights impacts into their project and loan requirements. This has increased the demand for clear guidance on how HRIAs are to be conducted. Impact assessments have been advanced by the World Bank in its Policy on Indigenous Peoples.[104] It requires a full environmental impact assessment in order to identify potentially adverse impacts of energy projects to the indigenous communities affected by the projects. This also includes a social assessment, paying 'particular attention' to indigenous land rights that may be affected (beyond mere ownership) and ensuring that there will be social and economic benefits for the communities involved.

2. Redress

[101] *Ibid.,* 6: "under the WTO's Doha Agenda, for example, the World Bank, universities and NGOs carried out assessments of the *likely* outcome of the negotiations" (emphasis in the original).

[102] *Ibid.*

[103] OHCHR, UN Guiding Principles for Business and Human Rights, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 19 March 2014).

[104] World Bank (note 26).

The law to a remedy is part of international law.[105] Reparation for violations of indigenous peoples' rights has been a controversial issue during the elaboration of the UNDRIP. Yet, rights to redress are included both in ILO Convention No. 169 and in the UNDRIP. Article 8 (2) UNDRIP affirms the right of indigenous peoples to redress for a number of practices threatening their cultural and ethnic identity and integrity. 'Just and fair compensation' is also envisaged in cases of relocation and removal (Article 10), while restitution and compensation are envisaged when indigenous peoples are deprived of their means of subsistence (Article 20). The most important provision dealing with reparation included in the UNDRIP is undoubtedly Article 28, which recognises the right of indigenous people

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

The IACtHR has recognised the rights of indigenous peoples to redress in *Saramaka* and other cases,[106] while the African Commission on Peoples and Human Rights recognised the indigenous right to redress in the *Endorois* case. At the national level the decision by the Supreme Court of Appeal of South Africa in *Richtersveld Community and Others* has been of importance, where the Court held that while mineral rights were frequently reserved to States and in lands owned by or reserved to indigenous peoples, where these lands are appropriated for government use, adequate compensation should be given to the owners, and should include other equally suitable land.[107]

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[105] Among others, it is recognised in Art. 8 Universal Declaration on Human Rights, GA Res. 217 A (III) of 10 December 1948; Arts. 29 (3), 9 (5) and 14 (6) ICCPR; Art. 6 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS 660, 195; Art. 2 (c) Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS 1249, 13. *Dinah Shelton,* Remedies in International Human Rights Law (2nd ed. 2005). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147 of 16 December 2005.

[106] IACtHR, *Saramaka People v. Suriname* (note 53), para. 158. See also *id., Sawhoyamaxa Indigenous Community v. Paraguay* (note 88), para. 128.

[107] Supreme Court of Appeal of South Africa, Case 488/2001, *Richtersveld Community and Others v. Alexkor Limited and the Government of the Republic of South Africa,* Judgment of 24 March 2003, para. 89.

3. Benefit Sharing

While the right of indigenous peoples to redress is quite well-accepted, this is not the case for the right of indigenous peoples to participation in economic benefits generated by the use of their lands and resources. Benefit sharing, for example, is limited to 'wherever possible' in Article 15 (2) ILO Convention No. 169, and it is not even mentioned in the UNDRIP.[108] Nor does any clear indication come from State practice or, with the exception of the Inter-American case-law, from international jurisprudence. Benefit sharing can take several forms. For example, in Australia, "[f]our main ways in which mining revenues are distributed to indigenous communities have been identified: individual payments to individuals (in cash or in kind); provision of services; investment in indigenous businesses; and investment in long-term capital funds."[109]

B. Prohibition of Forcible Removal

An important right that runs through the issue of free, prior and informed consent and indigenous land rights is the prohibition of forcible removal or relocation of indigenous peoples from their lands in order to allow energy projects. Unfortunately such relocation is still relatively common in such cases,[110] even though Article 10 UNDRIP puts a blanket prohibition on such removal without the FPIC of indigenous peoples and agreement on just and fair compensation. The provision goes further than the equivalent provision included in Article 16 (2) ILO Convention No. 169 which allows relocation in exceptional circumstances and "only following appropriate procedures established by national laws and regulations, including public

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[108] *Enzamaria Tramontana,* The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources, International Journal on Minority and Group Rights 17 (2010), 241, 247.

[109] Permanent Forum on Indigenous Issues, Study on the impact of the mining boom on indigenous communities in Australia, 5 March 2013, UN Doc. E/C.19/2013/20 (2013), para. 11.

[110] *Id.,* Consolidate report on extractive industries and their impact on indigenous peoples, Note by the Secretariat, 20 February 2013, UN Doc. E/CN.19/2013/16 (2013), para. 13. See also CHR, Transnational Investments and Operations on the Lands of Indigenous Peoples, 15 June 1994, UN Doc. E/CN.4/Sub.2/1994/40 (1994).

inquiries where appropriate, which provide for the effective representation of the people concerned."[111] Emerging international law is gradually making its impact on national legislation.[112]

States tend to justify relocations of indigenous peoples on the basis of the development of the economic life of the State and to point out that the freedom of movement and residence allows for restrictions "which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant" (Article 12 (3) ICCPR). However, one has to keep in mind that limitation clauses of human rights must be interpreted restrictively; therefore, the mere development of the economic life of the State does not constitute an adequate reason to bring such negative changes to a group's life.[113] The Guiding Principles on Internal Displacement underline that displacement is arbitrary "[i]n cases of large-scale development projects, which are not justified by compelling and overriding public interests;"[114] the same document adds that State authorities must ensure that all other feasible alternatives are explored and displacement shall last no longer than required and that the free and informed consent of those displaced is sought. Finally, the Guiding Principles include a particular obligation to protect against the displacement of indigenous peoples and other groups with a special dependency on and attachment to their lands. The prohibition of relocation without the agreement of indigenous peoples is also confirmed by the case-law of the the IACtHR, which has repeatedly affirmed the right of indigenous peoples to return to the lands they have been removed from or, if this is not possible, to receive adequate reparation.[115] According to *Anaya,* there is an implied duty in the *Saramaka*

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[111] See in particular CERD (note 32).

[112] See, *e.g.,* Art. 231 (5) Consitution of the Federal Republic of Brazil (*Constituição da República Federativa do Brasil*), 5 October 1988, Official Gazette of Brasil No. 191-A and the Law of Indigenous Rights and Culture of the Mexican State of Chiapas (*Ley de Derechos y Cultura Indígenas del Estado de Chiapas*), Official Gazette of Mexico of 29 July 1999.

[113] See Principles 6–9 Guiding Principles on Internal Displacement, 11 February 1998, UN Doc E/CN.4/1998/53/Add.2 (1998), Annex.

[114] Principle 6 (2)(c) Guiding Principles on Internal Displacement.

[115] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay* (note 88), para. 148; *id., Moiwana Community v. Suriname*, Judgment of 15 June 2005, Series C No. 124; *id., Saramaka People v. Suriname* (note 53).

judgment that the State must not adopt a measure forcing indigenous peoples away from their lands without the agreement of the community concerned, as this measure would have a substantial impact that may endanger the indigenous nation's physical and cultural well-being.[116]

United Nations bodies have repeatedly expressed their concern about the expulsions and displacements of indigenous communities in connection with energy projects and the actual involvement of the police and/or security forces. In 2010, CERD discussed at lengths the removals of indigenous communities from the lands they occupied in Panama for energy projects and the violence that private forces used to remove indigenous communities.[117]

In actual truth, such relocations may raise issues of genocide. The UNDRIP does not include the prohibition of ethnocide or other acts which indigenous peoples have often been victims of, such as 'ecocide', *i.e.* "adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations."[118] However, Article 8 (2) UNDRIP prohibits, among other things, any action depriving indigenous peoples of their identity or cultural values, or dispossessing them of their lands, territories and resources, or any population transfer. It is noteworthy that the provision requires the aim or even just the effect of dispossession of their lands to substantiate genocide.

C. Rights to Natural Resources

Traditionally, international law recognised the importance of natural resources for the State and hence accepted that natural resources may belong to the State. Common Articles 1 of both the ICCPR and the International Covenant on

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[116] HRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Summary of cases transmitted to Governments and replies received, 15 August 2008, UN Doc A/HRC/9/9/Add.1 (2008), Annex 1, paras. 39–40.

[117] CERD, Concluding Observations on Panama, 19 May 2010, UN Doc. CERD/C/PAN/CO/15-20 (2010), para. 15.

[118] CHR, Revised and updated report on the question of the prevention and punishment of the crime of genocide, 2 July 1985, UN Doc. E/CN.4/Sub.2/1985/6 (1985), para. 33.

Economic, Social and Cultural Rights (ICESCR)[119] recognises the right of 'peoples' "to freely dispose of their natural wealth and resources" and confirms that 'States' cannot be deprived of their own means of subsistence. Article 47 ICCPR and Article 25 ICESCR adhere that "nothing in the present Convention shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize freely their natural wealth and resources." The issue of whether the right is recognised only to whole populations of States has been complicated even more by a series of United Nations resolutions[120] equating rights of peoples with rights of States. The instruments on indigenous peoples provide some clarification: Although ILO Convention No. 107 does not even refer to natural resources, ILO Convention No. 169 recognises the right of indigenous peoples to "participate in the use, management and conservation of these resources" (Article 15 (1) ILO Convention No. 169). Article 15 (2) recognises that often natural resources belong to the State;

> [i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

Therefore, the actual right that the Declaration recognises is not that of ownership, but that of participation in the usage and conservation of the resources.[121] The UNDRIP is the first instrument that actually recognises the rights of indigenous peoples "to own, use, develop and control the [...] resources they possess by reason of traditional ownership or other traditional occupation or use" (Article 26 (2)). Although this is an important step forward, it is not clear whether the UNDRIP recognises *ownership* to indigenous peoples of their traditional resources or other weaker property rights; additionally, it seems doubtful that it recognises ownership to subsurface resources used for energy.

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[119] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, 3.

[120] GA Res. 626 (VII) of 21 December 1952; GA Res. 1514 (XV) of 14 December 1960; GA Res. 1515 (XV) of 15 December 1960 and 1803 (XVII) of 14 December 1962, GA Res. 3171 (XXVIII) of 17 December 1973; and the Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX) of 12 December 1974.

[121] *Heather Northcott,* Realisation of the Right of Indigenous Peoples to Natural Resources under International Law Through the Emerging Right to Autonomy, International Journal of Human Rights 16 (2012) 73, 79.

Of help for indigenous claims affected by energy projects is the right to development. Article 1 (2) UN Declaration on the Right to Development[122] includes within the scope of the right the full sovereignty over natural resources. ILO Convention No. 169 recognises the right of indigenous peoples "to decide their priorities for the process of development as it affects their lives [...] and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."[123] Going further, Article 23 UNDRIP recognises the right of indigenous peoples "to determine and develop priorities and strategies for exercising their right to development." Importantly, Article 20 UNDRIP also recognises that "indigenous peoples deprived of their subsistence and development are entitled to just and fair redress." In the *Endorois* case, the African Commission held that the State's failure to guarantee a reasonable share in the profits deriving from the development project amounted to a violation of the right of indigenous peoples to development.[124]

The Inter-American jurisprudence has provided important contextual elaborations on indigenous rights to natural resources: Both in the *Saramaka* and the *Kuchwa* cases the IACtHR noted the importance of above-surface natural resources for the survival of indigenous peoples and made a nuanced distinction between these and other natural resources, including sub-soil resources, that are important for the preservation of indigenous culture and ensure that the necessary resources are available. Without referring to ownership, the Court accepted that natural resources fall within the protection of indigenous property rights and indigenous cultural rights and discussed rights to participation in decisions relating to natural resources and benefit sharing. *Tramontana* finds this approach "a workable balance between national economic development strategies and damaging effects of environmental degradation deriving from resource extracting activities" and in line with sustainability and human rights approaches to development.[125]

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[122] Declaration on the Right to Development, GA Res. 41/128 of 4 December 1986, Annex. For a comprehensive analysis of the right of indigenous peoples to their development see *Joshua Castellino,* Indigenous Rights and the Right to Development: Emerging Synergies or Collusion?, in: Stephen Allen/Alexandra Xanthaki (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples (2011), 367.

[123] Art. 7 ILO Convention No. 169.

[124] African Commission on Human and Peoples' Rights, *Endorois* (note 60), para. 228.

[125] *Tramontana* (note 108), 263.

National practice makes a clear distinction between resources over the ground and sub-soil resources. For example, the Federal Court of Australia in *Attorney General of the Northern Territory v. Ward* recognised indigenous rights that include the right to "gather and use the natural resources of the land [...] and to have access to and use of natural water on the land," but that native title did not cover minerals and petroleum.[126] Equally, the Supreme Court of the Philippines also ruled that the Indigenous Peoples Rights Act[127] encompasses only the right to surface resources.[128] Notwithstanding some successes at the national level, notably the recognition by the Constitutional Court of South Africa of indigenous ownership including sub-soil resources in the *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community,*[129] *Errico* rightly concludes that "international, regional and national practice suggest that, at present, States do retain ownership of subsoil resources, and in practice, this poses a limit to indigenous peoples' right to 'own, use, develop and control' the resources located in their lands."[130]

However, it would be a restrictive and incorrect interpretation to conclude that with respect to the natural resources, indigenous peoples only have the right to consultation and participation, as guaranteed in Article 32 (2) UNDRIP. As seen above, they have rights of usage, management and conservation of sub-soil resources found in their lands. In addition, they have rights to the sharing of benefits, included both in the UNDRIP and in ILO Convention No. 169.[131] These can take several forms ranging from agreements with communities to redistribution of taxes.[132]

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[126] Federal Court of Australia, *Attorney-Geneal of the Northern Territory v. Ward* [2003] FCAFC 283, as discussed in: *Stefania Errico,* The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights, in: Allen/Xanthaki (eds.) (note 122), 329, 336.

[127] The Indigenous Peoples Rights Act, 29 October 1997, Official Gazette of the Philippines Republic Act No. 8371.

[128] Supreme Court of the Philippines, G.R. No. 13538, Judgment of 6 December 2000, available at: http://sc.judiciary.gov.ph/jurisprudence/2000/dec2000/135385.htm (accessed on 19 March 2014).

[129] Constitutional Court of South Africa, *Alexkor Ltd. and the Republic of South Africa v. the Richtersveld Community,* Judgment of 14 October 2003, CCT 19/03.

[130] *Errico* (note 126), 337.

[131] *Malgosia Fitzmaurice,* Tensions Between States and Indigenous People over Natural Resources in Light of the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 UN Declaration on the Rights of Indigenous Peoples (Including Relevant National Legislation and Case-Law), The Yearbook of Polar Law 4 (2012), 227, 232.

[132] *Ibid.*

Finally, the UNDRIP also recognises rights to redress and possible restitution for the resources used and damaged without their FPIC. States, recognised as the main guarantor of indigenous rights in energy projects, must ensure that these rights are implemented both with respect to the sub-soil resources as well as with respect to the above-soil resources affected by the energy projects.

D. Cultural and Social Rights

Energy projects often have adverse effects on the cultures of indigenous peoples and the social matrix of their communities. The non-indigenous migration into indigenous communities, the existence of transient workers with no meaningful commitment to the place, the better infrastructure which brings more traffic and possibly increased tourism and possible conflicts stemming from perceived and real opportunities for income, jobs and education have very detrimental effects on the rights of indigenous peoples. In addition, the infrastructure suffers at times with increased demand for housing, and increased rent which have a negative effect on already poor indigenous people and lead at times to homelessness, family disruption, alcohol related problems and violence. *Abbink* notes:

> An anthropological approach to dam impacts [...] not only needs to highlight the observable effects such as displacement, livelihood loss and social decline, but also the dissonances in cultural discourse around dam constructions as state infrastructural engineering feats incapable of incorporating views and interests of local people, who often have a long-established relationship to the land in the socio-economic and ritual sense.[133]

The Inter-American jurisprudence on indigenous rights has touched upon the effect of development projects on the cultural rights of indigenous peoples. In *Saramaka* and *Kichwa,* the Court noted that big energy projects have a negative effect on indigenous cultural rights. The World Bank recognises "that the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend" and acknowledges that the 'distinct circumstances' of indigenous peoples expose them "to different types of risks and levels of impacts from development projects, including loss of identity, culture, and

[133] *Abbink* (note 7), 126.

customary livelihoods, as well as exposure to disease."[134] The rights of indigenous peoples to their culture and the States' obligations to take measures that protect indigenous cultural rights have been widely recognised by ILO Convention No. 169 and the UNDRIP but also promoted and reinforced by the United Nations bodies.[135] In addition to the protection of cultural rights, energy projects must protect the biological diversity of indigenous territories. The 1992 Biodiversity Convention[136] recognises that indigenous peoples' knowledge and practices encompass "traditional lifestyles relevant for the conservation and sustainable use of biological diversity" and it requests States to respect, preserve and maintain such knowledge and practices, and promote their wider application with the approval and involvement of the holders. This is also confirmed in Article 31 UNDRIP, namely the right of indigenous peoples "to maintain, control, protect and develop" their cultural heritage, traditional knowledge and traditional cultural expressions. In dealing with the eviction of the *Endorois* from their ancestral lands, the African Commission has found that such a practice had resulted in a breach of Article 8 African Charter on Human and Peoples' Rights (ACHPR),[137] the right of this people to freely practice their religion.[138] There have been occasions where the State has recognised the effects of such projects on indigenous peoples: For example, in 2012, the judiciary in Mexico ordered the temporary suspension of the mining project at Wirikuta in Real del Catorce (San Luis Potosí) as the area was a seasonal pilgrimage site for some indigenous communities and so affected severely their cultural rights.[139] However, such issues have to be more openly discussed and reflected upon.

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[134] World Bank (note 26).

[135] *Alexandra Xanthaki,* Culture, in: Marc Weller/Jessie Hohmann (eds.), A Commentary on the United Nations Declaration on the Rights of Indigenous Peoples (forthcoming 2014); for a wider discussion see *Athanasios Yupsanis,* The Meaning of Culture in Article 15 (1)(a) of the ICERSC: Positive Aspects of CESCR's General Comment No 21 for the Safeguarding of Minority Cultures, German Yearbook of International Law 55 (2012), 345.

[136] Convention on Biological Diversity, 5 June 1992, UNTS 1760, 79.

[137] African Charter on Human and Peoples' Rights, 27 June 1981, UNTS 1520, 217 (ACHPR).

[138] African Commission on Human and Peoples' Rights, *Endorois* (note 60), para. 173.

[139] Permanent Forum on Indigenous Issues (note 74), 13.

E. The Right to the Conservation and Protection of the Environment

Although the scope of the right of environment is still very much contested,[140] the protection and conservation of the environment where indigenous peoples live is of paramount importance.[141] Energy projects may produce environmental liabilities, such as "solid or liquid waste, generally harmful to the environment or human health, which are left behind as residues of mining activity."[142] The right to life, the right to a private life and the right to property have been used as a basis for State obligations, including positive measures, to protect the environment; however, "the right to a decent environment" is still a contested notion.[143] The instruments specifically focused on indigenous rights are clearer. Principle 22 Rio Declaration also recognises 'the vital role' that indigenous peoples have "in environmental management and development because of their knowledge and traditional practices." Chapter 26 Agenda 21 affirms that the lands of indigenous peoples "should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate" and recognises that the cultural, economic and physical well-being of indigenous peoples depends on their "traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting." The Agenda 21 also expressly recognises that traditional knowledge and resource management practices are key to promoting environmentally sound and sustainable development. According to Chapter 26 (3) Agenda 21, measures should be established which recognise that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities. The Akwé: Kon Guidelines on sacred sites and indigenous lands and

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[140] *Alan Boyle,* Human Rights and the Environment: Where Next?, European Journal of International Law 23 (2012), 613.

[141] *Leena Hainamaki,* Protecting the Rights of Indigenous Peoples: Promoting the Sustainability of the Global Environment?, International Community Law Review 11 (2009), 3; see also *Cherie Metcalf,* Indigenous Rights and the Environment: Evolving International Law, Ottawa Law Review 35 (2003–2004), 101.

[142] Observatorio de Conflictos Mineros de América Latina, Consuelo Infante, Pasivos Ambientales Mineros: Barriendo Bajo la Alfombra, 2011, available *via:* http://www.conflictosmineros.net/biblioteca/publicaciones/publicaciones-ocmal/pasivos-ambientales-mineros-barriendo-bajo-la-alfombra/detail (accessed on 19 March 2014).

[143] *Boyle* (note 140), 615.

waters for an ethical code on ecological knowledge and customary norms of indigenous peoples relating to biodiversity, innovations and practices may serve to guide the impact-assessment processes and promote the use of appropriate technologies.

In all the general instruments above, the link between indigenous peoples and the environment is recognised and the protection of the environment is proclaimed, but there is no explicit recognition of a right to environment. In addition, the recognised emphasis of environmental rights lies on procedural rights related to participation and impact assessments. For example, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[144] adopted by the UN Economic Commission for Europe which builds upon the right to access to justice and procedural elements related to environmental protection is seen as an excellent model for future strengthening of 'environmental democracy'.[145] The decision of the African Commission in the *Ogoni* case is unique in paving the way of a substantive right to environment and in that the court ordered extensive environmental clean-up measures to be taken.[146]

The ILO Convention No. 169 follows this line too and specifies that measures shall be taken to protect the environment of indigenous peoples (Articles 4 and 7) and studies shall be carried out to assess the impact of the projects on the indigenous environment, but does not explicitly recognise a right to environment *per se*. However, Article 29 (1) UNDRIP is bolder and recognises indigenous peoples' right "to the conservation and protection of the environment and the productive capacity of their lands or territories and resources;" States are required to "establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination" and "effective measures to ensure that no storage

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[144] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, UNTS 2161, 447.

[145] UN Economic Commission for Europe, The Aarhus Convention: An Implementation Guide (2000), UN Doc. E/ECE/CEP/72 (2000).

[146] African Commission on Human and Peoples' Rights, Communication 155/96, *Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria,* Decision of 27 October 2001, available at: http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf (accessed on 17 March 2014).

or disposal of hazardous materials" remain in indigenous lands without their agreement.

A special mention must be made to renewable energy projects: Although they are seen in a positive manner by environmentalists and States, they often pose important challenges for indigenous communities. *Finley-Brook* and *Thomas* note that there is "a resurgence of historical prejudices that categorize subsistence practices as inefficient and indigenous customs as inferior."[147] Often, "state agencies and private firms selectively define sustainable development in renewable energy projects in ways that allow them to pursue neoliberal agendas while further marginalizing indigenous communities."[148]

V. Conflicts of Rights

States traditionally justify the restrictions of the rights of indigenous peoples by energy projects on the ground of the economic development of the State. Energy projects, States repeat, will allow the whole population to benefit from more energy or will improve their quality of lives through the revenues that will go to further services *etc.* The Special Rapporteur on the Rights of indigenous peoples has argued:

> It will be recalled that consent performs a safeguard role for indigenous peoples' fundamental rights. When indigenous peoples freely give consent to extractive projects under terms that are aimed to be protective of their rights, there can be a presumption that any limitation on the exercise of rights is permissible and that rights are not being infringed.[149]

However, the presumption that the restriction of their rights is permissible only exists if they have given their consent to each particular restriction and to the extent to which they have allowed their rights to be restricted. A general agreement to a project does not necessarily mean agreement to all actions of the energy company or the State with respect to the project. The agreement must be continuous and go through the different stages of the project.

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[147] *Finley-Brook/Thomas* (note 5), 864.

[148] *Ibid.*

[149] HRC (note 46), para. 33.

In addition, restrictions of all human rights analysed above are allowed under international law only as long as the principles of legality, legitimacy and proportionality are satisfied. Therefore any restriction must be established by law, aim to attain a legitimate goal, and be necessary and proportional.[150] However, the courts have recognised that the threshold for a lawful restriction of indigenous rights to their lands is higher than for other sectors of the population. The IACtHR has justified the higher threshold on the basis of "a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations."[151] Disregarding their land rights, the IACtHR continued, "could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members."[152] The Special Rapporteur has also noted that the principle of proportionality underlines the need to give due regard to the "significance to the survival of indigenous peoples of the range of rights potentially affected by the project."[153] However, both the Special Rapporteur and the IACtHR have not ruled out the possibility that "the territorial interests of private individuals or of the State" prevail over indigenous rights under certain circumstances.[154] In the *Endorois* case, the African Commission reflected on the phrase of Article 14 ACHPR that allows the restriction of property rights "in the interest of public need or the general interest of the community" when legality and proportionality are fulfilled. Again, the Commission noted that the 'public interest' test requires a much higher threshold in the case of indigenous peoples' land rights, because such rights are closely linked to their right to life, self-determination and to exist as a people.[155] The Special Rapporteur went further and noted that "a valid public purpose is not found in mere

[150] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay* (note 88), para. 144.

[151] *Ibid.,* para. 146.

[152] *Ibid.,* para. 147

[153] HRC (note 46), para. 36.

[154] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay* (note 88), para. 149.

[155] African Commission on Human and Peoples' Rights, *Endorois* (note 60), paras. 211–213. For an analysis of this point, see *Adem Kassie Abebe,* Limitations to the Rights of Indigenous Peoples in Africa: A Model for Balancing National Interest in Development with the Rights of Indigenous Peoples?, African Journal of International and Comparative Law 20 (2012), 407.

commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain."[156]

Article 2 Political Constitution of Mexico recognises that as part of their right to self-determination, indigenous peoples may have preferential use of the natural resources of the sites inhabited by their indigenous communities, except for the strategic resources.[157] Unfortunately in reality this article is nullified by the Mining Act which gives preference to requests for mining exploitation to indigenous peoples as long as they match the best financial offer presented by another bidder.[158] This effectively nullifies the preferential right that the Constitution gives to indigenous peoples, who are unlikely to have the financial and technical resources to outbid large multinational or national corporations, should they attempt to do so. It also nullifies their right to consultation and consent as guaranteed in the international legal instruments signed by Mexico.

VI. Conclusions – An Alternative Model?

States that initiate or agree to energy projects in areas where indigenous peoples live, or nearby areas, have the obligation to ensure that indigenous peoples give their free, prior and informed consent for such projects or, if the effect is not direct or not serious, must ensure the consultation and participation of indigenous peoples in all decisions taken relating to these projects and affecting them. However, this is not where the States' obligations end. Under international law and to the extent that indigenous peoples have not agreed (in a genuine, informed and free manner), States continue to have an obligation not to relocate indigenous peoples, to protect their lands, to protect the resources above surface and sub-soil that exist in their lands, to protect their cultures, not to disrupt the social cohesion of their communities and to take measures to protect the environment where indigenous peoples live. These rights also translate to procedural rights including ensuring that full human rights impact

[156] HRC (note 46), para. 35.

[157] Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), Official Gazette of Mexico of 5 February 1917, as amended in Official Gazette of Mexico of 26 February 2013.

[158] Art. 13*bis* (3)(2) Mexican Mining Act (*Ley Minera*), Official Gazette of Mexico of 26 June 1992, as amended in Offical Gazette of Mexico of 26 June 2006.

assessments are completed before a final decision regarding the project is reached; sharing the benefits of energy projects with the indigenous peoples that live in the areas where the resources are taken from; and providing them with just and fair compensation and redress for any violation that the energy project has resulted in.

The UN Special Rapporteur on Indigenous Peoples has recently suggested the development of "a new business model for natural resource extraction" where indigenous peoples initiate and control resource extraction in their own territories according to their priorities is being developed and is "more conducive to the full enjoyment by indigenous peoples of their rights than the one that currently prevails in much of the world."[159] Although the Special Rapporteur acknowledged that these projects also pose risks for environmental degradation and the violation of other rights, these risks can be minimised and the rights of indigenous peoples enhanced as indigenous peoples freely decide to engage in such activities. This is an exciting proposition that has to be reflected on further. Such partnerships of indigenous communities with energy companies have started in some parts of the world, notably Australia.[160] If this partnership is built on solid grounds, then it may combine the need for economic development and energy production with the respect of indigenous self-determination and indigenous control of the matters that concern them.

[159] HRC (note 46), para. 5.

[160] Permanent Forum on Indigenous Issues (note 109), para. 12.