Consultation or Consent?

Indigenous People's Participatory Rights with regard to the Exploration of Natural Resources according the UN Declaration on the Rights of Indigenous Peoples

by

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Thesis submitted in conformity with the requirements for the degree of Masters of Law (LL.M)

Graduate Department of Law

University of Toronto

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Abstract

This thesis examines the development of the right of indigenous peoples to natural resources on their lands and territories in international law. It examines international treaties, the jurisprudence of international courts and other international bodies, as well as the practice of international actors. A special focus is on the UN General Assembly Declaration on the Rights of Indigenous Peoples. The thesis describes the drafting process and the discussions that took place around the issue of land rights and natural resources, and uses this to draw conclusions on the development of a new international customary law of an indigenous right to free, prior and informed consent with regard to natural resources.
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A. Introduction

For years, states in all parts of the world have allowed or closed their eyes to the deprivation of lands previously occupied by indigenous peoples. Or such lands have been destroyed by large scale logging, pollution, exploration of oil or gas, or the extraction of other natural resources and the construction of facilities and roads that go hand in hand with it.

What participatory rights aboriginal peoples have with regard to natural resource exploitation and management has been the subject of much controversial debate over years. Is there a duty for the state to consult with aboriginal groups, and to what extent does their opinion have to be taken into account? Or is there even a duty to obtain their prior consent? The state of international law in this regard is by no means clear. The few existing treaties that deal with indigenous rights have not been ratified by the majority of states, and they partly reflect outdated perceptions of how to integrate aboriginals into society. On the other hand, many international bodies have been actively pursuing indigenous rights. At the forefront of this trend are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which in a number of cases have interpreted existing treaties to include indigenous rights. Furthermore, international institutions have adopted their own policies for dealing with aboriginal peoples' lands and resources that differ from one another.

The recent Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations on 13 September 2007 (hereinafter: “the UN Declaration” or “the Declaration”), states in Article 32 para. 2 that a state shall consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed prior consent with regard to extraction and utilization of natural resources. While a declaration by its nature does not have  

legally binding effect, this paper is going to argue that the provision contained in Article 32 para. 2 is already part of customary international law and as such binding on all states. While the current state of the law is, as mentioned, confused, there has been a clear development over the years towards acknowledging participatory rights of aboriginal peoples. Even further, when examining the jurisprudence of international bodies and the activities of other international actors in this regard, it becomes clear that a new standard of international law has developed which recognizes that there is a duty to obtain the free, prior and informed consent of indigenous peoples when undertaking activities of exploration, use or extraction of natural resources on their traditional lands.

To support this thesis, the paper is going to examine the evolution of the duty to obtain free, prior and informed consent in international instruments such as treaties, declarations, and acts by international bodies. It argues that the drafting process of the UN Declaration has been significantly influenced by those developments, and that the provision of the Declaration which requires states to seek the consent of indigenous peoples reflects the current state of international law.

Section B gives an overview of the respective provision of the UN Declaration dealing with the right to lands and natural resources. It describes the drafting process and the opposition with which the Declaration was confronted, as well as explaining its legal significance.

Part C describes the developments that have taken place in international law with regard to the right to free, prior and informed consent. The focus is especially on the relevant treaties and the jurisprudence and decisions of international bodies, which have advanced the law. But it also includes the policies of other international actors, which demonstrate a new understanding of the rights and obligations in this field.
Part D places the UN Declaration within the context of this evolving frame of law. It describes the discussions during the drafting process, especially with regard to land rights and the right to free, prior and informed consent, and shows how the state parties ultimately accepted such a right as the current state of the law. On the flip-side of the coin, the entrenchment of the right to free, prior and informed consent in the Declaration gives additional force to its establishment as a customary law norm.

Finally, in Section E, the paper makes a moral argument that a right to free, prior and informed consent is necessary for the effective protection of aboriginal peoples' rights to their culture, traditions and lifestyle, because natural resources have a special significance for them. It takes up the common criticism that a duty to obtain consent gives too much power to a group over the general population of a state, and argues that such a right is, however, necessary and justified in order to preserve aboriginal identity. Section F concludes.

B. The UN Declaration on the Rights of Indigenous Peoples

For a long time there was no one comprehensive instrument on the protection of indigenous rights, but only sectoral provisions scattered in various international and regional agreements. When the UN Declaration was finally adopted by the General Assembly in 2007 by an unexpected landslide affirmative vote of 144 states with only four states against (United States, Canada, Australia and New Zealand) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine), this was seen as a clear victory for the indigenous cause.
I. The Drafting Process

The Declaration has come a long way and has undergone much scrutiny, criticism and opposition from the presentation of the first draft in 1993 until the final adoption by the UN General Assembly in 2007. In 1982 the United Nations Economic and Social Council (ECOSOC) established a Working Group on Indigenous Populations with the task to draft standards concerning the rights of indigenous populations. The Working Group conducted the drafting process in a partnership between experts and representatives of indigenous peoples. Every indigenous group that wanted to participate received five minutes to bring their complaints and concerns to the attention of the drafting group. In 1993 the Working Group finally agreed on a Draft Declaration on the Rights of Indigenous Peoples. It thereby went beyond its mandate by changing the terminology from populations to peoples, an issue that was very controversial with states for fear that the recognition as a people would arise claims of external self-determination. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted the draft without amendment in 1994. It then went through a seemingly never-ending review in the UN Commission on Human Rights and was rather surprisingly adopted by the

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newly formed Human Rights Council in 2006. Thereafter, another year of discussion in the UN General Assembly followed before the Declaration was finally adopted on September 13, 2007 by a majority of 144 against four, with eleven abstentions.

The Declaration affirms indigenous peoples’ right to protect their cultures and traditions, and promotes education, health care and other human rights issues that affect indigenous groups. Perhaps most importantly, the Declaration explains that indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Furthermore, the Declaration affirms that indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Disagreement on and opposition to the declaration were based on very fundamental issues. States critiqued the absence of a definition of indigenous peoples, and negated the very concept of collective rights in international law. The inclusion of a right to self-determination was the cause of much debate and protest especially by the African states, Argentina, Brazil, and the United States, which were concerned that it would give rise to secessionist movements among indigenous groups. Finally, many states opposed the provisions foreseeing restitution of traditional lands. Considering this opposition to principles laying at the base of the Declaration,

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10 Declaration on the Rights of Indigenous Peoples, supra note 1, Art. 3.
11 Ibid. Art. 4.
12 See Gilbert, supra note 2 at 215 ff.
14 Gilbert, supra note 2 at 226 ff.
its final adoption with such an overwhelming majority can be regarded as a great success. While four countries voted in opposition of the Declaration in the General Assembly, two of those have since expressed their support. The Canadian House of Commons on 8 April 2008 endorsed the Declaration and called on the Parliament and Government to fully implement it. The Australian government gave its formal support to the Declaration on 3 April 2009. After these precedent, the New Zealand government also seems to be on its way to formally expressing its support for the declaration.

II. Legal Significance of the UN Declaration

As a declaration by the General Assembly, the Declaration on the Rights of Indigenous Peoples has no binding force such as a treaty. However, it is also not simply a statement, but to the contrary, some of past General Assembly declarations have gained significant status in international law. Simply the name of a “Declaration” gives the document a certain solemnity.

Other General Assembly Declarations in the field of Human Rights have, in spite of their non-
binding status, risen to extraordinary significance. As a prominent example, the Universal Declaration on Human Rights is frequently cited as an authoritative document with regard to human rights standards. Such a declaration can furthermore be regarded as an element of state practice, and thus, among others, can lead to the development of new customary international law.

In the view of UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James S. Anaya, the UN Declaration on the Rights of Indigenous Peoples constitutes "an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law (...)" Various scholars have joined him in this understanding, stating, as Bartolomé Clavero did:

"The Draft Declaration of Indigenous Rights is but a new step in the development of the international human rights regime that builds on the Universal Declaration on Human Rights. It is presented in declarative terms exactly because the instrument does not create these rights out of thin air, but instead confirms their prior existence and gives them practical meaning."
III. The Right to Lands, Territories and Natural Resources in the UN Declaration

Aboriginal peoples' relationship to their traditional lands and territories is recognized in the Declaration and given specific protection in Articles 25 to 32. At the outset, Article 25 ensures that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

The basic rights stemming from this are enlisted in Article 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

With regard to aboriginal peoples' rights to natural resources, the most significant provision is Article 32 which determines:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
The term natural resources is wide and can include such things as air, coastal seas, coastal ice, timber, minerals, oil, gas, as well as genetic resources and all other materials pertaining to indigenous lands and territories. The Preamble of the Declaration further emphasizes that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”.

Another important provisions concerning lands and territories is included in Article 10, which ensures that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

Articles 18 and 19 more generally state that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions” and that “States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

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26 Preamble, para. 10.
C. The development of a right to free, prior and informed consent with regard to natural resources in international law

The participatory rights of first nations with regard to their lands and the natural resources on them have been developed over decades in many international instruments and even more in the jurisprudence of international courts and bodies, as well as the practice of international institutions. While written treaties are always slow to develop, the judicial and monitoring bodies of international organizations have proved much more flexible in advancing indigenous rights by means of wide interpretations of existing provisions.

The following section is going to first lay out the principles from which a duty to obtain free, prior and informed consent before engaging in exploration of issues surrounding natural resources. It then describes the developments that have taken place in international law up to the adoption of the UN Declaration.

I. Background information concerning property right with regard to natural resources

The issue of aboriginal sovereignty over natural resources has to start with the regular principles of ownership. The question here is who, according to the law, holds the title over natural resources: the owner of the land on which the resources are found, or the state.

Two different approaches exist in this regard. “The Roman system, which is prevalent throughout most countries today, provides the state with subsurface rights regardless of who owns the land in question.”27 This is based on a utilitarian thinking, which upholds the state's sovereign rights over natural resources and the concept of its beneficial use for everyone.28 In comparison, land

ownership under the Anglosaxon system entails ownership of subsurface resources.\textsuperscript{29} 

In international law, UN General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources is the main instrument dealing with the topic. It affirms the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests\textsuperscript{30} and declares that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”\textsuperscript{31} Initially, the declaration’s focus was only on colonial peoples and offered them protection from exploitation by their colonizing powers. The terminology, which revolves around the state as the bearer of sovereign power, but also mentions the right of peoples and nations, has to be understood with regard to this background.\textsuperscript{32} However, the focus soon shifted towards a general understanding of state sovereignty over resources, as contrary to private ownership and exploitation.\textsuperscript{33} A state-centered notion is not the only possible understanding, though, as the declaration equally talks about the rights of peoples. This termination does not need to be set equal with the people of a nation-state, but allows for a wider interpretation. Accordingly, today the notion that sovereignty over natural resources lies with the sovereign state is again being challenged by new concepts, especially with regard to self-determination of peoples.

\textsuperscript{29} Stellato Gabrielli, \textit{supra} note 27 at 104.
\textsuperscript{30} UN GA Declaration 1803 (XVII), Preamble, para. 4.
\textsuperscript{31} \textit{Ibid.} operative para. 1.
\textsuperscript{32} Barrera-Hernandez, \textit{supra} note 28 at 45.
\textsuperscript{33} \textit{Ibid.}
II. Two ways to substantiate Aboriginal sovereignty over natural resources

With account to what has just been said, there are two ways in which aboriginal peoples can have sovereignty over natural resources on their lands. Where resources belong to the owner of the land, in accordance with the Anglosaxon system, aboriginal peoples can hold property in natural resources as a consequence of their ownership of the land. If the state is seen as the sovereign over sub-surface resources, however, as in the Roman system, the right of aboriginal peoples to the resources on their lands has to be founded on different grounds, such as a right to self-determination and autonomy.

1. Property Rights in Natural Resources

In a system where natural resources are deemed to belong to the owner of the land, they have to belong to aboriginal peoples who own land as a simple matter of non-discrimination. However, this has not always been that obvious, because states have not recognized Aboriginal ownership, especially communal ownership, in the same way as private ownership. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have decided some of those case, without however explicitly differentiating between those resources that are vested in the owner and those that belong to the state.

2. Rights over Natural Resources as part of Self-Determination

A different substantiation of indigenous peoples' rights over natural resources stems from the notion of self-determination and autonomy. The right to self-determination of peoples is enshrined in the common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Whether First Nations in fact constitute a peoples in the meaning of this clause is highly debated and has been the subject of much conflict in the drafting process of the UN Declaration on the Rights of Indigenous Peoples.36

James Anaya puts forward two basic ideas of why indigenous groups have rights.37 The first is because they are a people and therefore also a subject of sovereignty. They are an entity comparable to states, but historic injustice has removed their sovereign rights from them. Today, in order to redeem that injustice, First Nations are entitled to self-determination, autonomy and sovereign rights.38

The second idea is based on a human rights approach. It claims that indigenous people are groups of human beings with fundamental human rights concerns. The historic experience of conquest is mainly used as a background in this approach to explain present day oppression and inequality. Its primary focus, however, is concerned with the wellbeing of humans, to which it gives priority.

38 See ibid. at 241.
over the interests of sovereign entities.\textsuperscript{39} From this strain of thought, a moral duty evolves to grant aboriginal groups certain exclusive rights in order to fulfill their special needs. International Organizations tend to prefer the latter explanation, because their member states refrain from recognizing another sovereign entity that is not a state.\textsuperscript{40} The human rights based approach fits more neatly within an already developed and generally accepted framework of basic rights and freedoms, which has the capacity even to incorporate differentiated rights and privileges in a strife for factual equality and non-discrimination.

Anaya criticizes the very formalistic, positivist standpoint often taken by states as well as international actors. He claims that “[f]or formalists, words in texts, settled doctrine, and first principles tend to have preordained, fixed meaning that is discerned often in isolation from the political and social dynamics and the changing value structures to which they are relevant.”\textsuperscript{41} Their argumentation thus goes that peoples cannot have sovereignty because the established rule is that only states have it. Whether the underlying rule is normatively right or wrong, in consideration of the historic injustice of conquest, does not matter.

However, the historic argument does have an important part in the discussion. While states refrain from basing a right to self-determination only on the historic dispossession of aboriginal peoples of their lands and their sovereign rights, they accept this fact as one reason for giving special protection for aboriginal peoples rights in the present day. This argument plays into the human rights idea and strengthens the moral duty to grant exclusive rights and a degree of autonomy to aboriginal groups. The drafters of the UN Declaration were caught in exactly this dispute between recognition of historic injustice and continuing rejection of indigenous communities as sovereign

\textsuperscript{39} See \textit{ibid.}
\textsuperscript{40} See \textit{ibid.} at 241-242.
\textsuperscript{41} \textit{Ibid.} at 244.
actors.\textsuperscript{42} The Preamble pointedly expresses the General Assembly’s concern “that indigenous peoples have suffered from historic injustices as a result of, \textit{inter alia}, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”.\textsuperscript{43} Notably, the title and the text of the Declaration, in departure from the original appointment, use the term “Indigenous peoples”. Article 3 enshrines their right to self-determination, while Article 4 declares that this entails the right to autonomy or self-government in matters relating to their internal and local affairs. On the other hand, Article 46 para. 1 reinforces that neither the right to self-determination nor any other provision of the Declaration authorizes any action which would impair the territorial integrity or political unity of a sovereign state. In spite of this careful limitation, the Declaration gives a powerful momentum to the indigenous cause for self-determination.

Further areas of law play into the discussion and give addition strength to the argument for Aboriginal sovereignty over natural resources. Those are, for example, environmental protection, the right to subsistence and cultural preservation, and the issue of racial discrimination.\textsuperscript{44}

\textbf{III. The Development of International Legal Principles with regard to Aboriginal Consent}

The existence of participatory rights of indigenous peoples, and the scope of these rights, have been developed through a lively process. This includes some written treaties that have been drafted throughout the years. However, the more important role in advancing aboriginal rights


\textsuperscript{43} Preamble, para. 6.

was played by international bodies. While treaties are slow to evolve and often portray ancient conceptions of the law which have long been out-dated by new social realities and common understanding, international organs have proved to be flexible in interpreting those provisions in the light of modern developments.

1. International Instruments

Aboriginal peoples were mentioned for the first time in a multilateral treaty in the Inter-American Charter of Social Guaranties of 1948.\textsuperscript{45} Its Article 39 provides that states take necessary measures to protect indigenous peoples' lives and property, defending them from extermination, sheltering them from oppression and exploitation.\textsuperscript{46}

The first international instrument that was primarily dedicated to the protection of indigenous populations' rights was ILO Convention No. 107 of 1957 on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.\textsuperscript{47} It followed an approach of integration and assimilation that is rejected today, and placed little value on indigenous distinct culture. It still pursues the idea of formal non-discrimination and thus determines that members of the population concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth (Article 4).

Convention No. 107 was revised in 1989 by Convention No. 169 concerning Indigenous and


\textsuperscript{47} Available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107.
Tribal Peoples in Independent Countries. The latter has only been ratified by 20 states, but nevertheless has gained some significance in international law and has been referred to by international bodies in cases where the respective state is not party to the Convention. Article 15 deals with the issue of natural resources. It explicitly differentiates between such natural resources that belong to the owner of the land and such “cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands” (Article 15 para. 2). In the latter case, the Convention foresees a process of consultation, “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.”

Parallel to the drafting process of the UN Declaration, the Organization of American States (OAS) undertook to draft an American Declaration on the Right of Indigenous Peoples. In 1989 the OAS General Assembly recommended that the Inter-American Commission on Human Rights prepare such a declaration on indigenous peoples. The Commission drafted a proposal and submitted it to the General Assembly in 1997, but it has not been passed until this date. The American Declaration on Indigenous peoples expressly recognizes that in some countries the state is the owner of sub-surface resources. It does not foresee consent in those cases, but only

52 For an updated account of the process of adoption of the declaration see OAS, Permanent Council, Committee on Judicial and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, online at: http://www.oas.org/consejo/cajp/Indigenous.asp.
participation and compensation of the affected people.\textsuperscript{54}

2. Decisions and Recommendations of International Bodies

Where states were rather reluctant to recognize indigenous rights to land and natural resources for the longest time, international bodies, such as the Courts and Committees of international human rights institutions, have proved much more willing to incorporate and give effect to such rights.

\textbf{a) Inter-American Commission on Human Rights and Inter-American Court of Human Rights}

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the judicial organs of the OAS. The human rights system is a fundamental component of the area of work of this organization. Its basic pillars are the 1948 American Declaration on the Rights and Duties of Man\textsuperscript{55}, and the American Convention on Human Rights, which expanded and updated the Declaration in 1969.\textsuperscript{56} Additionally, there are a number of protocols complementing the Convention, such as the 1988 Protocol on Economic, Social and Cultural Rights,\textsuperscript{57} as well as other Conventions dealing with specific human rights issues, such as the Inter-

\begin{footnotesize}
\textsuperscript{54} The relevant provisions of Article 18 read:

4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.

5. In the event that ownership of the minerals or resources of the subsoil pertains to the State so that the State has rights over other resources on the lands the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent before undertaking or authorizing any program for tapping of exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation in accordance with international law, for any damages which they may sustain as a result of such activities.

\textsuperscript{55} American Declaration on the Rights and Duties of Man, OEA, AG/RES 1591 (XXVIII-O/98); OEA/Ser.L.V./I1 82 doc.6 rev.1 at 17 (1992).

\textsuperscript{56} American Convention on Human Rights, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

\textsuperscript{57} OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and
American Convention to Prevent and Punish Torture of 1985.\textsuperscript{58}

The Inter-American Commission was created in 1959, first as an autonomous entity with uncertain legal status.\textsuperscript{59} In 1967 it was made an organ of the OAS.\textsuperscript{60} Under the Charter, the Commission has the relatively weak function of promoting “the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”\textsuperscript{61} However, it is also an organ of the American Convention on Human Rights. Under its Article 41, the Commission is called upon to promote respect for and defence of human rights, to serve as a consultative organ, to make recommendations to the governments of member states, and to prepare studies and reports. The Commission thus does not have the power to issue legally binding judgments. However, it may take up individual petitions, conduct an investigation into the case and make recommendations to the respective government, or if it is necessary may refer the case to the Inter-American Court of Human Rights.\textsuperscript{62}

The Court is the principal judicial organ of the Inter-American system. It is a creation of the Convention on Human Rights and serves the role of interpreting and applying the Convention.\textsuperscript{63} It exercises two forms of jurisdictions: adjudicatory and advisory. With regard to the former, it has the power of issuing binding judgments if the state party in question has previously declared that it will recognize such contentious jurisdiction.\textsuperscript{64} To this date, 22 of the 34 member states have

\begin{footnotesize}
\begin{enumerate}
\item See Davidson, Scott, The Inter-American Human Rights System (Aldershot, GB: Dartmouth 1997), at. 7.
\item Ibid., Article 112 (now Article 11 of the OAS Charter).
\item American Convention on Human Rights, supra note, Articles 44, 48-51, 61 para. 1; see Davidson, supra note 59 at 155 ff.
\item Ibid., Articles 33, 61-69; Statute of the Inter-American Court of Human Rights, Adopted by the General Assembly of the OAS at its Ninth Regular Session in October 1979, Res. 448, Article 1.
\item American Convention on Human Rights, ibid., Articles 61 and 62.
\end{enumerate}
\end{footnotesize}
deposited a declaration in this regard. According to Article 61 of the Convention on Human Rights, only State parties or the Commission have the right to submit a case to the Court. Individuals thus do not have access directly to the Court, but first have to lodge a complaint with the Commission.

The American Convention on Human Rights does not include a specific right to natural resources. The provision which the Commission and the Court have used as a hook for their jurisprudence on land rights and resources is Article 21, dealing with the right to property, which reads:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

(…)

The Court and Commission have interpreted this article very flexibly in order to give sufficient consideration to aboriginal peoples' interests. They have also drawn on other provisions of the Convention to give those claims additional force.

The first landmark case decided by the Commission was the *Yanomami Indigenous Community* petition against the Government of Brazil of 1980. The complaint was directed against the government-sponsored construction of roads and farming, as well as the granting of mineral mining licenses on land where the official demarcation of boundaries of indigenous land was

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pending at that time. This had “led to a massive presence of foreigners in the said territory and had had serious effects on the community's well-being, including the alteration of their traditional organization, emergence of female prostitution, epidemics and diseases, forced displacement to lands unsuitable to their ways of life, and death of hundreds of Yanomamis.” The Commission found Brazil to be responsible for failing to take timely and effective measures to protect the Yanomamis' land and thereby violated their right to life, liberty and personal security, the right to residence and movement, and the right to preservation of health and well being. The Commission further considered that current international law acknowledges the right of indigenous groups to special protection for the use of their language, their religion and, in general, all elements essential to the preservation of their cultural identity. It recommends that the state proceed with the demarcation of indigenous lands and that it take preventive and remedial sanitary measures aimed at protecting the life and health of the Yanomami. It further points out the importance to ensure that education, health protection and social integration programs aimed at the Yanomami are carried out in consultation with the indigenous community.

The first time the Inter-American Court of Human Rights denounced a decision on indigenous land rights was in the 2001 case of Mayanga Community of Awas Tingni v. Nicaragua. This was also the first landmark case which dealt specifically with the state's power over natural resources. The Nicaraguan government had granted a concession to a Korean company for large-
scale timber logging and the construction of roads necessary for transportation on indigenous lands. The group of Awas Tingni complained that the land was erroneously considered to be state owned even though it was their ancestral land. The concession was granted without regard to their previous efforts to obtain legal recognition of the lands, and contrary to domestic legal provisions designed to protect the rights of indigenous communities.\(^\text{75}\)

The case was first brought before the Inter-American Commission, which dealt with it in 1998. The Commission found that the state had violated the indigenous community's property rights, in conjunction with other human rights, by refusing to grant them legal recognition of their land and by granting the concession for logging. In addition, it asserted that Nicaragua had violated the right to judicial protection as enshrined in Article 25 of the Convention.\(^\text{76}\) Therefore, the Commission decided to file a complaint against Nicaragua before the Inter-American Court of Human Rights.\(^\text{77}\)

In its concluding report on the case, the Commission found that:

“The state of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.”\(^\text{78}\)

In the view of the Commission, thus, not only consultation with the aboriginal group is required, but it demands that the state obtain their consent prior to undertaking or permitting any projects


\(^{78}\) Inter-American Commission Report No. 27/98, supra note.
aimed at the exploitation of natural resources on indigenous lands, and that it do not proceed without such consent.

The Court was convinced by the submissions of the Awas Tingni community and the Commission and decided that Nicaragua had violated the law of land ownership, as well as the right to judicial protection. What commentators have distinguished as “the most significant and far-reaching part of the decision” is the interpretation the Court has given to Article 21 of the American Declaration on Human Rights. It understands this provision as going beyond individual right of ownership and encompassing communal property of indigenous peoples in accordance with their customary land tenure. The rights articulated in international human rights instruments, the Court stresses, “have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.” Therefore, the Court is not confined in its decision to the scope that is given to the right to property in a domestic context. Instead, it looked into recent developments in international law with respect to the rights of indigenous peoples to property in land, including the jurisprudence of the European Court of Human Rights with regard to the protection of indigenous communal property in the European Convention on Human Rights, and the approaches of other international institutions.

Besides the acceptance of a concept of communal property, the Court also recognized the validity

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79 Inter-American Court of Human Rights, Case of Awas Tingni, supra note 73.
81 Inter-American Court of Human Rights, Case of Awas Tingni, supra note 73 at paras. 146, 148.
82 Ibid., para.146.
83 See Anaya, “Towards a Realist Trend”, supra note 37 at 253.
of indigenous customary land tenure patterns. Hence, “possession of the land should suffice for indigenous communities lacking real title to property of land to obtain official recognition of that property, and for consequent registration”.  

Consequently, property rights of the Awas Tingni community derive from its traditional occupancy and use of the land and do not depend on official registration or recognition by the state. The Court further recognizes that “for indigenous communities, relations to the land are not merely a question of possession and production, but a material and spiritual element which they must fully enjoy, as well as a means to preserve their cultural heritage and pass it on to future generations.” In its final orders, the Inter-American Court demanded that Nicaragua demarcate and title the Awas Tingni land with full participation of the community, and taking into account its customary law and values.

The most significant feature of this decision is that the Court did not stop at the formal wording of Article 21, but looked at the core values represented by the right to property, and took into account modern developments in international law. It thereby recognizes that international law, especially human rights law, is not bound by what a state is willing to implement in its national legislation and practice, but may move forward autonomously in accordance with modern values and believes.

The proceedings, even before the decision was surrendered, already had the side effect of creating large political pressure on the Nicaraguan authorities. For example, the World Bank heard about the struggle and conditioned its aid package to the country on the creation of legislature to demarcate indigenous lands. 

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84 Inter-American Court of Human Rights, *Case of Awas Tingni*, supra note 73 at para. 151.
85 Alvarado, *supra* note 75 at 612.
86 Inter-American Court of Human Rights, *Case of Awas Tingni*, supra note 73 at para. 149.
89 Amiott, *supra* note 80 at 899; Anaya/Williams, *supra* note 46 at 38.
A further remarkable part of the decision is the separate opinion of Judge García Ramírez, in which he makes reference to ILO Convention 169, even though Nicaragua was not a party to the Convention. This demonstrates a willingness to take such international instruments into account, independently of the individual states' ratification, as sources of customary international law. He also makes reference to the UN and OAS Draft Declarations, thus demonstrating a willingness to take those drafts into account as evidence of existing or emerging customary international law.

Another important decision of the Inter-American Commission in the Case of Maya Indigenous Communities of Toledo District v. Belize revolves around the concession for logging and oil extraction granted to companies on Maya traditional land. The Commission took immediate action in this case and accepted a request for precautionary measures by the indigenous community, calling upon Belize to suspend all permits, licenses, and concessions until it has investigated the substantive claims raised in the case.

In the decision on the merits, the Commission, in line with the Awas Tingni judgment, states that property rights protected under the Inter-American system are not limited to those property interests that are already recognized under domestic law, but rather the right to property has an autonomous meaning in international human rights law. With regard to the logging and oil extraction which are the central element of the complaint, the Commission goes even further in its interpretation of the property provision in favor of indigenous rights. In a detailed statement it

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90 Inter-American Court of Human Rights, Case of Awas Tingni, supra note 73, Concurring Opinion of Judge Sergia García Ramírez in the Judgment on the Merits and Reparations, reprinted in Anaya/ Grossman, supra note 77 at 449, at para. 7.
91 Anaya, Indigenous peoples in international law, supra note 34 at 146.
92 Concurring Opinion of Judge Sergia García Ramírez, supra note 90 at para. 8.
94 See Anaya/ Williams, supra note 46 at 39.
95 Inter-American Court of Human Rights, Case of Maya Indigenous Communities of the Toledo District, supra note 93 at para. 131; see also Alvarado supra note 75 at 614.
lays out its view on the states obligation to undergo a process of consultation:

“The Commission also observes in this connection that one of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission’s view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”

In the case of *Mary and Carrie Dann v. United States (2002)*, also called the *Western Shoshone case*, the Commission explicitly relies on new developments and trends in the international legal system regarding the rights of indigenous peoples. The occurrences behind the complaint were the introduction of a permit system imposed by the United States for grazing cattle on lands which to large parts was traditional Western Shoshone territory. The Dann sisters refused to comply with the permit requirement and were thus faced with forcible removal and substantive fines. The US government claimed that the Western Shoshone title to the land had been extinguished through administrative and judicial decisions and the territory now constituted public property.

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96 Inter-American Court of Human Rights, *Case of Maya Indigenous Communities of the Toledo District, ibid.* at para. 142.
98 Anaya, “Towards a Realist Trend”, *supra* note 34 at 254.
The Commission specifically refers to Article 18 of the American Draft Declaration on the Rights of Indigenous Peoples, which provides for the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. Even though the declaration is only in its drafting stage and has not been approved by the OAS General Assembly, the Commission takes it into account as a source of international law. “[T]he Commission considers that the basic principles reflected in many of the provisions of the Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.”

It furthermore makes an advanced statement in favor of extensive rights of indigenous peoples over their lands and natural resources:

“Of particular relevance to the present case, the Commission considers that general international legal principles applicable in the context of indigenous human rights to include:

the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;

the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and

where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

(…)

[T]his approach includes the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent.”


100 Inter-American Commission on Human Rights, Case of Mary and Carrie Dann, supra note 97 at para. 129.

101 Ibid. at para. 130 f.
Consequently, it decided that the extinction of the Western Shoshones' land rights as alleged by
the US was defective, lacking the requisite of fully informed consent by the indigenous people,
and violated their right to protection of property and of due process.\textsuperscript{102}

Renowned scholars, such as James Anaya, welcome this decision as a significant step towards a
system of protection of indigenous rights, in which “the commission further signaled the
development of a \textit{sui generis} regime of international norms and jurisprudence concerning
indigenous peoples”.\textsuperscript{103} He points towards “the benchmark represented by ILO Convention No.
169 in that development, even in regard to states, like the United States, that are not parties to the
convention.”\textsuperscript{104} Lila Barrera Hernandez asserts that the Commission’s reference to the Draft
Declaration on Indigenous Peoples “may open the door to increasing intervention of the System's
organs in resource allocation decisions, particularly if the disputes before them revolve around
issues of environmental law, which is inextricably connected to resource development and the
protection of human life and health.”\textsuperscript{105}

The Inter-American Court continued to develop its jurisprudence on indigenous peoples' property
rights in the cases of \textit{Moiwana Village v. Suriname,}\textsuperscript{106} which concerns reparations for the
displacement of an indigenous community by government forces, and \textit{Yakye Axa Indigenous
Community v. Paraguay,}\textsuperscript{107} dealing with the right to restitution of an indigenous community's
ancestral lands. Notably, in the latter case the Court for the first time expressly recognized that
communal property of indigenous communities relates to their culture, traditions and expressions,

\textsuperscript{102} Ibid, at para. 172.
\textsuperscript{103} S. James Anaya, \textit{Indigenous peoples in international law}, supra note 34 at 147.
\textsuperscript{104} Ibid.
\textsuperscript{105} Barrera-Hernandez, supra note 28 at 52.
customs, rituals, values, art, and relationship with nature.\textsuperscript{108}

The Commission also pronounced its opinion with regard to indigenous land right in its regular country-specific human rights reports. For example, in the 1997 report on Ecuador, it deals specifically with the exploitation of natural resources.\textsuperscript{109} It states that through government-sponsored activities in the exploitation of hydrocarbon and timber, as well as agricultural production, Ecuador encroached upon and interfered with indigenous peoples' use of the land and threatened their cultural and physical survival and integrity. In its final recommendations, the Commission requires that the state take adequate protective measures to guarantee the cultural survival in connection with resource development, and grant meaningful participation to the indigenous population in the decision making processes.

It has to be noted that not all of the decisions of the Commission are made public, in fact only a small faction thereof.\textsuperscript{110} It is therefore possible that many more cases with regard to natural resources have been decided. The cases described above, however, are sufficient to give an insight into the direction the jurisprudence and recommendations of the Inter-American organs are taking. They paint a vivid picture of the emergence of a new body of international law on indigenous rights. Instruments such as the ILO Convention No. 169 constitute the body of this new \textit{sui generis} system, which is built upon by modern developments laid down in the UN Declaration and the American Draft Declaration on Indigenous Peoples. Especially with regard to the right to land and natural resources, the Inter-American Court and Commission depart from restrictive national laws and recognize the autonomous and flexible meaning of international

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\textsuperscript{110} Barrera-Hernandez, \textit{supra} note 28 at 50.
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human rights norms.

b) Reports of Human Rights Bodies

Other international human rights bodies have also pronounced themselves on indigenous peoples' rights in general and on land and resources in particular. Foremost, the Committee of the International Convention against all Forms of Racial Discrimination (CERD) has repeatedly emphasized the duty of states to obtain the consent of aboriginal groups before taking decisions that affect them. In 1997 it has issued a General Recommendation which is designed specifically towards the protection of the right of indigenous peoples.\textsuperscript{111} It states in Article 4(d):


d"[The Committee calls in particular upon State parties to E]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".

The necessity of protecting the rights of aboriginal groups was also emphasized in a number of country reports. However, the distinction between mere consultation and a requirements to obtain consent is not always consistently drawn by CERD. For example, in its Concluding Observations on Suriname 2004, the Committee recommends that Suriname take urgent action to identify the lands which indigenous peoples have traditionally occupied and used, and to consult with indigenous peoples.\textsuperscript{112} It further requires that Suriname's constitutional provision which reserves rights over natural resources to the state must be exercised consistent with the rights of

\textsuperscript{111} UN Committee of the International Convention against all Forms of Racial Discrimination, General Recommendation XXIII on Indigenous Peoples, UN Doc. CERD/C/365, in A/52/18, Annex V (1997) at para. 3.

\textsuperscript{112} UN Committee of the International Convention against all Forms of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname, CERD/C/64/CO/9, 28 April 2004 at paras. 12-13.
indigenous peoples.\textsuperscript{113} In its \textit{Concluding Observations Nigeria 2005}, the Committee expresses concern about a lack of meaningful consultation with ethnic groups in relation to large-scale exploitation of natural resources with adverse effects on the environment.\textsuperscript{114} While only referring to consultations in those opinions, in the 2003 \textit{Concluding Observations on Ecuador} the Committee explicitly requires the state to obtain prior and informed consent:

\begin{quote}
“As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured.”\textsuperscript{115}
\end{quote}

As well, in its 2005 \textit{Concluding Observations on Australia}, the Committee emphasizes the need to take decisions directly relating to the rights and interests of indigenous peoples with their informed consent.\textsuperscript{116} Specifically with regard to land rights, it recommends that the state should make all efforts to seek the informed consent of indigenous peoples before adopting any decision effecting them.\textsuperscript{117}

The Committee on Economic, Social and Cultural Rights, which was created by the UN Economic and Social Council (ECOSOC) to monitor the implementation of the Covenant on Economic, Social and Cultural Rights, takes a similar stand. Even more explicitly then the

\textsuperscript{113} \textit{Ibid.} at para. 11.
\textsuperscript{117} \textit{Ibid.} at para. 16.
Committee on Racial Discrimination, the Committee on Economic, Social and Cultural Rights assumes a duty of the state to seek the aboriginal group's consent in matters affecting them. Its 2004 *Concluding Observations on Colombia* ascertain:

“The Committee notes with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem... The Committee urges the State party to ensure that indigenous peoples participate in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169 (1989) concerning indigenous and tribal peoples in independent countries.”

Shortly afterwards, in its 2004 *Concluding Observations on Ecuador*, the committee formulates an even stricter duty of states to obtain consent of aboriginal communities before undergoing resource extraction on their lands.

“The Committee is concerned that, although the Constitution recognizes the rights of indigenous communities to hold property communally and to be consulted before natural resources are exploited in community territories, these rights have regretfully not been fully implemented in practice. The Committee is deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities. The Committee is also concerned about the negative health and environmental impacts of natural resource extracting companies’ activities at the expense of the exercise of land and culture rights of the affected indigenous communities and the equilibrium of the ecosystem.”

The UN Sub-Commission on the Promotion and Protection of Human Rights undertook a specific inquiry into the topic of indigenous peoples' permanent sovereignty over natural resources in 2004. The final report of the Special Rapporteur *Erica-Irene A. Daes* examines practices of

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118 Para 12.
international actors and states and comes to the conclusion that all states and international actors must recognize the right to self-determination of indigenous peoples with regard to their lands, territories and resources and respect their rights to control and protect these lands.\textsuperscript{119}

c) Policies of International Bodies

The practice and official policies of international treaty bodies towards indigenous peoples have changed over time in a similar manner as indigenous rights were recognized and developed in national and international law. Traditionally, they typically ignored the concerns of indigenous peoples when undertaking consultations on such issues as development projects or environmental issues. Where indigenous interests were taken into account in the decision making process, it was not the affected people themselves that were consulted, but the bodies relied on external experts to decide on what would bring the most benefit to everybody.

However, this attitude has clearly began to change in recent years. There is an increasing tendency to not only include indigenous interests in the decisions on the undertaking of development processes, but specifically to give the communities effected by the decision a voice and let them participate in processes at an international level.

One interesting example of this development is the UN Convention on Biological Diversity.\textsuperscript{120}

Although it is a rather new instrument, adopted in 1992, it still follows a state-centered approach to natural resources and the question of indigenous participation. The preamble reaffirms “that States have sovereign rights over their biological resources, (... and) that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable

\textsuperscript{119} UN Sub-Commission on the Promotion and Protection of Human Rights, \textit{supra} note 53.

manner”.

While the preamble also recognizes “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components”, it fails to recognize a corresponding right of indigenous peoples. Moreover, it also fails to provide for any form of direct participation of aboriginals at the level of the treaty body, but instead sees their role solely in state-intern communication and negotiations with the relevant authorities. Article 8 stipulates that:

Each contracting party shall, as far as possible and as appropriate:

[j] Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In spite of this very limited provision for indigenous consultation, in practice a very different form of participation at the international level has developed. A Conference of Parties, which is established in Article 23 of the Convention, resumes every two years as a governing body for the Convention. While there was no aboriginal participation envisioned, communities who felt excluded have taken the initiative to convene a Summit of Indigenous Representatives to meet at the same time as the Conference of Parties. This Indigenous Summit has been meeting regularly as an alternative Convention parliament and has passed its own resolutions, which then would be
transferred as proposals to the Conference of Parties. Over time it has become an institution that is, while not officially enshrined in the text of the Convention, somewhat accepted as an actor of influence. Indigenous peoples see their taking part in those summits as an expression of their existing, if not yet recognized, right to participation in decision making processes in areas that affect their lives at the international level. At its fourth meeting in 1998, the Conference of Parties established a special working group on Article 8(j) of the Convention. Additionally, at its fifth meeting in 2000 the conference of Parties adopted a programme of work to enhance the role and involvement of indigenous and local communities in the achievement of the objectives of the Convention. This decision explicitly recognizes the role that the International Indigenous Forum on Biodiversity has played, and refers to a number of declarations by indigenous communities relating to conservation and sustainable use of biodiversity. For the future, it stipulates that “[t]he Working Group [on Article 8(j)] should further explore ways for increased participation by indigenous and local communities in the thematic programmes of work of the Convention on Biological Diversity.”

Paras. 11 and 12 furthermore explicitly call for indigenous participation in the international arena:

“The Conference of Parties (...)
11. Invites Parties and Governments to support the participation of the International Indigenous Forum in Biodiversity, as well as relevant organizations representing indigenous and local communities, in advising the Conference of the Parties on the implementation of Article 8(j) and related provisions;
12. Urges Parties and Governments and, as appropriate, international organizations, and organizations representing indigenous and local communities, to facilitate the full and effective participation of indigenous and local communities in the implementation of the Convention, and to this end:

121 See Clavero, supra note 24 at 47-48.
122 Ibid.
124 Ibid., operative para. 9.
(d) Strengthen and build capacity for communication among indigenous and local communities, between indigenous and local communities and Governments, at local, national, regional and international levels, including with the Secretariat of the Convention on Biological Diversity, with direct participation and responsibility of indigenous and local communities through their appropriate focal points”.

The United Nations Development Programme (UNDP) has for some time been at the forefront of the struggle for indigenous rights and participation. In 2001 it adopted a “Policy on Engagement” which has the explicit underlying aim of building a sustainable partnership with indigenous peoples. UNDP believes that “[e]nsuring the engagement of indigenous peoples and their organizations is critical in preventing and resolving conflict, enhancing democratic governance, reducing poverty and sustainably managing the environment.” The Policy was drafted in consultation with representatives of indigenous organizations worldwide. It emphasizes that development has often been imposed upon indigenous communities from outside, thereby often damaging their ancestral lands, waters and natural resources. As a consequence, UNDP fosters the full participation of indigenous peoples in all development processes. Para. 28 of the Policy states that:

“Consistent with United Nations conventions such as ILO Convention 169, UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them.”

The subsequent paragraphs further emphasize the importance of their traditional lands for indigenous peoples and promotes the recognition of right to these lands, territories and resources,

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126 Ibid.
127 Ibid. at para. 4.
128 Ibid. at para. 27.
as well as an aboriginal right to self-determined development and control of these ancestral lands. A number of UNDP Projects, such as the Regional Initiative on Indigenous Peoples' Rights and Development, have an explicit focus on facilitating cooperation between governments and indigenous peoples' organizations in order to integrate indigenous peoples' rights into national policies and strategies.

In 1998, the Council of Ministers of European Union adopted a Resolution entitled *Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States*. In this document, the Council recognizes “that indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas.” This was reaffirmed by the European Commission, which had been asked to undertake a review of progress of working with indigenous peoples.

The World Commission on Dams (WCD), which is an association of government representatives, international financial institutions, the private sector, civil society organizations and affected people, founded in 1997, carried out a global review of the effects of large dam buildings on development from 1998 to 2000. One of its findings was that such dams have disproportionately impacted indigenous peoples, underlying which was a general institutional lack of consideration for indigenous peoples, their social exclusion in official policies and institutions, denial of their

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129 Ibid. at paras. 29-30.
right to self-determination, and discrimination against them in society.134 The WCD released a report in 2000 in which it recommends a new framework for decision making, which is based on the principle of free, prior and informed consent.135 As part of this principle, the report emphasized the right of access to information, legal and other support to enable an informed decision-making process, negotiations in an open and transparent process and the participation of formal and informal representative bodies of aboriginal groups.136

A shift can be seen also in the World Bank's approach to indigenous participation with regard to the financing of development programs which effect their lands and lives. Earlier policies, such as the 1982 Operational Policy Statement on Tribal Peoples in Bank-financed Projects (OMS 2.34), was rather concerned with the protection of small, isolated groups from the negative impacts of development projects than with providing a framework for effective consultation with indigenous peoples as such.137 Even though a study conducted shortly before OMS 2.34 was drafted concluded that the World Bank should avoid all unnecessary or avoidable encroachment onto territories used or occupied by tribal groups, and should not undertake any projects not agreed to by those peoples,138 the policy statement failed to implement many of its proposals.139

OMS 2.34 was elaborated exclusively by members of the Bank without any participation by indigenous peoples, and was based on a notion of integration which was at that time already seen

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136 Ibid. at 215.
as outdated by other international bodies. Therefore, a review undertaken by the office of Environmental and Scientific Affairs in 1987 concluded that a revision of the policy was necessary, with a shift in the definition away from the focus on isolation and acculturation of tribal societies towards a broader approach including all indigenous peoples. It also recommended to incorporate indigenous peoples into the Bank's overall environmental program and to promote their direct participation in the planning of projects.

As a result of this review and massive criticism of OMS 2.34 by indigenous groups and non-governmental organizations, in 1991 the World Bank issued Operational Directive 4.20 (OD 4.20). This new Directive indeed included a broader definition of indigenous peoples, as had been recommended in the review, and stated as its explicit aim that they benefit from development projects. To this end, it called for informed participation of indigenous peoples and required special Indigenous Peoples Development Plans to be prepared in connection with every investment project which affected them. OD 4.20 thus expressed a fundamental shift in the Bank's policy towards an active role of indigenous groups.

The Directive has been subject of a continuous revision since 1994 as a part of a broader framework aimed at safeguarding environmental and social aspects which may be affected by Bank financed projects. A new draft Operational Policy 4.10 (OP 4.10) was prepared in 2000 and underwent a process of consultation with representatives of different interest groups, such as borrower governments, indigenous organizations, non-governmental organizations, academia and

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140 Errico, supra note 137 at 368-369.
143 Ibid., paras. 2 and 3.
144 Ibid., paras. 8 and 13 ff.
145 Errico, supra note 137 at 370.
146 Ibid. at 386.
development institutions.\textsuperscript{147} The end result, however, was criticized by indigenous groups as merely converting the existing directive into a new policy format, without offering any substantive guarantees for them in relation to development projects.\textsuperscript{148} They hence rejected the draft as being inconsistent with their internationally recognized rights.\textsuperscript{149} In spite of such criticism, OP 4.10 was adopted by the World Bank on 20 May 2005 and entered into force in July of the same year.\textsuperscript{150}

The greater part of the discussions on the new Operational Policy revolved around the question of participation by indigenous peoples. In the end, the drafters refused to include a duty to obtain free, prior and informed consent, but instead included the rather unclear formula according to which “the Bank requires the borrower to engage in a process of free, prior, and informed consultation”, which needs to “result in a broad community support to the project by the affected Indigenous Peoples” in order to be eligible for Bank financing.\textsuperscript{151} It did so in spite of an Extractive Industries Review, commissioned by the World Bank itself, which came to the conclusion that recognition and implementation of free, prior, and informed consent is necessary,\textsuperscript{152} an assertion shared by many of the international bodies cited above. The Executive Directors of many countries, such as Thailand/Indonesia, Germany and Switzerland expressed support for a notion that granted the right of free, prior and informed consent to the community directly affected, which was the principle stakeholder.\textsuperscript{153} However, a number of countries rejected

\textsuperscript{147} Ibid. at 371.
\textsuperscript{148} MacKay, supra note 139 at 66-67.
\textsuperscript{151} Ibid., para. 1.
\textsuperscript{152} World Bank Group, Extractive Industries and Sustainable Development: An Evaluation of World Bank Group Experience, July 29, 2003, see Errico, supra note 137 at 385; MacKay, supra note 139 at 77.
\textsuperscript{153} See MacKay, ibid. at 78.
it as effectively constituting a veto right for a certain group which was incompatible with democracy and equality, insisting that sub-soil resources were in state ownership. The failure to include a duty to obtain consent has been highly criticized by indigenous groups and other commentators as falling behind established international standards.

The wording of the policy is rather equivocal. It appears that the notion of free, prior and informed consultation carried out in good faith, within a gender and inter-generationally inclusive framework, which is appropriate to the social and cultural values of the indigenous peoples and their local conditions, and allowing for well-informed participation, is focused more on the process then on the resulting community support. On the other hand, para. 11 of OP 4.10 clearly states that “[t]he Bank does not proceed further with project processing if it is unable to ascertain that such support exists.” While there is thus no explicit negative veto right for indigenous groups enshrined in the policy, the latter provision turns the matter into a positive prerequisite of existing broad community support.

In addition, the policy foresees special considerations where rights to land and natural resources are affected, which indigenous peoples are regarded to be especially tied up with. The borrower is to pay particular attention to the customary individual and collective rights of aboriginals pertaining to land or territories, to the need to protect such lands and resources against illegal intrusion or encroachment, as well as to indigenous peoples' natural resources management practices. If the project involves the commercial development of natural resources, the

154 Ibid. at 78.
156 See World Bank OP 4.10, supra note 150, para. 10.
157 MacKay, supra note 139 at 81.
158 World Bank OP 4.10 supra note 150, para. 16.
borrower is to ensure that as part of the free, prior and informed consultation process the affected communities are informed of, inter alia, their rights to such resources under statutory and customary law.\textsuperscript{159}

The Inter-American Development Bank had already recognized in its 1990 Strategies and Procedures on Sociocultural Issues as Related to the Environment that projects which may have been intended to benefit indigenous groups often instead threaten their physical and sociocultural survival.\textsuperscript{160} It therefore established a principle according to which in general the Bank “will not support projects that involve unnecessary or avoidable encroachment onto territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement with the objectives of the project”.\textsuperscript{161} This document, however, while providing an advanced scope of protection for the time, still focused primarily on isolated tribes. A report on the Eights General Increase in the Resources of the Bank, adopted in 1994, required the systematic inclusion of indigenous issues in the policies and projects of the Inter-American Development Bank.\textsuperscript{162} It still took another twelve years until the Bank finally adopted an Operational Policy on Indigenous Peoples and Strategy for Indigenous Development in 2006.\textsuperscript{163} In this Policy, the Bank particularly subscribes to strengthening the capacity of indigenous peoples to manage and govern their lands and territories, their institutional capacities, as well as their ability to undertake dialogue and negotiations with States and other actors.\textsuperscript{164} With regard to natural resources, the Policy is rather vague, however, speaking only of “indigenous co-
management” pursuant to the standards of ILO Convention No. 169, as well as national regulations, with respect to participatory rights and fair compensation. However, the Policy also ascertains that “[b]efore approving operations with particularly adverse impacts [on indigenous communities], the Bank will demand evidence that the project proponent has reached satisfactory and duly documented agreements with the peoples affected, or has obtained their consent.”

Finally, the United Nations Development Group, which is an establishment that unites the 32 United Nations funds, programmes, agencies, departments, and offices that play a role in development, and whose objective it is to coordinate, harmonize and align their activities, has released *Guidelines on Indigenous Peoples' Issues* in 2008. Their purpose is to assist the UN system in providing a “normative, policy and operational framework for implementing a human rights based and culturally sensitive approach to development for and with indigenous peoples”.

These guidelines, which are inspired by the UN Declaration, contain one of the most well-defined and unequivocal set of instructions for the dealing with indigenous peoples' natural resources:

- Indigenous peoples have rights to the natural resources on their lands although in some countries sub-surface and natural resource rights legally belong to the state. However, these rights are often expressed through legal agreements that define how resources will be used, ensuring protection of indigenous heritage, benefit sharing and compensation.
- Indigenous peoples’ rights to resources that are necessary for their subsistence and development should be respected.
- In the case of state owned sub-surface resources on indigenous peoples’ lands, indigenous peoples still have the right to free, prior and informed consent for the

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exploration and exploitation of those resources and have a right to any benefit-sharing arrangements.

Permits for extraction and even prospecting of natural resources on indigenous land should not be granted if the activity hinders indigenous peoples to continue to use and/or benefit from these areas or where the free, prior and informed consent of indigenous peoples concerned has not been obtained.\footnote{Ibid. at 17.} 

Mention should further be made of the \textit{Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights}.\footnote{U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), approved by the U.N. Sub-Commission on the Promotion and Protection of Human Rights in 2003, together with its Interpretative Commentary,\footnote{Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), available at: http://www1.umn.edu/humanrts/links/norms-Aug2003.html.} are the first set of norms to constitute an authoritative guide to social responsibility for transnational corporations and other companies.\footnote{See Hillemanns, Carolin, “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (2003) online: 4 German Law Journal 1065 at 1065, available at: http://www1.umn.edu/humanrts/links/commentary-Aug2003.html.} These norms, which were approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003, together with its Interpretative Commentary,\footnote{Supra note 171, para. 1.} are the first set of norms to constitute an authoritative guide to social responsibility for transnational corporations and other companies.\footnote{Supra note 172, para. 10(c).} They stipulate that states, as well as the transnational corporations themselves within their respective sphere of influence, have the responsibility to ensure the protection of human rights, including the rights and interests of indigenous peoples.\footnote{Supra note 172, para. 1.} The Commentary clarifies these duties, stating that corporations shall respect the rights of indigenous peoples to own, occupy, develop, control, protect and use their lands and natural resources and respect the principle of free, prior and informed consent of the communities that will be affected by their development projects.\footnote{Supra note 172, para. 10(c).}

It is particularly interesting to observe that various of these bodies refer to one another in their policies. Many guidelines and policies make mention of ILO Convention 169 and refer to its
regulations as the guiding principles in the international law on indigenous peoples. New ones do so as well with regard to the UN Declaration on the Rights of Indigenous Peoples. UNDP's Policy of Engagement further cites the Convention on Biodiversity and its regular references to indigenous communities. By way of such cross-references, the different bodies engage actively in the creation of new standards that are regarded as valid, independent of their binding power, by the community of international organizations and actors.

IV. Concluding observations with regard to the development of international law

As has been shown, the aboriginal right to participation in decisions regarding their lands and natural resources has been constantly evolving and is not yet at the end of its development process. The current state of affairs is not clear without ambiguity, as some international actors have advanced in their protection of indigenous rights, while others have faced opposition and have rolled back. Some of the positions are purposely formulated in an indefinite way so as to avoid a clear decision on the scope of participatory rights.

However, there is still an obvious development towards recognizing a duty of the state to obtain free and informed consent of indigenous peoples prior to the exploration of natural resources. This has been advanced to a great part by the jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights, as well as by international treaty bodies. But also international institutions have played a great part, as they have recognized the emergence of new and more advanced aboriginal rights in their policies and observed their right to participation in their practices. Finally, the Inter-American Court has determined that norms of international law

176 See, for example, UNDP and Indigenous Peoples, supra note 125 at para. 13; UN Development Group Guidelines on Indigenous Issues, supra note at 11.
177 UN Development Group Guidelines on Indigenous Issues, ibid.
178 UNDP and Indigenous Peoples, supra note 125 at 13.
can develop independently from domestic laws and have an autonomous meaning that can go above what has been recognized by states within their domestic sphere.

D. How does the UN Declaration reflect and reinforces this current status of international law?

Many of the discussions and disagreements during the drafting process of the UN Declaration on the Rights of Indigenous Peoples revolved around the issue of indigenous rights with regard to natural resources on their lands. The original draft of the Declaration,\textsuperscript{179} adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on 26 August 1994,\textsuperscript{180} provided for extensive sovereign rights for indigenous peoples over their territories. Its Article 26 reads:

“Indigenous peoples have the rights to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.”

Article 30 of the 1994 draft, which corresponds to Article 32 of the final General Assembly Declaration, states:

“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States \textit{obtain their free and informed consent} prior to the approval of any project affecting their lands, territories and other resources, particularly in


connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.\textsuperscript{181}

Additionally, draft Article 20 provides that indigenous peoples have the right to fully participate in devising legislative or administrative measures that affect them. States are duty-bound to obtain their free and informed consent before adopting and implementing any such measures.

During the further negotiations on the draft, states have tried to preserve their control over indigenous lands and resources, and have proposed a number of amendments to weaken the rights foreseen in the Declaration. Especially the United States made clear that under no circumstances were they willing to accept a notion of internal self-determination which included indigenous sovereignty over natural resources.\textsuperscript{182}

During the negotiations within the Commission on Human Rights, the respective provisions underwent several amendments and re-drafting. During the consultations that took part on the articles related to land rights and self-determination during the sixty-first session in 2004, proposals were made especially to change the wording from a duty to obtain the free and informed prior consent of indigenous peoples before approving any project which would affect their lands, territories and other resources into a mere obligation to seek consent.\textsuperscript{183} However, after all positions were presented, the facilitator strongly suggested to keep the original language.\textsuperscript{184} Another proposal tried to limit the scope of the duty to obtain consent to such projects which \textit{significantly} affect indigenous interests.\textsuperscript{185} On the other hand, states that were

\textsuperscript{181} Emphasis by the author.
\textsuperscript{182} See Huff, \textit{supra} note 42 at 321.
\textsuperscript{184} \textit{Ibid}.
\textsuperscript{185} See UN Commission on Human Rights, “Chairperson's summary of proposals”, Sixty-second session, UN Doc.
geared more positively towards the recognition of indigenous rights came back with counter-proposals, formulating that: “Indigenous Peoples have the rights to the possession, ownership and control of surface and subsurface resources within their traditional lands and territories.”\(^{186}\)

The provision finally adopted, which uses the formulation “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” reflects the compromise agreed on. While it does not require indigenous consent in absolute terms, it is still a stronger obligation than a mere consultation. The process, must be geared towards obtaining the consent and, as emphasized, must be carried out in a spirit of cooperation and good faith.

The second sentence of then Article 30, which now constitutes the third paragraph of Article 32, was somewhat watered down. Where the original formulation foresaw just and fair compensation for projects that affected indigenous territories, the new one only required that the state shall provide effective mechanisms for such redress. The most significant cuts were made with regard to Article 26. The extensive reference to the environment of traditional aboriginal lands in the first draft, including the air, seas, sea-ice, flora, fauna and other resources, was eliminated, as was the explicit reference to traditional laws and customs for the development and management of resources.

In spite of this watering down of some of the original positions, the UN Declaration is still an advanced instrument for the protection of aboriginal rights. The provision contained in Article 32 does not quite live up to the high standards set by the Inter-American Commission and Court and by some other international bodies on the obtaining of consent. However, it emphasizes the

process of consultation with the ultimate goal of obtaining consent, as well as the requirement of
good faith on part of the state, and thereby goes father than the respective clause in ILO
Convention No. 169. On top of this, it should not be underestimated that the UN Declaration was
adopted with the votes of 144 states, in comparison to the 20 states which have ratified the ILO
Convention. This extraordinary approval by countries which in their national laws have far more
restrictive provisions, and some of which have previously been reprimanded by international
human rights bodies for their failure to protect lands and resources, testifies to a change in the
perception of indigenous rights. States have thereby proved their acceptance of a modern system
of aboriginal law which has developed in the international sphere and has become binding on
states regardless of their ratification of specific instruments.

E. The significance of rights over natural resources for the realization of indigenous rights
to their traditional lands

Besides the focus on the legal framework and developments in the rights of indigenous peoples,
the question of why natural resources are so significant for them should also be addressed. When
governments and private corporations talk about resources, they plan for their exploration and
exploitation and negotiate contracts for extraction of valuable materials. Natural resources are
seen as a source of wealth for a state and as a business opportunity. Even where the focus is rather
on conservation than on extraction, this is usually done with a view to future opportunities of
exploitation and business. Conservation of a resource just for its own sake, as is done, for
example, in the protection of biospheres and biodiversity, is a rather new phenomenon.
For first nations, natural resources that are located on their land can be a valuable financial
resource and a way for them to participate in development processes. Many indigenous communities are among the poorest people in the world, and they thus agree to the exploitation of resources on their lands and territories by the state or by private investors in order to profit from the business and improve their living conditions. But on the other hand, nature has a distinct place in first nations' history, traditions and beliefs that is unique to their culture and goes beyond the mere financial value.\textsuperscript{187} The relationship with the land and all living things is at the core of their societies.\textsuperscript{188} For indigenous peoples, their lands and resources are tied to their existence and survival as a group.

\begin{quotation}
“Land is the basis for the creation stories, for religion, spirituality, art and culture. It is also the basis for relationships between people and with earlier and future generations. The loss of land, or damage to land, can cause immense hardship to indigenous people.”\textsuperscript{189}
\end{quotation}

First nations also have a perception of responsibility for the earth and nature which differs from the Western understanding that lands are subject to sovereign rights and can be used and exploited by the government or private persons. Sustainability of the environment and natural resources for future generations is very important to them. In indigenous believes, land is not something inherited from your ancestors, but something you borrow from your children.\textsuperscript{190}

These aspects have to be taken into account when assessing an indigenous right over natural


resources. Many have argued that the duty to obtain prior, free and informed consent by a community before engaging in any form of use or exploitation of natural resources on their lands would amount to a veto right, which is incompatible with basic understandings of democracy and equality. During the drafting of the UN Declaration, some governments argued that such a right to give or withhold consent would grant too extensive powers to a group of the population over the common interest of the nation, and would therefore be anti-democratic and discriminate against non-indigenous. A statement issued by the United States mission to the UN clearly sets out this objection:

“The text also could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples, free, prior and informed consent before passage of any law that "may" affect them (e.g., Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process.”

Canadian Minister for Indian Affairs Chuck Strahl as well voiced the concern that the rights of non-native Canadians would be threatened by such a veto power. He called the document unworkable in a Western democracy under a constitutional government.

“In Canada, you are balancing individual rights versus collective rights, and (this) document . . . has none of that. By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that’s inconsistent with our Constitution.”

Similar arguments were advanced during the discussions around World Bank OP 4.10 by Latin

America, Africa, Saudi-Arabia, Pakistan, the UK and others.  

The concern that a duty to obtain free, prior and informed consent would amount to a veto power and ultimately to inequality between indigenous and non-indigenous people are objections that cannot be ignored. Where the legal system establishes the ownership of and sovereignty over natural resources as belonging to the state, even if they are found on private lands, it constitutes an unequal treatment of land owners if indigenous groups are granted the power to give or withhold their consent to exploitation, while others are withheld the same right.

However, such differentiated treatment might be justified. It has to be taken into account that rights to land and natural resources constitute a part of the indigenous claim to self-determination. This results from the very fact that lands and resources are so important to indigenous identity. The significance of lands and resources for aboriginal peoples has long been recognized in international legal instruments and by international bodies. Article 13(1) of ILO Convention No. 169 sets out that:

“In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

The UN Human Rights Committee, in its General Comment on Article 27 of the International Covenant on Civil and Political Rights, points out that indigenous culture may manifests itself in a particular way of life associated with the use of land resources.  

Also, in its 1999 Concluding observations on Canada, it explicitly emphasizes that the right to self-determination requires that

192 MacKay, supra note 139 at 79.
193 UN Human Rights Committee, General Comment No. 23 (50): The rights of minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 of 8 April 1994, para. 7.
all peoples must be able to control their natural wealth and resources. The Inter-American Court of Human Rights has made similar observations. Further, international institutions such as the World Bank have recognized “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. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.”

The UN Development Group Guidelines on Indigenous Peoples most clearly point out the importance of indigenous sovereignty over natural resources and the role first nations have been playing in their management and conservation:

“Indigenous peoples’ natural resources are vital and integral components of their lands and territories. The concept includes the entire environment: surface and sub-surface, waters, forests, ice and air. Indigenous peoples have been guardians of these natural environments and play a key role, through their traditions, in respectfully maintaining them for future generations. They have managed these resources sustainably for millennia and in many places have created unique biocultural landscapes. Many of these indigenous management systems, even though altered or perturbed by recent processes of change, continue to contribute to the conservation of natural resources to this day.”

The UN Declaration recognizes this special perception of land and resources. The Preamble recognizes that control over developments affecting their lands, territories and resources will enable indigenous peoples to maintain and strengthen their cultures, traditions, and institution.

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196 World Bank OP 4.10, supra note 150 at para. 2.
197 UN Development Group Guidelines on Indigenous Peoples Issues, supra note 176 at 17.
Article 25 refers to their distinctive spiritual relationship to their lands, territories, waters and coastal seas, and their responsibility to future generations in this regard. This understanding forms the basis of aboriginal rights to lands and resources as enshrined in the declaration. Finally, it has to be noted that the differentiation between surface and sub-surface rights, as is made in the Roman law system, does not exist in aboriginal thinking. In the view of first nations, surface as well as sub-surface resources are part of the mother land and have to be taken care of in the same way. 198

Thus, for a right to self-determination to be meaningful, it has to include sovereignty over lands and natural resources. Even though a duty to obtain free, prior and informed consent grants certain rights to aboriginal peoples to resist decisions of the state and thereby the democratically elected government, this is inherent and necessary for any form of self-determination and autonomy. Self-determination would be deprived of all meaning if the group that is granted such a right had no means of opposing decisions of the majority elected government.

F. Conclusion

Indigenous peoples enjoy participatory rights with regard to activities of natural resource exploitation or use on their traditional territories. This has been recognized at least since ILO Declaration 169 was adopted in 1989. Those rights can emanate from two legal principles: ownership of the land, and with it, its resources, or from self-determination. The content of such participation has evolved over the years and is still in the process of developing into a secured norm of international law. International organs, first and foremost the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,

198 Nieva, supra note 35 at 7-8.
have interpreted existing human rights norms to include a duty to obtain the free, prior and informed consent of indigenous peoples. In its leading decision in the case of *Awas Tingni v. Nicaragua*, the Commission and the Court first established that consent of the indigenous inhabitants is necessary before granting a logging permission on their territory. They also recognized communal property of aboriginal peoples as protected property under the relevant human rights norms. In the decision on *Maya Indigenous Communities of Toledo v. Belize*, the Commission extended this principle to the extraction of oil and other resources. Other international bodies, such as the Committee of the International Convention against all Forms of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, have followed the lead of the Court and Commission, investigating cases where states failed to obtain prior consent of an affected aboriginal community and calling upon the states to observe those rights. Also, international institutions have recently included in their policies the requirement to obtain consent before engaging in or supporting any projects on indigenous lands. Considering the special importance lands and resources play in aboriginal culture and tradition, such a right is a necessary element of indigenous self-determination.

The UN Declaration has been drafted in the spirit of this newly evolved consent in the international community. It regulates that indigenous peoples have the right to own, use, develop and control their lands, territories and resources, and that states shall consult with them in order to obtain their free and informed consent prior to the approval of any project in connection with the utilization or exploitation of natural resources. This provision is in line with the newly developed international law. With the overwhelming affirmation of the UN Declaration, the United Nations General Assembly has recognized this right and taken a further step to reinforce it.

The approach towards indigenous peoples and their claim to self-determination has significantly
changed in recent time, away from an assimilationist view towards a recognition of their distinctive history, culture, religion, and view of the world. In accordance with this, the law on indigenous peoples is still in a process of evolution and has to be open for new developments. Land rights and the right to free, prior and informed consent are frequently violated in the national context, which is why the victims still have to seek redress with the relevant international organs, such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Those bodies have been successfully interpreting the law and setting the standards for the protection of indigenous peoples. With the new UN Declaration, they have another instrument at their hands to demonstrate the current state of the law. It is to be hoped that the regulations set out in the UN Declaration will be observed by national governments and will have a positive effect on the compliance with aboriginal rights.