

# The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law

Tara Ward\*

## I. INTRODUCTION

¶1 The right to free, prior, and informed consent (FPIC) in relation to development projects, resource extraction, and other investment projects within the territory of indigenous peoples is currently being debated within international law. On a basic level, the concept of FPIC is contained within its phrasing: it is the right of indigenous peoples to make free and informed choices about the development of their lands and resources. The basic principles of FPIC are to ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.<sup>1</sup>

¶2 This article explores the development of FPIC within international law. It does so by examining the development of indigenous peoples' rights of participation, consultation, and consent within international law, and asks whether these rights represent a customary international legal principle as of yet. It then applies these standards to two distinct cases. The first is the case of the Lubicon Cree in Northern Alberta, Canada, which revolves around a historic land claim dispute. Ultimately, the lack of clarity regarding the status of their rights to land has severely limited the ability of the Lubicon Cree to exercise their participation rights. The second case is that of the Mayan communities of Sipacapa and San Miguel Ixtahuacan, Guatemala, and the development of a gold mine within their territory. The Mayan communities have clearly articulated their struggle as the failure of both the company involved and the Guatemalan government to effectively consult them prior to the granting of either the exploration or exploitation licenses. These cases are in distinct political, social, judicial, and legislative contexts, but together provide insight into the challenges that exist for indigenous peoples in exercising their participation rights.

¶3 This article finds that although a customary international legal principle that addresses indigenous peoples' full right to FPIC does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith

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\* Tara Ward has an L.L.M in Human Rights from the University of East London, a Masters of Education in Studies in Lifelong Learning from Mount Saint Vincent University, and a Bachelor in Environmental Studies from York University. She has worked extensively in support of human rights defenders with Peace Brigades International and her research interests revolve around the framework for business and human rights with a particular focus on the extractive industries.

<sup>1</sup> U.N. Comm'n. on Human Rights, Sub-Comm. on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, ¶ 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation).

consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources. Even with this minimal consensus, however, this article demonstrates the size of the gap that exists between the developing international norms and States' practice. Finally, the discussion of the jurisprudence and the analysis of the two case studies highlight that, for the affected communities, FPIC and other participation rights are not merely administrative processes, but are an exercise in and expression of the right to self-determination.

## II. FREE, PRIOR, AND INFORMED CONSENT IN INTERNATIONAL LAW

¶4 For indigenous rights advocates, free, prior, and informed consent (FPIC) and other participation rights are derived from the right to self-determination, which is considered to be the founding principle of indigenous peoples' rights.<sup>2</sup> Given the fact that the concept of self-determination has historically been connected to the process of decolonisation and the secession of peoples from States, the development of an effective legal argument for indigenous peoples' rights to self-determination has been challenging within international law.<sup>3</sup> However, modern conceptions of self-determination, particularly for indigenous peoples, do not necessarily include the right to separate from a State, but rather "a range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy and self-governance."<sup>4</sup>

¶5 Scholars argue that the right to self-determination is clearly articulated in Common Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that: "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>5</sup> As such, groups or communities of indigenous peoples, as peoples, have the right to self-determination.<sup>6</sup> It is further argued that in order to be meaningful, self-determination must include economic self-determination, which ultimately involves the control over traditional lands, territories and resources.<sup>7</sup> As an extension of these rights, indigenous peoples must have the right to grant or withhold consent to certain development projects within their lands, and which impact their resources.<sup>8</sup>

<sup>2</sup> Bartolome Clavero, *The Indigenous Rights of Participation and International Development Policies*, 22 ARIZ. J. INT'L & COMP. L. 41, 42 (2005); Katsuhiko Masaki, *Recognition or Misrecognition? Pitfalls of Indigenous Peoples Free, Prior, and Informed Consent (FPIC)*, in RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL PITFALLS 69 (2009); U.N. Comm'n. on Human Rights, *supra* note 1, at 56.

<sup>3</sup> Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT'L L. 439, 458-59 (2008).

<sup>4</sup> Erica-Irene A. Daes, Special Rapporteur on the Rights of Indigenous Peoples, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur*, United Nations, U.N. Doc. E/CN.4/2004/30, at 17 (2004).

<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1978) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1967) [hereinafter ICESCR].

<sup>6</sup> United Nations Comm'n on Human Rights, *supra* note 1, at 10.

<sup>7</sup> Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 4, ¶ 17; Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT'L L. 699, 708 (2008).

<sup>8</sup> Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 4, ¶ 38; U.N. Comm'n on Human Rights, *supra* note 1, at 10.

¶6 While for indigenous rights advocates self-determination is the basis for FPIC, within international human rights jurisprudence FPIC is legally based in property rights, cultural rights, and the right to non-discrimination. Most clearly, FPIC has been articulated in the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration).<sup>9</sup> Within other international instruments and jurisprudence, there appears to be a debate as to whether the right of participation is a right to be consulted or whether it is the right to give or withhold consent over certain development projects.<sup>10</sup> In order to examine whether FPIC is an existing customary international legal principle or merely a norm in development, we must explore its development within international law, specifically within the context of the United Nations system, the International Labour Organisation Treaty system, and the Inter-American Human Rights system.

#### A. *United Nations Treaties Supervisory Bodies*

¶7 The Human Rights Committee (HRC) has examined the right of participation of indigenous peoples with relation to their traditional lands, territories, and resources under Article 27 of the ICCPR. This Article addresses the rights of ethnic, religious or linguistic minorities to their culture and states that “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>11</sup> In General Comment No. 23, the HRC has interpreted Article 27 with regard to the rights of indigenous peoples to include the protection of a way of life that is connected to the control over, and use of, lands and resources.<sup>12</sup> Further, the HRC states that with regard to the cultures of indigenous peoples and the use of their traditional lands and resources, Article 27 includes the positive duty of the State to “ensure the effective participation of members of minority communities in decisions which affect them.”<sup>13</sup> The HRC has used this interpretation to consistently call on States Parties in its concluding observations to respect their duty to consult with indigenous peoples prior to any economic development or granting of any resource concessions within their traditional lands or territories.<sup>14</sup>

¶8 The Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body of the ICESCR, has specifically referred to the participation rights of indigenous communities in relation to land and resource rights as requiring consultation with the goal of obtaining consent in its concluding observations to both Colombia and Ecuador.<sup>15</sup> Most recently, the CESCR has

<sup>9</sup> United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007) [hereinafter United Nations Declaration].

<sup>10</sup> S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005).

<sup>11</sup> ICCPR *supra* note 5, art. 27.

<sup>12</sup> U.N. High Comm'r. for Human Rights, *General Comment No. 23: The rights of minorities (Art. 27)*, ¶ 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

<sup>13</sup> *Id.* ¶ 7.

<sup>14</sup> See, e.g., U.N. High Comm'r. for Human Rights, *Concluding observations of the Human Rights Committee: Chile*, ¶ 19, U.N. Doc. CCPR/C/CHL/CO/5 (March 12-30, 2007); U.N. High Comm'r. for Human Rights, *Concluding observations of the Human Rights Committee: Panama*, ¶ 21, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008); U.N. High Comm'r. for Human Rights, *Concluding observations of the Human Rights Committee: Nicaragua*, ¶ 21, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008).

<sup>15</sup> U.N. High Comm'r. for Human Rights, Committee on Economic, Social and Cultural Rights [CESCR], *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, ¶ 12 and 33, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2007); CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, ¶ 12 and 35, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004).

further expanded on the right of indigenous peoples to FPIC in General Comment No. 21.<sup>16</sup> This interpretation of Article 15 of ICESCR, which outlines the right to participate in cultural life, includes the rights of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples.<sup>17</sup> Further, it calls on States Parties to the Convention to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights.”<sup>18</sup> The CESCR clearly recognises indigenous peoples’ collective rights to lands and resources through their right to participate in and maintain their cultures.

¶9 The Committee on the Elimination of Racial Discrimination (CERD) also calls not just for consultation, but also informed consent with its interpretation of the rights of indigenous peoples in applying the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>19</sup> In General Recommendation No. 23, CERD requires States Parties to ensure that indigenous peoples have equal rights to participate in public life and that no decisions relating directly to indigenous peoples are to be taken without their informed consent.<sup>20</sup> With specific reference to land and resource rights, CERD calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples.<sup>21</sup> CERD has used this General Recommendation in its concluding observations, requiring States Parties to ensure consultation and ultimately the consent of indigenous peoples with regard to development and resource exploitation within their traditional lands and territories.<sup>22</sup> Ultimately, CERD has used the framework of protecting indigenous peoples from discrimination and upholding the right to equality, in order to promote their participation rights and ultimately the right to FPIC.

¶10 It should be emphasised that the concluding observations to States Parties and general comments or recommendations on the application of a treaty by the U.N. Treaty Supervisory bodies are not legally binding decisions.<sup>23</sup> They are interpretations of how a State Party should apply a treaty in order to fulfill its international obligations. Even though there does appear to be a minimal consensus amongst the supervisory bodies in relation to the right of indigenous peoples to be consulted in regard to development projects, these recommendations do not represent legally binding obligations and this limits their impact on the development of a customary international legal norm.

<sup>16</sup> CESCR, *General comment No. 21 Right of everyone to take part in cultural life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

<sup>17</sup> *Id.* ¶ 36.

<sup>18</sup> *Id.* ¶ 37.

<sup>19</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

<sup>20</sup> U.N. Comm’n. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination: Annex V - General Recommendation XXIII*, ¶ 4(d), U.N. Doc. Supplement No. 18 (A/52/18) (Sept. 26, 1997).

<sup>21</sup> *Id.* ¶ 5.

<sup>22</sup> See, e.g., U.N. Comm’n. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, ¶ 16, U.N. Doc. CERD/C/ECU/CO/19 (Sept. 22, 2008); U.N. Comm’n. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Namibia*, ¶ 18, U.N. Doc. CERD/C/NAM/CO/12 (Sept. 22, 2008); U.N. Comm’n. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: USA*, ¶ 29, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

<sup>23</sup> Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 33 (2006).

*B. United Nations Declaration on the Rights of Indigenous Peoples*

¶11 The U.N. Declaration is the result of two decades of advocacy and negotiations by indigenous peoples' rights advocates,<sup>24</sup> and most clearly articulates free, prior, and informed consent (FPIC) in relation to self-determination rather than as a derivative right to culture or the right to non-discrimination. The Declaration as a whole is based upon the principle of indigenous peoples' right to self-determination and that "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>25</sup> It is argued that the subsequent and more operative articles of the Declaration outline what self-determination would look like in practice.<sup>26</sup> In this vein, the U.N. Declaration explicitly calls for the FPIC of indigenous peoples in: Article 10 in the case of relocation of indigenous communities, Article 19 when a State is adopting legislative or administrative measures that affect indigenous peoples, and Article 29 regarding the disposal of hazardous waste within their territories.<sup>27</sup> In addition, Article 32 requires free and informed consent prior to "the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."<sup>28</sup>

¶12 During the negotiations of the U.N. Declaration, participation rights were some of the most contentious in large part because of the ambiguity of the definition.<sup>29</sup> For some indigenous rights advocates FPIC is seen as a right to veto projects, while others argue that FPIC is not meant to be a veto right, but rather a way of ensuring that indigenous peoples meaningfully participate in decisions directly impacting their lands, territories, and resources.<sup>30</sup> What is clear is that FPIC within the U.N. Declaration is conceived of as a way to ensure that the right to self-determination is respected and protected by States.

¶13 It should be noted that the U.N. Declaration is not a binding legal instrument and is ultimately considered as an instrument of soft law.<sup>31</sup> Some argue that it represents and affirms existing customary international law.<sup>32</sup> Others argue that it is not completely accurate to suggest that the Declaration already represents emerging customary international law.<sup>33</sup> The idea behind a Declaration and other non-binding instruments is that they create norms that can guide the behaviour of States and ultimately this behaviour can develop into customary international law.<sup>34</sup> What is clear is that the text of the Declaration is well informed by international law, and appears to represent the interpretations of the U.N. human rights supervisory bodies on their respective

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<sup>24</sup> S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 184 (Claire Charters & Rodolfo Stavenhagen eds., 2009); Davis, *supra* note 3, at 440.

<sup>25</sup> United Nations Declaration, *supra* note 9, art. 3.

<sup>26</sup> Davis, *supra* note 3, at 461.

<sup>27</sup> United Nations Declaration, *supra* note 9, art. 32(2).

<sup>28</sup> *Id.*

<sup>29</sup> Davis, *supra* note 3, at 465.

<sup>30</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 48, UN Doc. A/HRC/12/34 (July 15, 2009) (by S. James Anaya); Davis, *supra* note 3, at 465.

<sup>31</sup> Davis, *supra* note 3, at 465.

<sup>32</sup> Anaya, *supra* note 24; Clavero, *supra* note 2, at 43.

<sup>33</sup> Davis, *supra* note 3, at 465; Alexandra Xanthaki, *Indigenous Rights in International Law over the Last 10 Years and Future Developments*, 10 MELB. J. INT'L L. 27, 36 (2009).

<sup>34</sup> Anaya, *supra* note 24, at 184; Davis, *supra* note 3, at 440.

treaties in relation to indigenous peoples rights.<sup>35</sup> The Declaration is referred to as an international standard by other U.N. human rights bodies, within the Inter-American System,<sup>36</sup> and by at least one national Supreme Court.<sup>37</sup> Such recognition for the Declaration, although building up slowly, will hopefully transform itself into State practice and stronger enforcement of the rights contained within the Declaration. At the very least, the Declaration augments indigenous peoples' rights within international law and contributes to the development of indigenous peoples' participation rights and helps to slide the scale towards a duty of obtaining consent, rather than mere consultation.

### C. *International Labour Organisation Treaties*

¶14 The International Labour Organisation (ILO) Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107)<sup>38</sup> was the first international treaty that created binding obligations for States regarding indigenous people.<sup>39</sup> Although the treaty is no longer open for ratification, it is still binding over seventeen States.<sup>40</sup> The treaty, however, is considered problematic given that it was clearly developed with a State-centric view of development, and was aimed at the assimilation of indigenous peoples.<sup>41</sup> The only provision that recognises the participation rights of indigenous peoples is in relation to the relocation of indigenous communities. Article 12, Convention No. 107 clearly requires the free consent of the affected indigenous communities, but then places restrictions on this right by allowing States to subordinate the right of consent if the relocation is in accordance with national laws, in the interest of national security, or the interest of national economic development.<sup>42</sup> Ultimately, the Convention severely limits the right to give or withhold consent by allowing States to ignore these rights using the excuses historically invoked to remove indigenous peoples from their lands.<sup>43</sup>

¶15 The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)<sup>44</sup> was negotiated with the intent of replacing ILO Convention No. 107, and made some significant improvements. These include using the term “indigenous peoples” rather than “indigenous populations,”<sup>45</sup> recognizing the communal land rights of indigenous

<sup>35</sup> Xanthaki, *supra* note 33.

<sup>36</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 131 and 136 (Nov. 28, 2007) [hereinafter *Saramaka People v. Suriname*].

<sup>37</sup> Maia S. Campbell & S. James Anaya, *The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights*, 8 HUM. RTS. L. REV. 377, 379 (2008).

<sup>38</sup> International Labour Organisation (ILO), *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO No. 107), adopted June 26, 1957, entered into force June 2, 1959, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107].

<sup>39</sup> ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND*, 49 (2007).

<sup>40</sup> Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syrian Arab Republic, and Tunisia. List of States that have ratified, denounced, or declared the ILO Convention No. 107 inapplicable, available at <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C107>.

<sup>41</sup> XANTHAKI, *supra* note 39, at 51.

<sup>42</sup> ILO Convention No. 107, *supra* note 38, art. 12(1).

<sup>43</sup> XANTHAKI, *supra* note 39, at 63.

<sup>44</sup> ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Doc. 169), adopted June 27, 1989, entered into force September 5, 1991, 28 I.L.M. 1382, [hereinafter ILO Convention No. 169].

<sup>45</sup> *Id.* art. 1.

communities,<sup>46</sup> and recognizing the rights of indigenous peoples to their natural resources.<sup>47</sup> The Convention is still controversial given that indigenous peoples were not involved in the negotiation of the text.<sup>48</sup>

¶16 Even with the controversies, the Convention and its application by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) have placed the participation rights of indigenous peoples at the forefront. The Convention specifically outlines the participation rights of indigenous peoples with regard to the implementation of the Convention itself in Articles 6 and 7. These provisions require that consultations undertaken in the application of the Convention must be, “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”<sup>49</sup> It is argued that these two articles “reflect the spirit of prior informed consent and apply to each provision of ILO 169.”<sup>50</sup> The Convention further outlines the right to consultation prior to the exploration or exploitation of resources,<sup>51</sup> the need for free informed consent of indigenous peoples prior to any relocation,<sup>52</sup> and the requirement to consult with indigenous peoples prior to any transfer of land rights outside of their community.<sup>53</sup>

¶17 Participation rights have been the foundation of the CEACR interpretations of how the Convention applies to States Parties. For example, a Committee established to examine Ecuador’s non-compliance with the Convention stated that “the spirit of consultation and participation constitutes the cornerstone of ILO Convention No. 169 on which all its provisions are based.”<sup>54</sup> Further the CEACR stated that it:

cannot over-emphasize the importance of ensuring the right of indigenous and tribal peoples to decide their development priorities through meaningful and effective consultation and participation of these peoples at all stages of the development process, and particularly when development models and priorities are discussed and decided.<sup>55</sup>

¶18 The CEACR has repeatedly called on States Parties to respect their obligations to consult with indigenous peoples prior to exploration and exploitation of natural resources within their traditional territories, and has insisted on the adoption and implementation of domestic legislation in order to facilitate such consultations.<sup>56</sup> Again in interpreting the Convention, the

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<sup>46</sup> *Id.* art. 13.

<sup>47</sup> *Id.* art. 15.

<sup>48</sup> Clavero, *supra* note 2, at 46.

<sup>49</sup> ILO Convention No. 169, *supra* note 44, art. 6(2).

<sup>50</sup> David C. Baluarte, *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, 4 SUSTAINABLE DEV. L. & POL'Y 9, 10 (2004).

<sup>51</sup> ILO Convention No.169, *supra* note 44, art. 15(2).

<sup>52</sup> *Id.* art. 16(2).

<sup>53</sup> *Id.* art. 17(2).

<sup>54</sup> ILO, *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, ILO Doc. GB.277/18/4, GB.282/14/2 (Nov. 14, 2001).

<sup>55</sup> International Labour Conference, 98<sup>th</sup> Session, 2009, *General Observation concerning Convention No. 169, in Report of the Committee of Experts on the Application of Conventions and Recommendations*, at 672 (2009).

<sup>56</sup> See, e.g., CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ecuador, ILO Doc. 062010ECU169, ¶ 4 (2010); CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala, ILO Doc. 062006GTM169, ¶¶ 10, 13, and 15 (2006); CEACR,

CEACR does not have a way to enforce its recommendations,<sup>57</sup> and the communications mechanism of the CEACR is not a judicial remedy. Furthermore, the impact of ILO Convention No. 169 in developing a customary legal norm is limited given that it has only been ratified by and is only binding upon 20 states.<sup>58</sup>

#### D. Inter-American Human Rights System

¶19 The Inter-American Human Rights System has developed an advanced and substantive body of jurisprudence on the rights of indigenous peoples.<sup>59</sup> The Inter-American System has recognised the collective rights of indigenous peoples to land, rights to the natural resources traditionally used and found within their territories, and ultimately to FPIC with regard to any large-scale development projects that impact their survival as indigenous peoples. The right to full FPIC has been a slow-developing norm within the Inter-American System and has been articulated through several landmark cases before both the Inter-American Commission of Human Rights (Commission) and the Inter-American Court of Human Rights (Court). This body of jurisprudence has been developed around the rights to property, culture, and judicial protection<sup>60</sup> as outlined by the American Declaration on the Rights and Duties of Man (American Declaration),<sup>61</sup> and the American Convention on Human Rights (American Convention).<sup>62</sup> It should be noted that although the American Declaration is not a legally binding document, it is interpreted as a source of international legal obligations for member States of the Organisation of American States (OAS) by both the Commission and the Court.<sup>63</sup> The American Convention, however, is a legally binding treaty, and the rulings of the Court are considered to be binding on States Parties who have recognised the jurisdiction of the Court.

¶20 The case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* examined the fact that the Nicaraguan government had issued various logging concessions to foreign companies within territory traditionally used and occupied by the Awas Tingni Community.<sup>64</sup> Ultimately, the Court found that Nicaragua had violated the rights of the Awas Tingni to judicial protection of Article 25 and the right to property of Article 21 of the American Convention. Specifically, the Court found that Nicaragua had violated the right to judicial protection by not having an

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Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Mexico, ILO Doc. 062006MEX169, ¶ 10 (2006).

<sup>57</sup> Shin Imai, Ladan Mehravar & Jennifer Sander, *Breaching Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS L. J. 101, 130 (2007).

<sup>58</sup> XANTHAKI, *supra* note 39, at 91.

<sup>59</sup> Baluarte, *supra* note 50, at 9; Enzamaría Tramontana, *The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources*, 17 INT'L J. MINOR GROUP RTS. 241, 242 (2010); Xanthaki, *supra* note 33, at 32.

<sup>60</sup> Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, 16 (2004).

<sup>61</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133, (1949)[hereinafter American Declaration].

<sup>62</sup> Organisation of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 123 [hereinafter American Convention].

<sup>63</sup> Nigel Bankes, *International Human Rights Law and Natural Resources Projects within the Traditional Territories of Indigenous Peoples*, 47 ALBERTA L. REV. 457, 479 (2009); *Basic Document Pertaining to Human Rights in the Inter-American System: Introduction*, INTER-AM. COMM'N H.R., <http://www.cidh.oas.org/basicos/english/Basic1.%20Intro.htm>.

<sup>64</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgement Inter-Am. Ct. H.R. (ser. C) No. 79, (August 31, 2001) [hereinafter *Awas Tingni v. Nicaragua*].

effective system through which indigenous peoples' lands could be delimited, demarcated, and titled.<sup>65</sup> The Court used an evolutionary interpretation of international human rights instruments to determine that the right to property includes the communal property of indigenous communities.<sup>66</sup> This was the first internationally binding ruling that recognised the collective property rights of indigenous peoples and is the basis of the Inter-American judicial framework for the land and resource rights of indigenous peoples within the Americas.<sup>67</sup>

¶21 The Court ordered Nicaragua to adopt the necessary domestic legal measures to “create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary laws, values and mores.”<sup>68</sup> The Court also ruled that until the delimitation and titling of the Awas Tingni community's land, the State itself must prevent agents of the State or third parties from acting in a way that affects the Awas Tingni community members' use, value, or enjoyment of the property where they live and carry out their activities.<sup>69</sup> It is argued that this ruling affirmed the right of indigenous peoples to their lands and resources without State interference, and also asserted the positive obligation of the State to prevent interference by third parties.<sup>70</sup>

¶22 The case of *Mary and Carrie Dann v. United States* was brought before the Inter-American Commission of Human Rights<sup>71</sup> and built upon the Court's decision in *Awas Tingni*. The Danns, members of the Western Shoshone Nation, argued that they had never extinguished their rights to lands that had traditionally been used for cattle grazing and other activities.<sup>72</sup> The United States argued that the Western Shoshone traditional land rights had been extinguished through legal and administrative procedures, and that this was a legal dispute, not an issue of human rights violations.<sup>73</sup> However, the Commission found that the United States had violated the Danns' right to equality under the law, the right to a fair trial, and the right to property as defined in the American Declaration.<sup>74</sup> The Commission argued that the Declaration in this case needed to be applied in relation to wider principles of international human rights that protect the individual and collective interests of indigenous peoples.<sup>75</sup> It concluded that by refusing to accept the Danns' legal intervention, as members of the Western Shoshone Nation, the State had failed to “fulfil its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole.”<sup>76</sup> This interpretation by the Commission recognises that any determination with regard to indigenous land rights must “be based on fully informed consent of the whole community, meaning that all members be fully informed and have the

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<sup>65</sup> *Id.* ¶ 140-155.

<sup>66</sup> *Id.* ¶ 148.

<sup>67</sup> S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 2 (2002); Xanthaki, *supra* note 33, at 32.

<sup>68</sup> *Awas Tingni v. Nicaragua*, *supra* note 64, ¶ 138.

<sup>69</sup> *Id.* ¶ 164.

<sup>70</sup> Anaya, *supra* note 10, at 16; Page, *supra* note 60, at 14.

<sup>71</sup> See *Mary & Carrie Dann v. U.S.*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. Rev, ¶ 1 (2002) [hereinafter *Mary & Carrie Dann v. U.S.*].

<sup>72</sup> *Id.* ¶ 35-43.

<sup>73</sup> *Mary & Carrie Dann v. U.S.*, *supra* note 71, ¶ 76.

<sup>74</sup> *Id.* ¶ 172.

<sup>75</sup> *Id.* ¶ 131.

<sup>76</sup> *Id.* ¶ 141.

chance to participate.”<sup>77</sup> Ultimately, the State must ensure special measures exist to recognise the collective interests of indigenous peoples with regard to their land and resources.<sup>78</sup>

¶23 In the case of *Maya Communities of the Toledo District v. Belize*, the Commission built on its decision in the *Dann* case and the precedent set by the Court in the *Awes Tingni* case. This case dealt with resource concessions granted to foreign companies by Belize within lands that traditionally belonged to and were used by the Maya Communities.<sup>79</sup> The Commission found that the State had violated the Maya Communities’ property rights, first by not fully and effectively delimiting, demarcating, and recognising the communal lands that had traditionally been occupied and used by the Maya Communities.<sup>80</sup> Further, Belize violated these property rights by granting the concessions within the lands “without effective consultations with and the informed consent of the Maya people.”<sup>81</sup> Ultimately, the Commission held in this case “that the duty to consult is a fundamental component of the States obligations in giving effect to the communal property rights of the Maya people in the lands that they have traditionally used and occupied.”<sup>82</sup> With this ruling, the Commission articulated that in order to protect the communal property rights of indigenous peoples, consultation with the goal of obtaining consent is required.<sup>83</sup>

¶24 The case of *Saramaka People v. Suriname*<sup>84</sup> is the most recent binding decision of the Inter-American Court and also the one that most clearly articulates not only the right of indigenous peoples to FPIC, but also the substantive nature of that right within the Inter-American System. The *Saramaka* case revolves around the fact that Suriname granted resource concessions to private companies within the territories of the Saramaka People without their consultation or consent. The Court found that Suriname had violated the Saramaka People’s rights, as tribal peoples, to judicial protection and property by granting the logging and mining concessions, and failing to have effective mechanisms to protect them from acts that violate their rights to property as defined in the American Convention.<sup>85</sup>

¶25 However, the Court held that the property rights of the American Convention are not absolute and that States have the right to subordinate property rights in the interests of society.<sup>86</sup> The Court stated that “a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.”<sup>87</sup>

¶26 The Court, however, also placed limits on a State’s authority to subordinate the rights of indigenous peoples, ruling that such restrictions must not violate the right of indigenous peoples to survival.<sup>88</sup> In order to ensure this protection, the Court prescribed a series of safeguards which require States to: ensure effective participation of the affected people in the decision; guarantee that the affected peoples will receive a reasonable benefit from such a plan; and ensure

<sup>77</sup> Page, *supra* note 60, at 18.

<sup>78</sup> Anaya, *supra* note 10, at 15.

<sup>79</sup> Page, *supra* note 60, at 18.

<sup>80</sup> Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1, ¶ 194 (2004) [hereinafter *Maya Communities v. Belize*].

<sup>81</sup> *Id.* ¶ 153.

<sup>82</sup> *Id.* ¶ 155.

<sup>83</sup> Anaya, *supra* note 10, at 16; Page, *supra* note 60, at 19.

<sup>84</sup> *Saramaka People v. Suriname*, *supra* note 36.

<sup>85</sup> *Id.* ¶ 185.

<sup>86</sup> *Id.* ¶ 127.

<sup>87</sup> *Id.* ¶ 127.

<sup>88</sup> *Id.* ¶ 127.

that prior to granting any concession, independent and technically sound environmental and social impact assessments be undertaken to mitigate any negative effects.<sup>89</sup> The first safeguard calls for the effective participation of the affected people in line with their customs and traditions regarding any development or investment plan within their territory.<sup>90</sup> The Court further defines this State obligation as including the State's duty to disseminate and receive information, and specifies that consultations must be in good faith, be culturally appropriate, and have the intent of reaching an agreement.<sup>91</sup> In the case of large-scale developments that could impact the survival of a people, the State has the duty not only to consult, but also to obtain free, prior, and informed consent.<sup>92</sup>

¶27 The *Saramaka* case clearly sets a precedent within the Inter-American System.<sup>93</sup> The Court has recognized indigenous peoples' right to consultation with regard to any developments within their lands and territories, and requires FPIC with regard to large-scale development projects. This can be considered a step forward in the enforcement of indigenous peoples' rights at the international level.<sup>94</sup> However, there is still some concern, in that placing restrictions on indigenous peoples' rights to their lands and resources when States deem it to be in the interests of society is problematic.<sup>95</sup> Especially because this, as stated earlier, has been one of the historic reasons that States have used to justify undermining indigenous peoples' land and resource rights. The fact that smaller scale concessions may be granted without achieving consent is also of concern.<sup>96</sup>

¶28 In July 2011, the Inter-American Court held hearings on the case of *Kichwa People of Sarayaku v. Ecuador*.<sup>97</sup> This case revolves around the granting of oil exploration and exploitation licenses within the territory traditionally occupied and used by the Kichwa People of Sarayaku.<sup>98</sup> The Commission contends that the State of Ecuador violated the Kichwa People of Sarayaku's right to property (Article 21) in relation to the right to freedom of thought and expression (Article 13), and the right to participate in government (Article 23) by failing to effectively consult the affected communities prior to the granting of the licenses and allowing activities within the territories of Kichwa People of Sarayaku to their detriment.<sup>99</sup>

¶29 In its application to the Court, the Inter-American Commission builds on the safeguards developed in the *Saramaka* case, arguing that there is an implicit obligation to ensure prior consultation in the safeguard requiring effective participation of indigenous peoples with regard to any development, investment, exploration and mining on indigenous peoples lands.<sup>100</sup> The Commission further argues that the Court in *Saramaka* was unequivocal in the need to achieve

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<sup>89</sup> *Id.* ¶ 133.

<sup>90</sup> *Id.* ¶ 133.

<sup>91</sup> *Id.* ¶ 133.

<sup>92</sup> *Id.* ¶ 134.

<sup>93</sup> Brunner, *supra* note 7, at 706; Tramontana, *supra* note 60, at 221.

<sup>94</sup> Brunner, *supra* note 7, at 710.

<sup>95</sup> Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Inter-American Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WISC. INT'L L.J. 51, 84 (2009).

<sup>96</sup> *Id.* at 91.

<sup>97</sup> Press Release, The Inter-American Court of Human Rights (Oct. 27, 2011), available at [www.corteidh.or.cr/docs/comunicados/cp\\_07\\_11\\_eng.pdf](http://www.corteidh.or.cr/docs/comunicados/cp_07_11_eng.pdf).

<sup>98</sup> *Kichwa People of Sarayaku and its members v. Ecuador*, Case 12.465, Inter-Am. Comm'n H.R., Application to the Inter-Am. Ct. H.R. ¶¶ 56-69 (Apr. 26, 2010).

<sup>99</sup> *Id.* ¶ 259.

<sup>100</sup> *Id.* ¶ 115.

consent when a project is of large enough scale to impact the survival of a people.<sup>101</sup> The Commission then attempts to further the development of the content and scope of the duty to consult.<sup>102</sup> Focusing on the right to information, the Commission states that the information provided on the proposed project must be in clear and accessible language, and that the information provided be sufficient and complete enough to guarantee that if consent is given, it has been given free from manipulation.<sup>103</sup> The information and consultations must be held sufficiently in advance of either the granting of authorization or the initiation of any negotiations.<sup>104</sup> Further, if full consent is not determined to be required, then within the terms of the consultation there should be a time when the communities can know why their arguments were overridden and be provided adequate information about compensation and reparations.<sup>105</sup> Ultimately, the Commission argues that the right to prior consultation “implies the right to play a real role in the decision-making process.”<sup>106</sup> Depending on the Court’s ruling in this case, there is potential to expand and reinforce the safeguards developed in the *Saramaka* case and further develop the content and scope of the right to free, prior, and informed consultations within the Inter-American system.

### *E. Discussion*

¶30 At a minimum, international standards call for the consultation of the affected peoples when any development project is being considered that is either within their lands and territories or that affects traditionally used resources. The U.N. Treaty supervisory bodies have increasingly interpreted existing conventions as requiring this minimum duty to consult indigenous peoples when decisions are being made regarding their lands and resources. More specifically the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on Social, Economic and Cultural Rights (CESCR), have increasingly recognized full FPIC by requiring States Parties to ensure that the consultation of indigenous peoples has the goal of reaching consent. These conclusions have largely been based around the right to culture and the right to non-discrimination, rather than on the right of indigenous peoples to self-determination. Ultimately, the only textual expression of FPIC is found within the U.N. Declaration, which specifically bases FPIC on the right to self-determination.

¶31 ILO Convention No. 169 and the subsequent interpretations by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) confirm the minimum standard of indigenous peoples’ rights to consultation regarding development projects, resource extraction, and investment projects within their traditional lands and territories. Furthermore, the convention establishes that consultations must be undertaken in good faith and have the goal of consent. If a project will involve the relocation of indigenous peoples, then consent is not just an aspiration, but a requirement.

¶32 The Inter-American Human Rights system has progressively developed clear standards in relation to indigenous peoples’ participation rights with regard to their natural resources and lands based in property rights, and effective judicial protection. The first standard requires that States have effective mechanisms to delimit, demarcate and title indigenous peoples’ lands and

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<sup>101</sup> *Id.* ¶ 114.

<sup>102</sup> *Id.* ¶ 144.

<sup>103</sup> *Id.* ¶ 145.

<sup>104</sup> *Id.* ¶ 146.

<sup>105</sup> *Id.* ¶ 148.

<sup>106</sup> *Id.* ¶ 143.

territories as initially defined in the *Awás Tingni* case. The second standard is that any changes to the title of indigenous peoples' lands cannot occur without the consent of the entire community affected. The third standard is clearly outlined within the safeguards articulated in the *Saramaka* case, whereby indigenous peoples have the right to be consulted with relation to any development project that is to be undertaken within their lands and territories, and, moreover, FPIC is required if the project is large enough to have a profound impact on the survival of the affected peoples.

¶33 Much of the development of the right to consultation and consent has been developed within the Americas, given the role of the Inter-American Human Rights system and the fact that most signatories to ILO Convention No. 169 are found in Latin America. However, there are also interesting developments in other parts of the world. For example, a communication filed with the African Commission of Human Rights on behalf of the Ogoni People of the Niger Delta found that in order to comply with the spirit of Articles 16 and 24 of the African Charter on Human and Peoples' Rights,<sup>107</sup> referring respectively to the rights to health and a clean environment, a State is required to undertake scientifically and technically sound environmental and social impact assessments, publicise these results, and provide meaningful opportunities for the affected peoples to be heard and participate in the decision making process.<sup>108</sup> Most recently, a government investigation in India found that the granting of licenses to a mining project violated the rights of the affected indigenous peoples' right to FPIC, as articulated in India's Forest Rights Act.<sup>109</sup>

¶34 Ultimately, for a more complete analysis of the right to FPIC of indigenous peoples as a customary international legal norm, there is a need to examine State practice beyond the ratification or endorsement of international agreements. A customary international legal norm or principle "is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to legitimate expectations of similar conduct in the future."<sup>110</sup>

¶35 The practice of States includes not just the practice of the executive branch, but the legislative and judicial organs as well.<sup>111</sup> What the above discussion demonstrates is that there is a minimal consensus amongst treaty supervisory bodies that the major international human rights treaties implicitly recognise a right to consultation in good faith. Further, in one regional human rights system, consultation is required with regard to any development project, and ultimately consent must be given if a project will impact the survival of a people. These might not yet represent a customary international legal principle, but they are contributing to the development of such a norm by slowly shaping and challenging State practice.

<sup>107</sup> Organisation of African Unity, African Charter on Human and Peoples' Rights, arts. 16, 24, June 27, 1981, 1520 U.N.T.S. 217.

<sup>108</sup> The Soc. and Econ. Rights Action Ctr. and the Ctr. for Econ. and Social Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples Rights, ¶ 53 (October 2001) [hereinafter *Ogoni People v. Nigeria*].

<sup>109</sup> Dr. N.C. Saxena et al., *Report of the Four Member Committee for Investigation into the Proposal Submitted by the Orissa Mining Company for Bauxite Mining in Niyamigiri* [India] 4, 5, and 56 (2010).

<sup>110</sup> Committee on Formation of Customary (General) International Law, *Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law*, at 8 (2000).

<sup>111</sup> *Id.* at 17.

## III. CASE OF THE LUBICON CREE OF NORTHERN ALBERTA

¶36 The Lubicon Cree<sup>112</sup> are a First Nation of about 500 people who have an on-going land dispute with the government of Canada with regard to an expanse of territory of about 10,000 square kilometres in Northern Alberta.<sup>113</sup> In 1984, Chief Bernard Ominayak of the Lubicon Lake Band filed a communication with the Human Rights Committee (HRC) alleging that the Canadian government had violated their right as a people to self-determination as defined in Article 1 of the ICCPR (*Ominayak v. Canada*).<sup>114</sup> The case dealt with the land dispute between the Lubicon and the federal government of Canada, as well as the exploration and exploitation of energy resources, such as oil and gas, within the disputed territory.<sup>115</sup> Due to a dispute over the facts between the parties in the case, the HRC did not publish its views until 1990.<sup>116</sup> The HRC found that a violation of Article 1 of the ICCPR could not be found given that as an individual, Chief Ominayak could not file a complaint on behalf of a collective.<sup>117</sup> Instead, the HRC published its findings based on Article 27, stating that “[h]istorical inequities, to which the State Party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue.”<sup>118</sup> The HRC agreed that a negotiated settlement would be an appropriate remedy; to date, however, the Lubicon Cree do not have a land claim agreement and oil and gas exploitation within their territories has continued. This case study will examine the history of the Lubicon Cree’s attempts to have their land rights recognised, and will ultimately explore how this lack of recognition has impacted the rights of the Lubicon to be consulted with regard to oil and gas exploration and exploitation within their lands.

## A. History

¶37 In Canada there are several bases for proven or claimed Aboriginal land rights: historic treaties; modern day comprehensive land claims; certain Aboriginal rights to participate in traditional activities, such as hunting, trapping or fishing, which may exist without a signed treaty; and Aboriginal title which arises from the proven historic use and occupancy of land.<sup>119</sup> Unlike earlier treaties, which were negotiated with individual First Nations, the Numbered Treaties or Post-Confederation Treaties covered large expanses of land which involved many, potentially unrelated First Nations communities, and negotiations did not bring all of the concerned nations together at one location.<sup>120</sup> What instead occurred was a process of adhesion which:

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<sup>112</sup> The Lubicon Cree are a legally recognised band known as the Lubicon Lake Band, but also self-identify as the Lubicon Lake Indian Nation.

<sup>113</sup> Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984, Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, vol. 2, ¶ 2.2, U.N. DOC. A/45/40, Annex IX(A) (1990) (view adopted on Mar. 26, 1990 at the 38th Sess.) [hereinafter *Ominayak v. Canada*].

<sup>114</sup> *Id.* ¶ 2.1.

<sup>115</sup> *Id.* ¶ 2.3.

<sup>116</sup> *Id.* ¶ 30.

<sup>117</sup> *Id.* ¶ 32.1.

<sup>118</sup> *Id.* ¶ 33.

<sup>119</sup> Heather L. Treacy, Tara L. Campbell & Jamie D. Dickson, *The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development*, 44 ALBERTA L. REV. 571, 573–78 (2007).

<sup>120</sup> Thomas Flanagan, *Adhesion to Canadian Indian Treaties and the Lubicon Lake Dispute*, 7 CANADIAN J.L. & SOC’Y 185, 187 (1992).

“allowed a band that had not participated in the negotiations to join or adhere afterwards to a treaty. They would join as a group, with the chief and headmen signing the treaty, just as if they had been present at the first signing, expect that the terms were now fixed and not subject to further negotiation.”<sup>121</sup>

¶38 The Canadian governmental authorities see all of the Numbered Treaties as having extinguished Aboriginal title to the entire expanses of lands within the territories identified; in their view, the bands “that signed each treaty surrendered, not unique homelands within the treaty area, but their right to use the entire area.”<sup>122</sup> This is where the point of original contention lies for the Lubicon in that, as a separate nation, they never adhered to a treaty and thus never ceded their land rights.<sup>123</sup>

¶39 In 1899, Treaty No. 8 was negotiated and signed between a treaty commission and two Cree Chiefs representing the Cree people who were present at the negotiations.<sup>124</sup> The treaty covers 324,900 square miles in northern parts of British Columbia, Alberta, and Saskatchewan, and part of the Northwest Territories.<sup>125</sup> In the early 1900s, a series of adhesions were incorporated into Treaty No. 8, including the adhesion of a band at Whitefish Lake.<sup>126</sup> During this period, various individuals were added to band lists of communities to which they did not necessarily belong.<sup>127</sup> For example, instead of adhering a separate Lubicon Lake band, the Indian Agents at the time added individuals from the Lubicon Lake Nation to the band list of the Whitefish Lake Band.<sup>128</sup> Until the 1930s, no action was taken to address the separate identity and outstanding land entitlements of these Aboriginal communities.<sup>129</sup>

¶40 In 1933, several Lubicon men petitioned the federal government to have a reserve established at Lubicon Lake.<sup>130</sup> In 1940, the Lubicon Lake Band was given permission to elect a Chief, but by this time the federal government had transferred control of these lands to the province of Alberta under the Alberta Natural Resources Act of 1930 and it was too late for the federal government to simply allocate a reserve.<sup>131</sup> Instead, the federal government would have to request land from the province, and needed to undertake a land survey.<sup>132</sup> The federal government sent an Indian Agent with a surveyor to Lubicon Lake and they selected an approximate location for the reserve of about twenty-five square miles. However, the official survey was never completed and the land was never transferred back from the province to the federal government.<sup>133</sup> In 1953, the Province of Alberta issued an ultimatum to the federal government, giving the federal government thirty days to come to a final determination regarding

<sup>121</sup> *Id.* at 187.

<sup>122</sup> *Id.* at 203.

<sup>123</sup> Lubicon Lake Indian Nation, *Submission to the 36th Session of the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's 4th and 5th Periodic Reports*, at 1 (May 1, 2006).

<sup>124</sup> Darlene Abreu Ferreira, *Oil and Lubicons Don't Mix: A Land Claim in Northern Alberta in Historical Perspective*, 12 CANADIAN J. NATIVE STUD. 1, 3 (1992).

<sup>125</sup> Flanagan, *supra* note 120, at 194.

<sup>126</sup> *Id.* at 198; Abreu Ferreira, *supra* note 124, at 3–4; Dennis Madill, *Treaty Research Report: Treaty No. 8*, at 57 (1986).

<sup>127</sup> Madill, *supra* note 126, at 57.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Flanagan, *supra* note 120, at 199.

<sup>131</sup> *Id.*

<sup>132</sup> Madill, *supra* note 126, at 54, 59.

<sup>133</sup> *Id.*; Abreu Ferreira, *supra* note 124, at 4.

the Lubicon Lake reserve. The federal government did not act, which resulted in the Lubicon Lake reserve being removed from Alberta's records, and the area was opened up for oil exploration.<sup>134</sup>

¶41 The Lubicon continued to live on and use these territories to hunt, trap and fish as they had traditionally done. In the early 1970s, the growth of oil and gas exploitation in northern Alberta caused the Lubicon Cree and other Aboriginal communities, who had also been left out of Treaty No. 8, to form a coalition called the Alberta Isolated Communities.<sup>135</sup> In 1975, this group attempted to file a caveat with the Registrar of the Alberta Land Registration District "which would give notice to all parties dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act."<sup>136</sup> The registrar refused the caveat and forced the communities to take legal action,<sup>137</sup> first pursuing domestic relief and finally initiating a case before the Human Rights Commission when domestic efforts were unsuccessful. The ruling of the provincial Court was postponed, and during this time the Alberta government passed the amendments to the Land Titles Act, which precluded the right to file caveats and was retroactive to January 1975.<sup>138</sup> The Alberta Isolated Communities' request to file a caveat was then dismissed by the Court in 1977.<sup>139</sup>

¶42 In 1982, the Lubicon attempted to get an injunction to temporarily halt activities of oil and gas companies operating within a nine hundred square mile radius of claimed reserve land and to reduce activity in a further 8,500 square miles of land traditionally used for hunting and trapping.<sup>140</sup> The application for the injunction asserted that the Lubicon had never ceded their land rights and the continuation of the activities of the oil and gas companies would cause "irreparable harm to their traditional way of life, in particular, of hunting and trapping."<sup>141</sup> The application for the injunction was dismissed in 1983, when the Court ruled that the balance of convenience was in favour of the oil companies, and that they would suffer substantial losses if the injunction was granted.<sup>142</sup> Ultimately, the judge did not agree with the Lubicon argument that the activities of the oil companies in question would cause irreparable harm to their culture and stated that:

[t]he twentieth century, for better or for worse, has been part of the applicants' lives for a considerable period of time. The influence of the outside world comes from various sources, in many cases not connected with any of the activities of any of the respondents.<sup>143</sup>

¶43 The Lubicon Lake Band appealed to the Alberta Court of Appeals, but in 1985 this Court upheld the ruling.<sup>144</sup> The Supreme Court of Canada further refused leave to appeal.<sup>145</sup>

<sup>134</sup> Flanagan, *supra* note 120, at 200.

<sup>135</sup> Abreu Ferreira, *supra* note 124, at 12.

<sup>136</sup> Ominayak v. Canada, *supra* note 113, ¶ 3.3.

<sup>137</sup> Abreu Ferreira, *supra* note 124, at 12.

<sup>138</sup> Ominayak v. Canada, *supra* note 113, ¶ 3.3.

<sup>139</sup> Abreu Ferreira, *supra* note 124, at 12; Ominayak v. Canada, *supra* note 113, ¶ 3.3.

<sup>140</sup> Flanagan, *supra* note 120, at 202.

<sup>141</sup> Richard H. Bartlett, *Resource Development and the Extinguishment of Aboriginal Title in Canada and Australia*, 20 U.W. AUSTL. L. REV. 453, 482 (1990).

<sup>142</sup> Ominayak v. Norcen Energy Res. Ltd. (1983), 29 Alta. L.R. 2d 151, ¶ 21 (Can. Alta. Q.B.).

<sup>143</sup> *Id.* ¶ 20.

<sup>144</sup> Ominayak v. Norcen Energy Resources Ltd., (1985) 58 A.R. 161 (Can. Alta. C.A.).

<sup>145</sup> Ominayak v. Canada, *supra* note 113, ¶ 3.9.

¶44 It was during this period of time in 1984 that the Lubicon had filed their communication with the HRC. In 1988, frustrated by the lack of response in the legal system, the Lubicon set up roadblocks and forced the provincial government into negotiations for a land agreement.<sup>146</sup> The result was an agreement in which the provincial government would transfer ninety-five miles of land to the federal government in order to set up a reserve.<sup>147</sup> This agreement has never been implemented.<sup>148</sup> In 1990, the HRC published its opinion regarding *Ominayak v. Canada*, and the Canadian government committed to negotiating a land claim settlement with the Lubicon. Three rounds of negotiations have occurred since this time: first in 1992, then 1998, and most recently in 2003.<sup>149</sup> The points of contention in the negotiations appear to be the Lubicon's desire to include both compensation for past harms and the right to self-government within a binding legal agreement.<sup>150</sup>

¶45 Between 1979 and 1982, four hundred oil wells had been drilled within the traditional territories of the Lubicon.<sup>151</sup> By 2002, the number of wells had grown to 1,700,<sup>152</sup> and as of 2010, there have been over 2,600 wells drilled.<sup>153</sup> The wells are spread over approximately seventy percent of the disputed territory.<sup>154</sup> Given the fact that the provincial and federal governments have yet to recognise the Lubicon land claim, many of these wells have been developed without any consultation by the provincial government with the Lubicon.<sup>155</sup> In some cases, individual companies have consulted directly, but ultimately the Lubicon Cree have limited recourse if they do not consent to the proposed projects.<sup>156</sup>

### B. Canada's Human Rights and Legal Obligations

¶46 Canada has ratified or acceded to many of the major international human rights treaties. These treaties importantly include the International Covenant on Civil and Political Rights (ICCPR)<sup>157</sup> and its first optional protocol,<sup>158</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>159</sup> and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).<sup>160</sup> Although none of these treaties include a textual expression regarding the right of indigenous peoples to be consulted or to FPIC, the interpretations of the supervisory bodies of these treaties create a minimum obligation to consult with Aboriginal peoples in good faith.<sup>161</sup>

<sup>146</sup> Paul Barnsley, *Lubicon Crees Under Siege – Again*, WINDSPEAKER, at 19 (2005).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 22.

<sup>149</sup> Lubicon Lake Indian Nation, *supra* note 123, at 4–6.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 12.

<sup>152</sup> *Id.*

<sup>153</sup> Amnesty International, *Canada: 20 Years' Denial of Recommendations made by the United Nations Human Rights Committee and the Continuing Impact on the Lubicon Cree*, at 5 (2010).

<sup>154</sup> *Id.*

<sup>155</sup> Lubicon Lake Indian Nation, *supra* note 123, at 12–13; Amnesty International, *supra* note 153, at 5.

<sup>156</sup> Amnesty International, *supra* note 153, at 11.

<sup>157</sup> ICCPR, *supra* note 5 (acceded 19 May 1976).

<sup>158</sup> G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 59 (Dec. 19, 1966). (acceded May 19, 1976).

<sup>159</sup> ICESCR, *supra* note 5 (acceded May 19, 1976).

<sup>160</sup> ICERD, *supra* note 19 (ratified October 14, 1970).

<sup>161</sup> See e.g., HRC, *supra* note 12; CDESCR, *supra* note 15.

¶47 Canada is not a signatory to the American Convention, but both the Inter-American Court and Commission consider the American Declaration a representation of the human rights provisions in the Organization of American States (OAS) Charter. As such, the Court and Commission consider the Declaration binding on all OAS member states, including Canada.<sup>162</sup> The Inter-American Commission has held that in order to fully respect and comply with Article XXIII (the right to property) of the American Declaration, there appears to be a minimum standard that requires States Parties to consult with indigenous peoples regarding any development within their traditionally used and occupied territories or lands.<sup>163</sup>

¶48 In order to effectively analyze the Lubicon Lake Band's rights to consultation and consent, it is also worth understanding what Canadian legal standards are being developed with regard to Aboriginal peoples participation rights. Since the initial cases brought by the Lubicon in the Canadian courts, there has been extensive development in terms of the duty to consult. In the last ten years, three cases have been decided by the Supreme Court of Canada which have set the standard for the Crown's duty to consult and accommodate Aboriginal peoples: *Haida Nation v. British Columbia*, *Taku River First Nation v. British Columbia*, and *Mikisew Cree First Nations v. Canada*.<sup>164</sup> These three decisions define the duty to consult as flowing from the honor of the Crown (Canadian government) and affirm that this duty exists whenever there is knowledge of the potential existence of an Aboriginal right or title.<sup>165</sup> The duty falls to the Crown and not the project proponents.<sup>166</sup> The Supreme Court of Canada defines the scope of the duty to consult as relative to the existing claim to the Aboriginal title or right and the degree of the expected impact.<sup>167</sup> This means that the duty depends on the strength of the claim to title or to the right, the degree of significance of the right itself, and the degree of potential infringement on the right.<sup>168</sup>

¶49 It is important to note that within Canadian domestic legal jurisprudence, the participation rights of Aboriginal Canadians do not appear to flow from international human rights obligations,<sup>169</sup> but rather from the honour of the Crown. This duty to consult, although it can contribute to the development of State practice in terms of indigenous peoples participation rights, is not the equivalent of the more substantive right to FPIC recognized in international law. Furthermore, domestic standards do not remove Canada's international human rights legal obligations with regard to the consultation of Aboriginal peoples. The relevant question becomes whether Canadian standards meet the developing norms in international human rights jurisprudence, and in particular whether the Canadian and provincial governments have violated the Lubicon Lake Band's rights to consultation or consent under international norms which apply to the Canadian government.

<sup>162</sup> Bankes, *supra* note 63, at 479.

<sup>163</sup> See e.g., Mary and Carrie Dann v. United States, *supra* note 71; Maya Communities v. Belize, *supra* note 80, ¶¶ 155, 194.

<sup>164</sup> Morris Popowich, *The National Energy Board as Intermediary Between the Crown, Aboriginal Peoples, and Industry*, 44 ALBERTA L. REV. 837, 839 (2006); Veronica Potes, Monique Passelac-Ross & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation and Practice*, 4 (Alberta Energy Futures Project ed., Paper No. 14) (2006); Patricia Ochman, *Recent Developments in Canadian Aboriginal Law: Overview of Case Law and of Certain Principles of Aboriginal Law*, 10 INT'L COMMUNITY L. REV. 319, 333 (2008).

<sup>165</sup> Popowich, *supra* note 164, at 851.

<sup>166</sup> Treacy, Campbell, and Dickson, *supra* note 119, at 588.

<sup>167</sup> Potes, Passelac-Ross, and Bankes, *supra* note 164, at 11.

<sup>168</sup> *Id.* at 8-9.

<sup>169</sup> Bankes, *supra* note 63, at 459.

¶50 The Canadian government has refused to ratify ILO Convention No. 169, and until recently it refused to endorse the U.N. Declaration,<sup>170</sup> both of which contain the clearest textual expressions of FPIC. At a minimum, however, the Canadian government and its provincial counterparts do appear to have a duty to engage in good faith consultations regarding any development or investment project within their territories or that affects resources that have been traditionally used. This is the norm that appears to be developing in the treaty bodies that Canada has ratified, within the Inter-American Commission's interpretations of the American Declaration which apply to Canada as a member of the OAS, and even within Canada's own domestic jurisprudence.

### C. Discussion

¶51 In its original decision in *Ominayak v. Canada*, the HRC stated that both historical inequalities and recent developments were threatening the way of life and culture of the Lubicon Cree, and constituted a violation of Article 27 of the ICCPR.<sup>171</sup> There was no mention of the right to consultation, although the initial communication submitted by the Lubicon was based upon their right to self-determination and included their right to dispense of their natural resources. The decision is actually considered to be quite vague given that it does not further articulate the recent developments or historical inequalities to which it is referring.<sup>172</sup> The Human Rights Committee (HRC) simply found a general violation of Article 27. However, since this decision, the HRC has continued to expand on its interpretation of this Article. In particular, it is clear that the HRC takes the view that ethnic, linguistic, or religious minorities have the right to participate in decisions that affect them,<sup>173</sup> and has applied this standard with particular reference to the rights of indigenous peoples. Referring to its original decision, in 2006 the HRC drew the Canadian government's attention to the fact that the negotiations with the Lubicon Lake Band had reached an impasse and called for a resumption of such negotiations.<sup>174</sup> It further called on the Canadian government to consult the Lubicon people with regard to any exploitation of resources within the disputed land as part of its obligations in applying the ICCPR.<sup>175</sup>

¶52 Other U.N. bodies and special procedures have also called attention to the case of the Lubicon Cree, referring both to the failed negotiations regarding the land claim agreement and the need to consult with the Lubicon prior to any resource exploration or exploitation. For example, in 2006 the Committee on Economic, Social and Cultural Rights (CESCR) called upon the Canadian government to re-enter into negotiations with the Lubicon and consult with them regarding developments within the disputed territories.<sup>176</sup> In 2008, the Committee on the Elimination of Racial Discrimination (CERD) issued an early warning communication to Canada, highlighting its concerns regarding the unsettled land claim, and in particular the

<sup>170</sup> Press Release, Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples, Department of Northern and Indian Affairs, Government of Canada (Nov. 12, 2010).

<sup>171</sup> *Ominayak v. Canada*, *supra* 113, ¶ 33.

<sup>172</sup> Bankes, *supra* note 63, at 467-69.

<sup>173</sup> CESCR, *supra* note 15; CESCR, *General comment No. 21 Right of everyone to take part in cultural life*, *supra* note 16, ¶ 36.

<sup>174</sup> HRC, *Concluding Observations of the Human Rights Committee: Canada*, ¶ 9, UN Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006).

<sup>175</sup> *Id.* ¶ 9.

<sup>176</sup> CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, ¶ 38 UN Doc. E/C.12/CAN/CO/4 - E/C.12/CAN/CO/5 (May 22, 2006).

proposal to develop a pipeline that would run through the disputed land without full consultations of the Lubicon people.<sup>177</sup> In 2009, the U.N. Special Rapporteur on Adequate Housing visited the Lubicon Lake Band and in her final recommendations called for a moratorium on all activities in the disputed land until a settlement is reached and consultations can be undertaken regarding all activities within the disputed territory, regardless of the status of the land claim.<sup>178</sup>

¶53 The Canadian government has consistently responded to these recommendations by stating that it has attempted to negotiate a settlement with the Lubicon on various occasions and that the provincial government has halted all activities within the proposed reserve land. The government further asserts, with regard to new large-scale pipelines, that the Lubicon had been given access to present their case at the appropriate regulatory proceedings.<sup>179</sup> However, what appears to be consistent in these observations is that regardless of whether a settled land claim exists or not, the provincial and federal government have the duty to ensure that the Lubicon are consulted with regard to any developments within the disputed territory, not merely the lands earmarked for a reserve. This is important given that the Canadian governments' position does not recognise the larger area of land traditionally used by the Lubicon Cree for hunting and trapping. There does not appear to be clarity in the U.N. System in terms of the scope of the duty to consult and how it should be implemented; thus, whether merely giving the Lubicon or other First Nations standing with regulatory and licensing bodies will satisfy the duty to consult is of debate. It would appear that Canada has continued to violate the Lubicon Lake Band's rights to culture as articulated in Article 27 of the ICCPR and Article 15 of the ICESCR by not settling the land claim issue. Furthermore, there appears to be an on-going violation of these provisions of the ICCPR and the ICESCR due to Canada's failure to ensure that the Lubicon are consulted with regard to developments within the disputed territories.

¶54 In the case of the Lubicon Lake Band, it would appear that Canada has failed to fulfill the minimum standards developed by the Inter-American Commission on Human Rights. These norms dictate first that there cannot be any change in title to indigenous peoples' lands without the consent of the entire community affected and that the State must consult with the Lubicon regarding any development within the lands and territories that they have traditionally occupied and used. Not doing so could be a violation of the right to equality under the law (Article II), the right to culture (Article XIII), the right to a fair trial (Article XVIII), and the right to property (Article XXIII), as articulated in the American Declaration and as applied by the Commission.

¶55 First, there are parallels with the *Mary and Carrie Dann* case, in which the Inter-American Commission found that no change to indigenous peoples' land title can be made without the consent of the entire indigenous community.<sup>180</sup> When looking at the interpretation and application of Treaty No. 8 and the process of adhesion, it is clear that as a collective the Lubicon never signed the treaty. Even if other Cree leaders and nations signed or adhered to the treaty, within the Inter-American Commission's interpretation of the property rights of indigenous peoples this does not mean that the Lubicon as a people ever extinguished their title

<sup>177</sup> Letter from Fatima-Binth Victorire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, to the Permanent Rep. of the Permanent Mission of Canada to the United Nations at Geneva (Aug. 15, 2008), [http://www2.ohchr.org/english/bodies/cerd/docs/Canada\\_letter150808.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/Canada_letter150808.pdf).

<sup>178</sup> *Id.*

<sup>179</sup> Government of Canada, *Information provided by the Government Canada on the implementation of the Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶ 68-72, CERD/C/CAN/CO/18 (Aug. 6, 2009).

<sup>180</sup> *Mary and Carrie Dann v. United States*, *supra* note 71, ¶ 165.

to the lands that they had both historically occupied and used. Therefore the Canadian government could be found to have violated the collective property rights of the Lubicon Cree. Further, the granting of concessions within the lands traditionally used and occupied by the Lubicon without prior and informed consultation, would be considered a further violation of these property rights as determined in the *Maya Communities v. Belize* case.<sup>181</sup> Again, the standard appears not to be limited to a small reserve area, but to the lands traditionally occupied and used by the Lubicon.<sup>182</sup>

¶156 Although the Inter-American Court does not have jurisdiction over Canada, the Lubicon case could be used to assess the effectiveness of the safeguards as developed in the case of *Saramaka People v. Suriname*,<sup>183</sup> with regard to what standard is being used to determine whether a development project is of a small- or large-scale, and what determines whether such developments will have an impact on the survival of a people. The 10,000 square kilometres over which the Lubicon claim title is covered in large numbers of wells and oil extraction infrastructure, but there has never been a public proposal for a single large-scale project. Rather, it is the cumulative impacts of the wells that have caused the Lubicon to argue that their survival and the survival of their culture have been at risk for decades.

¶157 With regard to the duty to consult Aboriginal peoples as articulated in Canadian jurisprudence, the Lubicon case is also evocative. There is clearly a relationship within Canadian law between the duty to consult and an existing, proven or unproven, Aboriginal right or land title.<sup>184</sup> This means that even with the lack of a negotiated settlement with regard to the land claim, the provincial and federal governments are required to ensure that the Lubicon are consulted with regard to developments within both the reserve land and the larger area of land traditionally used for subsistence hunting and trapping.

¶158 Ultimately, even with the ongoing land dispute, consultation in good faith is required by Canada's international human rights obligations with regard to developments within both the designated reserve land and the lands which the Lubicon have historically occupied and used for hunting and trapping. The question as to whether full consent could be required depends on whether the Inter-American Commission will begin to apply the safeguards test in its interpretation of the American Declaration and how the Commission determines whether a project is of a large enough scale that it could impact the survival of a people. Ultimately, there is still potential to infringe upon the Lubicon Cree's rights to property, culture, judicial protection, and ultimately self-determination with regard to the standards concerning whether a project is considered small or large scale. This implies that consultations need to be held at the moment that a State is considering opening up certain lands for resource exploration, as well as ongoing consultations, not just in terms of individual small projects or individual well licenses, but also in terms of addressing the cumulative impact of such developments.

#### IV. CASE OF THE MAYAN COMMUNITIES OF SIPACAPA AND SAN MIGUEL IXTAHUACAN

¶159 The municipalities of San Miguel Ixtahuacan and Sipacapa are located in the western highlands of Guatemala and are the site of the Marlin Mine. Both communities are composed of a largely indigenous population: in San Miguel Ixtahuacan ninety-eight percent of the population

<sup>181</sup> *Maya Communities v. Belize*, *supra* note 80, ¶ 153.

<sup>182</sup> *Id.* ¶ 155.

<sup>183</sup> *Saramaka People v. Suriname*, *supra* note 36 ¶ 133-34.

<sup>184</sup> Popowich, *supra* note 164, at 851.

identify as Maya-Mam, and Sipacapa's population is seventy-seven percent Maya-Sipacapense.<sup>185</sup> The mine occupies about five square kilometres with eighty-seven percent of the full twenty square kilometre concession lying within San Miguel Ixtahuacan and thirteen percent found within Sipacapa.<sup>186</sup> The Marlin Mine consists of two open-pit mines, an underground mine, and a mill, plant, and tailings storage facilities.<sup>187</sup> Both a gold and silver mine uses open-pit and underground mining methods to extract the ore, followed by a cyanide vat leaching process.<sup>188</sup> The mine is one hundred percent owned by Montana Exploradora Ltd. (Montana), which is a privately held company under Guatemalan law.<sup>189</sup> As of 2006, Montana was a wholly owned subsidiary of Goldcorp Inc., which is a Canadian-based mining company.<sup>190</sup>

¶60 The mining project has been the focus of an intense national and international debate with regard to indigenous peoples' rights not only to consultation, but also to FPIC with regard to development projects. The people of both Sipacapa and San Miguel Ixtahuacan have challenged the presence of the mine within their lands by raising concerns with regard to health and other environmental impacts of the exploitation process, and by contesting the fact that the Guatemalan government never fully consulted with the affected communities before granting either the exploration or exploitation licenses. This case study will examine the development of the Marlin Mine, the opposition to the mine project, and the attempts of the people of Sipacapa and San Miguel Ixtahuacan to have their rights respected.

#### A. History

¶61 In 1997, one year after the signing of the Guatemalan Peace Accords, the Guatemalan government passed Legislative Decree 48-97, known as the Mining Law.<sup>191</sup> The new law reduced the percentage of royalties that mining companies are required to pay the Guatemalan government from six to one percent, abolished limits on foreign ownership of mines, and granted mining operations duty free imports.<sup>192</sup> The following year, a group of geologists discovered the Marlin mineral deposit and in 1999 Montana was granted an exploration license.<sup>193</sup> It was in 2002 that Montana first began purchasing land from individual landowners; the land purchases continued up until 2005 and consisted of the purchase of 395 parcels of land from 254 different land owners.<sup>194</sup> According to the company records, it was also during this period that Montana began holding community meetings with a total of thirty meetings in San Miguel Ixtahuacan and seventeen in Sipacapa between June and September 2003.<sup>195</sup> However, no details about the

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<sup>185</sup> FREDEMI & The Center for International Environmental Law, *Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises Concerning: The Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala*, 4-5 (2009).

<sup>186</sup> *Id.* at 4.

<sup>187</sup> CAO, *Assessment of a Complaint Submitted to CAO in Relation to the Marlin Mining Project in Guatemala*, 12 (2005).

<sup>188</sup> William N. Holden & R. Daniel Jacobson, *Civil Society Opposition to Nonferrous Metals Mining in Guatemala*, 19 VOLUNTAS 325, 330 (2008).

<sup>189</sup> ON COMMON GROUND CONSULTANTS INC., HUMAN RIGHTS ASSESSMENT OF GOLDCORP'S MARLIN MINE 34 (2010).

<sup>190</sup> *Id.* at 36.

<sup>191</sup> Holden and Jacobson, *supra* note 188, at 329.

<sup>192</sup> *Id.*

<sup>193</sup> ON COMMON GROUND CONSULTANTS, INC., *supra* note 189, at 34.

<sup>194</sup> CAO, *supra* note 187, at 12, 29.

<sup>195</sup> Imai, Mehravar & Sander, *supra* note 57, at 109.

contents of the meetings were recorded.<sup>196</sup> In September 2003, Montana asked municipal officials in both Sipacapa and San Miguel Ixtahuacan to submit signed letters in support of the mine.<sup>197</sup> This process was considered to be quite controversial in Sipacapa, but the letters of support were eventually submitted with the required environmental impact assessment (EIA) in Montana's application for an exploitation license.<sup>198</sup> The Ministry of Energy and Mines granted Montana a twenty-five year exploitation license and further exploration licenses in the region in the last quarter of 2003.<sup>199</sup>

¶62 In 2004, the construction of the Marlin Mine began and the project received a \$45 million loan from the International Finance Corporation.<sup>200</sup> It was this same year that opposition grew against the mine within the affected communities; as early as February 2004 protests were held in Sipacapa.<sup>201</sup> The first recorded meeting between the Ministry of Energy and Mines and the local communities took place around the same time in early 2004, when the vice-minister traveled to both Sipacapa and San Miguel Ixtahuacan.<sup>202</sup> In January 2005, the Municipal Council of Sipacapa passed a resolution to hold a *consulta de buena fe* (consultation or community referendum) regarding the Marlin Mine.<sup>203</sup> Only a few days before the consultation was to be held, Montana brought an injunction and the Municipal government of Sipacapa was blocked from hosting the consultation.<sup>204</sup> Instead, the Catholic Church and several local non-governmental organizations assumed responsibility for organizing the referendum.<sup>205</sup> On June 18, 2005, the thirteen villages that compose the municipality of Sipacapa participated.<sup>206</sup> The referendum resulted in eleven communities rejecting the mine, one community voting in favour of the mine, and another community abstaining from the referendum.<sup>207</sup> Of the approximately 2,500 voters who participated, ninety-eight percent voted against the mine.<sup>208</sup> The government and Montana challenged the legality of the consultation, and the Guatemalan government eventually took the case to the Constitutional Court.

¶63 In 2005, the first of several international investigations into the actions of both Montana and the Guatemalan government was undertaken by the Compliance Advisor Ombudsman of the International Finance Corporation. The Compliance Advisor Ombudsman eventually determined that the consultation processes employed by the company, while not necessarily meaningful or culturally appropriate, were adequate under International Finance Corporation guidelines.<sup>209</sup> Ultimately, the assessment determined that it did not expect Sipacapa to be significantly environmentally impacted by the mine and simply called for dialogue between the community

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<sup>196</sup> ON COMMON GROUND, *supra* note 189, at 43.

<sup>197</sup> *Id.* at 45.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 36; *et al.*, *supra* note 57, at 109.

<sup>200</sup> ON COMMON GROUND, *supra* note 188, at 36; Imai, Mehravar & Sander, *supra* note 57, at 109.

<sup>201</sup> Imai, Mehravar & Sander, *supra* note 57, at 110.

<sup>202</sup> CAO, *supra* note 187, at 30.

<sup>203</sup> Imai, Mehravar & Sander, *supra* note 57, at 111.

<sup>204</sup> Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 619 (2009).

<sup>205</sup> *Id.*

<sup>206</sup> McGee, *supra* note 204, at 619.

<sup>207</sup> Imai, Mehravar & Sander, *supra* note 57, at 114.

<sup>208</sup> CAO, *supra* note 187, at 5.

<sup>209</sup> *Id.* at 33.

and the mining company.<sup>210</sup> Surrounded by conflict and despite the opposition of Sipacapa, the mine went into production in late 2005.<sup>211</sup>

¶164 In 2006, a national union federation, UNSITRAGUA, filed a communication with the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization (ILO) arguing that the government had failed to undertake consultations with the people of both Sipacapa and San Miguel Ixtahuacan and raising concerns over the potential environmental impacts of the mine.<sup>212</sup> In its observation issued in response to the complaint, the CEACR noted that the Guatemalan government did not contest that it had never consulted with the affected communities prior to the granting of licenses and called on the Guatemalan government to undertake such consultations.<sup>213</sup>

¶165 In 2007, the Constitutional Court of Guatemala ruled with regard to the referendum in Sipacapa.<sup>214</sup> The Court determined that although the referendum in Sipacapa itself was legal, the results were not binding.<sup>215</sup> The Court found that a referendum held by the municipal government could not be binding over the national government or over matters under the jurisdiction of other government agencies, in this case the Ministry of Energy and Mines.<sup>216</sup> The case has since been brought before the Inter-American Commission of Human Rights.<sup>217</sup>

¶166 In 2008, a group of Goldcorp shareholders traveled to Guatemala to meet with community members and investigate the human rights claims, and as a result Goldcorp commissioned a human rights impact assessment (HRIA), which was published in May 2010.<sup>218</sup> On December 9, 2009, the Front in Defense of San Miguel Ixtahuacán (“FREDEMI”) filed a specific instance complaint with the Canadian National Contact Point of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.<sup>219</sup> Given that Guatemala is not a member of the OECD, this complaint was filed in Canada, but Montana is a wholly owned subsidiary of Goldcorp, whose headquarters are located in Canada and whose stocks are traded on the Toronto Stock Exchange.<sup>220</sup> The complaint states that Goldcorp’s operations at the Marlin Mine “are not consistent with Guatemala’s obligations to respect the complainants’ rights to life, health, water, property, to be free from racial discrimination, and to free, prior, and informed consent.”<sup>221</sup> This case has yet to be resolved.

¶167 The Marlin Mine completed its first year of production in 2006 and “is expected to yield approximately 250,000 ounces of gold and 3.6 million ounces of silver a year until its anticipated

<sup>210</sup> *Id.* at 37.

<sup>211</sup> ON COMMON GROUND CONSULTANTS, INC., *supra* note 189, at 37.

<sup>212</sup> CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala (ratification: 1996)*, ¶¶ 7-15, ILO Doc. 062009GTM169 (2009).

<sup>213</sup> *Id.* ¶ 14.

<sup>214</sup> Corte de Constitucionalidad [Const. Ct.] May 8, 2007, Rosa Maria Montenegro de Garoz v. Consejo Municipal de Sipacapa's Convocatoria a Consulta de Buena Fe (Guat.).

<sup>215</sup> Leonardo A. Crippa, *Cross-Cutting Issues in the Application of the Guatemalan "NEPA": Environmental Impact Assessment and the Rights of Indigenous peoples*, 24 AM. U. INT'L L. REV. 103, 135-36 (2008).

<sup>216</sup> Crippa, *supra* note 214, at 135-36; McGee, *supra* note 203, at 625; Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211, 234-35 (2007).

<sup>217</sup> See Comunidades del pueblo maya (Sipakapense y Mam) de los municipios de Sipacapa y San Miguel Ixtahuacán en el Departamento de San Marcos, Guatemala, MC-260-07, Inter-Am. Comm'n H.R., <http://www.cidh.org/medidas/2010.sp.htm> (Aug. 20, 2010).

<sup>218</sup> ON COMMON GROUND, *supra* note 189, at 8.

<sup>219</sup> FREDEMI AND THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 185.

<sup>220</sup> *Id.* at 5.

<sup>221</sup> *Id.* at 6.

completion date in 2015.”<sup>222</sup> Montana has paid approximately \$5.8 million dollars in royalties with equal amounts going to the Guatemalan government and the municipality of San Miguel Ixtahuacan.<sup>223</sup> To date, the municipality of Sipacapa has refused to accept a reserve fund that has been set aside by the company.<sup>224</sup> It should be noted that two men have been killed in connection with this process, one during a protest against the mine in January 2005,<sup>225</sup> and one two months before the referendum in Sipacapa.<sup>226</sup> That same year, a credible plot to assassinate Bishop Alvaro Ramazzini, a vocal opponent to the mine, was discovered.<sup>227</sup> Furthermore, threats and harassment have been reported by community members and opponents to the mining project, including death threats as well as the criminalization of protests.<sup>228</sup>

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On May 20, 2010, the Inter-American Commission of Human Rights granted precautionary measures for eighteen communities in Sipacapa and San Miguel Ixtahuacan with regard to the Marlin Mine.<sup>229</sup> The measures called on the state of Guatemala to suspend the mining license of the Marlin Project, implement measures to prevent environmental contamination, and provide protection to the members of the eighteen communities until the Commission publishes a decision on the merits of the case.<sup>230</sup> On June 23, 2010, the President of Guatemala publicly issued the temporary suspension of the mining license after studying the precautionary measures.<sup>231</sup> Further, on July 21, 2010, the Ministry of Energy and Mines was officially notified by the Attorney General of Guatemala to begin the administrative processes required to temporarily suspend operations at the mine,<sup>232</sup> but as of the publishing of this article the mine continues to operate.

### B. Guatemala's Human Rights and Legal Obligations

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Guatemala has ratified or acceded to many of the major international human rights treaties. In particular, Guatemala is a party to the International Covenant on Civil and Political Rights (ICCPR)<sup>233</sup> and its first optional protocol,<sup>234</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>235</sup> and the International Convention on the Elimination of All

<sup>222</sup> Holden & Jacobson, *supra* note 188, at 330.

<sup>223</sup> ON COMMON GROUND, *supra* note 189, at 37.

<sup>224</sup> *Id.*

<sup>225</sup> Imai, Mehravar & Sander, *supra* note 57, at 110-11.

<sup>226</sup> *Id.* at 111.

<sup>227</sup> Vincent Castagnino, *Metal Mining and Human Rights in Guatemala: The Marlin Mine in San Marcos* 28 (1<sup>st</sup> ed., 2006).

<sup>228</sup> *See* Comunidades del pueblo maya (Sipakapense y Mam), *supra* note 217; FREDEMI AND THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 185.

<sup>229</sup> *Communities of the Maya People (Sipakapense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*, PM 260-07, Inter-Am. Comm'n H.R., <http://www.cidh.oas.org/medidas/2010.eng.htm> (May 20, 2010).

<sup>230</sup> *Id.*

<sup>231</sup> Ana González, *Colom ordena cierre temporal de operaciones de la mina Marlin*, DIARIO DE CENTROAMERICA, (June 24, 2010).

<sup>232</sup> Letter from Guillermo Antonio Porras Ovalle, Lawyer, Attorney General's Office, to Romeo Rodriguez Menéndez, Minister of Energy and Mines (July 21, 2010) (on file with Attorney General's Office, Ref: DS/SCE-349-2010).

<sup>233</sup> ICCPR, *supra* note 5 (acceded May 5, 1992).

<sup>234</sup> Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 158 (acceded Nov. 28, 2000).

<sup>235</sup> ICESCR, *supra* note 5 (acceded 19 May 19, 1988).

Forms of Racial Discrimination (ICERD).<sup>236</sup> Again, these treaties do not include any textual expressions with regard to the right to FPIC of indigenous peoples, but the supervisory bodies have interpreted a minimal obligation to consult with indigenous peoples in good faith prior to any development project within their territories.<sup>237</sup>

¶70 Having ratified the American Convention,<sup>238</sup> Guatemala has a binding obligation to fulfill the standards developed within the Inter-American System by both the Commission and the Court. These standards include the requirement to: ensure an effective system that delimits, demarcates and titles indigenous peoples collective property;<sup>239</sup> ensure that no changes to such title can be made without the consent of the entire community;<sup>240</sup> and apply the safeguards test developed in the *Saramaka People* case whenever considering a development project within indigenous peoples lands or that affects traditionally used natural resources.<sup>241</sup> The safeguards test specifically requires consultation with regard to any development project,<sup>242</sup> and further requires full consent if the project is of a large enough scale that it could impact the survival of a people.<sup>243</sup>

¶71 With specific regard to the rights of indigenous peoples, Guatemala has both ratified ILO Convention No. 169<sup>244</sup> and endorsed the U.N. Declaration.<sup>245</sup> Article 15 of ILO Convention No. 169 clearly calls for consultation prior to exploration or exploitation of natural resources within the territories of indigenous peoples. The standards for consultations are articulated in both Articles Six and Seven of the ILO Convention, which call for consultations to be in good faith, to be appropriate to the situation, and to have the goal of reaching agreement or consent.<sup>246</sup> Although not a legally binding document, the U.N. Declaration calls for FPIC of indigenous peoples with regard to any development projects that affects their lands, territories or other resources.<sup>247</sup>

¶72 With regard to its domestic law, Guatemala's legal obligations to consult with or achieve consent of indigenous peoples are less clear. As part of the 1996 Peace Accords, which ended 36 years of internal armed conflict, the Guatemalan government negotiated the Agreement on the Identity and Rights of Indigenous Peoples, which "committed the Guatemalan state to implement a series of constitutional reforms recognising indigenous peoples' collective rights."<sup>248</sup> "These included the right to be subject to customary indigenous law, the right to bilingual education, and protections for communally held land."<sup>249</sup> However, during a referendum in 1999, the proposed reforms were rejected and as a result the legal protection of indigenous rights within Guatemalan domestic law is comparatively weak.<sup>250</sup> Furthermore, even though Guatemala ratified ILO

<sup>236</sup> ICERD, *supra* note 19 (ratified Jan. 18, 1983).

<sup>237</sup> See e.g. HRC, *supra* note 12; CESCR, *supra* note 5.

<sup>238</sup> American Convention, *supra* note 62 (ratified Apr. 27, 1978).

<sup>239</sup> See, e.g., *Awas Tingni v. Nicaragua*, *supra* note 64, ¶ 138-39.

<sup>240</sup> See, e.g., *Mary and Carrie Dann v. United States*, *supra* note 71, ¶ 141.

<sup>241</sup> See, e.g., *Saramaka People v. Suriname*, *supra* note 36, ¶ 133-34.

<sup>242</sup> *Id.* ¶ 133.

<sup>243</sup> *Id.* ¶ 134.

<sup>244</sup> ILO Convention No. 169, *supra* note 44 (ratified June 5, 1996).

<sup>245</sup> See Press Release, GAOR: General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, says President, U.N. Doc. GA/10612 (Sept. 13, 2007).

<sup>246</sup> ILO Convention No. 169, *supra* note 44

<sup>247</sup> United Nations Declaration, *supra* note 9, art. 32(2).

<sup>248</sup> Sieder, *supra* note 216, at 217, 218.

<sup>249</sup> *Id.* at 218.

<sup>250</sup> *Id.* at 219.

Convention No. 169 in 1996, it has yet to implement domestic legislation that creates effective mechanisms through which such consultation can take place.<sup>251</sup> The lack of clarity with regard to consultation in Guatemala is evident in the 2007 ruling of the Constitutional Court in *Rosa Maria Montenegro de Garoz v. Consejo Municipal de Sipacapa*, which found that although community referenda are legal and can be considered a popular expression of a community's view, the results are not binding.<sup>252</sup>

¶73

Guatemala may have little clarity with regard to domestic laws, but it has strong international legal obligations with regard to the participation rights of indigenous peoples. As a party to the American Convention and the ILO Convention No. 169, the Guatemalan State is obligated to consult with indigenous peoples with regard to all development projects within their territories or that could affect their resources.<sup>253</sup> These consultations must be in good faith, be culturally appropriate,<sup>254</sup> take place prior to exploration and exploitation phases,<sup>255</sup> and be fully informed. If a project has the potential to impact the survival of a people, then the State of Guatemala must obtain the consent of the affected people before allowing or undertaking such a project.<sup>256</sup>

### C. Discussion

¶74

There are two questions at the centre of this case. First, what constitutes meaningful consultation? Second, whose responsibility it is to undertake such consultations? The government of Guatemala and the mining company maintain that the affected communities were consulted through the series of community meetings that the mining company held between 2002 and 2003. These meetings were conducted as part of the environmental impact assessment (EIA) as required by Guatemalan law, and the government maintains that it informed the company that it was required to undertake such public participation in order to obtain the exploitation license.<sup>257</sup> In addition, the company has argued that there is evidence of consent implicitly found with the land purchases and furthermore that all of these transactions were voluntary.<sup>258</sup> At the same time, there is no evidence that the Guatemalan government itself undertook any type of consultation at either the exploration phase or prior to granting the exploitation license, and only in 2004 and 2005 did the Ministry of Energy and Mines meet with the communities of Sipacapa and San Miguel Ixtahuacán.<sup>259</sup>

<sup>251</sup> CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala (ratification: 1996), ILO Doc. 062009GTM169 (2009); Sieder, *supra* note 215, at 223; Amanda M. Fulmer, Angelina Snodgrass Godoy, & Phillip Neff, *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine*, 50 LATIN AM. POL. & SOC'Y 91, 99 (2008).

<sup>252</sup> *Rosa Maria Montenegro de Garoz v. Consejo Mun. de Sipacapa*, *supra* note 214); McGee, *supra* note 204, at 626

<sup>253</sup> See e.g. CEACR, *supra* note 55, ¶ 4; Saramaka People v. Suriname, *supra* note 36, ¶ 133.

<sup>254</sup> Saramaka People v. Suriname, *supra* note 36, ¶ 133.

<sup>255</sup> See e.g. CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Ecuador, ¶ 4, ILO Doc. 062010ECU169 (2010); CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Guatemala, ¶¶ 10, 13, and 15, ILO Doc. 062006GTM169 (2006); CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Mexico, ¶ 10, ILO Doc. 062006MEX169 (2006).

<sup>256</sup> See e.g., Saramaka People v. Suriname, *supra* note 36, ¶ 133-34.

<sup>257</sup> *Comunidades del pueblo maya (Sipakapense y Mam) de los municipios de Sipacapa y San Miguel Ixtahuacán*, *supra* note 217, ¶ 13.

<sup>258</sup> CAO, *supra* note 187, at 29.

<sup>259</sup> *Id.*

¶75 With regard to the standards set by the U.N. treaty bodies of the ICCPR, ICESCR, and ICERD, the Guatemalan government was required at a minimum to ensure that consultations were undertaken and that such consultations had the intention of reaching agreement. In 2010, the Committee on the Elimination of Racial Discrimination (CERD), in reference to General Recommendation No. 23, specifically called on the Guatemalan government to ensure consultation with the affected indigenous peoples at every stage of resource exploitation projects, and in particular informed the State that it must obtain consent prior to undertaking any such project.<sup>260</sup> The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People visited Guatemala in 2010. In his preliminary observations, the Special Rapporteur clearly stated that the government did not consult with the affected communities prior to the issuing of exploration and exploitation licenses.<sup>261</sup> Further, he called attention to the Human Rights Impact Assessment (HRIA) commissioned by Goldcorp that indicates that, given the lack of government involvement in the consultations undertaken by the company, these consultations do not adhere to international standards.<sup>262</sup> Although the mining company engaged in community meetings, these do not constitute consultations and do not absolve the Guatemalan government of its international obligations. Furthermore, it is clear that these meetings do not meet the standards set by the U.N. Declaration, which calls for fully informed and prior consent of the affected indigenous peoples. Given that in Goldcorp's own human rights impact assessment (HRIA), the company found that the communities have continually contested the original agreements to endorse the mine, the consultations were not adequate.<sup>263</sup>

¶76 ILO Convention No. 169 specifically requires that a State Party consult with indigenous peoples prior to any exploration or exploitation of natural resources in their lands or territories. Importantly, this convention was ratified by Guatemala prior to the issuing of both the exploration and exploitation licenses for the Marlin Mine Project and, thus, the Guatemalan government had a legally binding obligation to ensure that such consultations took place. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted in 2006 that the government did not argue that it had held consultations, implying that this obligation had been met by the mining company through the process of completing the environmental impact assessment (EIA).<sup>264</sup> Ultimately, the Guatemalan government failed to meet its obligations under the ILO Convention.

¶77 The CEACR has since repeatedly called for the Guatemalan government to ensure that the consultations take place, and to develop effective legislative machinery to implement the Convention, such as ensuring the Mining Law is brought into line with Articles 6, 7, and 15 of the ILO Convention.<sup>265</sup> Additionally, the CEACR has emphasised that when using the terms "lands" and "territories," these are to be interpreted as the territories that affected peoples have

<sup>260</sup> Committee on the Elimination of Racial Discrimination, *Observaciones Finales del Comité para la Eliminación de la Discriminación Racial Guatemala*, ¶ 11(a), UN Doc. CERD/C/GTM/CO/12-13 (Mar. 16, 2010).

<sup>261</sup> Special Rapporteur on the Situation of the Rights of Indigenous Peoples, *Observaciones Preliminares del Relator Especial de Naciones Unidas Sobre la Situación de los Derechos Humanos y las Libertades Fundamentales de los Indígenas*, S. James Anaya, sobre su visita a Guatemala (13 a 18 de junio de 2010), Section 3 (June 18, 2010).

<sup>262</sup> *Id.*

<sup>263</sup> ON COMMON GROUND, *supra* note 189, at 60.

<sup>264</sup> CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Guatemala, ¶ 10-12, ILO Doc. 062006GTM169 (2006).

<sup>265</sup> CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Guatemala (ratification: 1996), ¶ 15, ILO Doc. 062009GTM169 (2009).

traditionally occupied and used, and not simply the lands owned by individuals.<sup>266</sup> Thus, the argument that landowners gave their consent to sell their land does not fulfill the consultation requirement, in particular when the lands are considered to be of a collective nature. Finally, in 2009, the CEACR emphasised that consultation of indigenous peoples with regard to natural resources is based on the idea that they be involved in the formulation of such plans, and that any belated consultations are not effective.<sup>267</sup> It is clear that the Guatemalan government failed to effectively implement the Convention, and in particular has violated the right to consultation of the indigenous people of San Miguel Ixtahuacan and Sipacapa under Articles 6, 7, and 15 of ILO Convention No. 169.

¶78 Within the Inter-American System, the applicable standards can be found within the safeguards as developed in *Saramaka People v. Suriname*.<sup>268</sup> It is clear that the minimum requirement of consultation in good faith has not been met in the case of the Marlin Mine. The company meetings do not fulfill Guatemala's legal obligations, nor do they meet the standards of being meaningfully or culturally appropriate. Any meetings held by the government after the issuing of exploration and exploitation licenses fail to address the need for prior consultation.

¶79 The question as to whether full consent is required, as opposed to consultation as the goal of an agreement, is based on how the Inter-American Commission determines when a peoples' survival is at risk. The complaints filed by communities in both Sipacapa and San Miguel raise concerns regarding environmental and health impacts of the mine. The Inter-American Commission granted precautionary measures based on the claims that the mine has severely impacted the water supply because of the presence of heavy metals in water samples, as well as the drying up of wells and springs as a result of mining activities.<sup>269</sup> It is important to note that Sipacapense is a unique Mayan linguistic group.<sup>270</sup> The determination of the existing and potential future environmental and social impacts of the mine will need to be evaluated not just in relation to the Mayan populations in both municipalities, but specifically with respect to the Sipacapense people. If the survival of the Sipacapense-Maya people is determined to be at risk by the Inter-American Commission, it is irrelevant that only a comparatively small percentage of the mine and concession fall within the municipality of Sipacapa. If the survival of the Sipacapense is at risk as a result of mining activities, then their full consent is required before activities can continue.

¶80 Ultimately, it is clear that Guatemala has failed to uphold the minimal requirements to hold consultations in good faith with the Mayan communities in Sipacapa and San Miguel Ixtahuacan, and that the consultations undertaken by Montana do not meet international standards. These meetings were held without any government involvement, are not considered to be meaningful or culturally appropriate, and they were not held prior to the granting of the exploration license. Interestingly, however, the community referendum held in the municipality of Sipacapa on June 18, 2005, appears to meet many of these standards. The referendum itself was conceived through local governance processes and structures: it was the result of several Municipal Council resolutions.<sup>271</sup> The voting was undertaken through culturally appropriate methods with each of

<sup>266</sup> CEACR, *Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala (ratification: 1996)*, ¶ 5, ILO Doc. 062007GTM169 (ILO, 2007).

<sup>267</sup> *Id.* at ¶ 3.

<sup>268</sup> *Saramaka People v. Suriname*, *supra* note 36, ¶ 133-34.

<sup>269</sup> Inter-Am. Comm'n. H.R., PM 260-07, *supra* note 229.

<sup>270</sup> CAO, *supra* note 186, at 4; Compliance Advisor Ombudsman, *Assessment of a complaint submitted to CAO in relation to the Marlin Mining Project in Guatemala*, at 4 (2005).

<sup>271</sup> Imai, Mehravar & Sander, *supra* note 57, at 116.

the thirteen communities undertaking the vote according to their own traditions; these voting methods ranged from blind ballots to an open vote through a show of hands.<sup>272</sup> It is clearly problematic that the referendum was held after the mining exploration and exploitation licenses were issued. However, given the lack of prior consultation by the Guatemalan government, the processes used and the results of the community referendum do appear to represent the views of the majority of the people of Sipacapa.

## V. CONCLUSION

¶81 What becomes clear in this analysis is the size of the gap between the norms being developed within international human rights jurisprudence and State practice. If FPIC, as stated earlier, is intended as a way to ensure meaningful engagement with indigenous peoples with regard to their lands, territories, and resources, then stronger legally binding obligations are required. The cases of both the Lubicon Cree and the Mayan Communities of Sipakapa and San Miguel Ixtahuacan demonstrate that consultations cannot simply be considered administrative procedures, but rather must be implemented with the understanding that consultations are an expression of the right to self-determination.

¶82 In the case of the Lubicon Cree, their rights to consultation regarding oil and gas exploitation have largely been ignored because of a land dispute with the Canadian government. It is the failure to have their land rights recognised which has further caused their right to consultation to be violated. The Mayan Communities of Guatemala have clearly articulated their struggle against the Marlin Mine as a violation of their rights to both consultation and FPIC. In this case, no significant attempt was made on the part of the Guatemalan government to undertake consultations of any kind, nor to ensure that the mining company undertook meaningful, informed, and culturally appropriate consultations prior to either the exploration or exploitation of resources within the Mayan territories. The outcome in both cases is that the Lubicon Cree and the Mayan Communities of Sipakapa and San Miguel Ixtahuacan have had their participation rights violated. In the end, this has resulted in the ongoing exploitation of resources within traditional territories without the collective consent of the affected indigenous peoples.

¶83 These cases highlight the need for clear domestic legislation modeled after international norms to implement appropriate and meaningful consultations and give adequate protection to indigenous peoples. The cases also demonstrate the need to further develop the standards being applied by the Inter-American System with regard to the three safeguards as developed in the *Saramaka People v. Suriname* case.<sup>273</sup> Specifically, there is a need to clarify the distinction between small- and large-scale development projects and their potential to impact the survival of a people. Furthermore, the Inter-American system needs to substantively define what it means by survival.

¶84 Various conditions need to exist for the effective implementation of the right to free prior and informed consultation or consent. Firstly, special attention must be paid to the political, economic, and social context of a consultation process in order to ensure that it is truly free from coercion. Secondly, for a process to be informed, all parties involved, including the State, private industry, and the affected indigenous peoples, must have access to and share accurate information regarding potential impacts of a project, demonstrating the need for technically

<sup>272</sup> *Id.* at 113.

<sup>273</sup> *Saramaka People v. Suriname*, *supra* note 36.

accurate environmental and social impact assessments. Thirdly, all processes involved with the consultation must be culturally appropriate, defined as ensuring that information is provided in the appropriate language and that traditional decision-making processes are respected. Finally, in order for any consultation to be meaningful, the concerns and potential opposition of the affected peoples must have an impact on the final decision including the mitigation of negative impacts and compensation for harms done, even if a full veto right is determined not to exist.

¶85 This discussion on the right to FPIC highlights the complexity of both the implementation and significance of indigenous peoples' participation rights. The only textual expression of full free, prior, and informed consent is in the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration),<sup>274</sup> a non-binding instrument. The other developments within international human rights law with regard to FPIC have been the non-binding commentaries of U.N. Treaty bodies, such as the Committee on Economic, Social, and Cultural Rights (CESCR),<sup>275</sup> and the Committee on the Elimination of Racial (CERD).<sup>276</sup> The Committee of Experts on the Application of Conventions and Recommendations (CEACR) in its interpretation of ILO Convention No. 169 has argued that consultation and participation are the cornerstones of the Convention,<sup>277</sup> however only 20 States have ratified this convention. The Inter-American system has some of the most substantive jurisprudence on the right to consultation and consent, but it is regionally focused and only the rulings of the Inter-American Court are considered binding. Ultimately, all of these developments have limited impact in developing customary international law. However, given that international customary law is both developed and evidenced by the practice of States,<sup>278</sup> what these human rights instruments and mechanisms can do is continue to challenge and guide State practice.

¶86 Although there does not appear to be an existing customary international legal principle of the right of indigenous peoples to FPIC, there does appear to be a minimal norm developing that requires consultation in good faith. This developing norm requires that consultations take place prior to both the exploration and exploitation of resources within the territories of indigenous peoples or that affect traditionally used resources. This means that consultation processes are not intended to simply take place when issuing an exploration or exploitation license, but at the moment a State is considering opening up an area to exploration and throughout the various stages of resource exploitation. Within both the ILO System and the Inter-American System, respecting the right to consultation requires that States adopt legislation in order to implement indigenous peoples' participation rights. Furthermore, the adoption of such legislation itself must be in consultation with the affected indigenous peoples. Even though it is not articulated as consent, the developing norm of consultation in good faith, if applied as a standard that requires States to consult with indigenous peoples in such a way that the goal is to reach an agreement or consensus, might well become a de facto obligation that ensures that indigenous peoples' FPIC is sought and respected.

<sup>274</sup> United Nations Declaration, *supra* note 9.

<sup>275</sup> See e.g. CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, para. 12 and 33, UN Doc. E/C.12/1/Add.74 (December 6, 2007); CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, ¶¶ 12, 35, UN Doc. E/C.12/1/Add.100 (June 7, 2004).

<sup>276</sup> Committee on the Elimination of Racial Discrimination, *supra* note 20.

<sup>277</sup> ILO, *supra* note 4, ¶ 1.

<sup>278</sup> Committee on Formation of Customary (General) International Law, *supra* note 110.