THE POWER OF INDIGENOUS PEOPLES TO VETO DEVELOPMENT ACTIVITIES: THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT (FPIC) WITH SPECIFIC REFERENCE TO ETHIOPIA

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)

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30 OCTOBER 2009.

Plagiarism Declaration

I ADEM KASSIE ABEBE do hereby declare that the dissertation '**The power of indigenous peoples to veto development activities: The right to free, prior and informed consent (FPIC) with specific reference to Ethiopia'** is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Dedication

To my sister Hawa - your courage, strength, patience and aspirations are all alive. We love you, and you will always be with us!

May God Bless YOU and Your Children!

I also dedicate this dissertation to my brother Mosa, for discovering and helping me discover what is in me! You are my angel.

Acknowledgment

My family, your limitless love, care, prayers and support always keep me going and strong.

I am particularly indebted to my supervisor Ms Odile, for her unreserved guidance and constructive comments despite her own tight schedule.

Getahun, I should simply say you cooled me down during strangely irritating times; you were an angle out of hell.

Prof Belay Kassa, President of the University of Haramaya, and Mr Gizachew Admassu, Dean of the Law Faculty, deserve my heartfelt gratitude for arranging my travel expenses. Dr Tena Alamirew, Vice President of Haramaya University, and Fitsum, I am grateful for smoothly processing the letter for waiver of the repatriation fee.

I should also thank Prof Frans Viljoen and Prof Hansungule for sharing their immense knowledge and experience on the subject matter.

I should say it is a privilege to be part of this amazingly smart, active, educating and peaceful batch. Thank you all my friends.

Acronyms

Unless the context requires otherwise, the abbreviations stand for this:

ACHPR	African Charter on Human and Peoples' Rights
AfDB	African Development Bank
African Commission	African Commission on Human and Peoples' Rights
AU	African Union
CERD	Convention on the Elimination of All Forms Racial Discrimination
CERD Committee	Committee on the Convention on the Elimination of All forms of Racial Discrimination
ICESCR Committee	Committee on the ICESCR
CSO	Civil Society Organization
Declaration	Declaration on the Rights of Indigenous Peoples
FPIC	Free, prior, and informed consent
FPICon	Free, prior, and informed consultation
HRC	Human Rights Committee
IACmHR	Inter-American Commission of Human Rights
IACt HR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ILO 169	ILO Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries No 169
OD	Operational Directive
OP	Operational Policy
SERAC case	*Social and Economic Rights Action Centre v Nigeria (SERAC)* (2001) AHRLR 60 (ACHPR2001)

Special Rapporteur	UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
WB EIR	World Bank Extractive Industrial Review
WB	World Bank
Working Group	African Commission's Working Group on the Rights of Indigenous Populations/Communities

CONTENTS

Plagiarism declaration ii

Dedication iii

Acknowledgment iv

Acronyms v

Contents vii

Chapter One: Introduction 1

1.1 Background 1

1.2 Problem statement 2

1.3 Research question and objectives 3

1.4 Significance of the research 4

1.5 Limitations 4

1.6 Definition 4

1.7 Methodology 5

1.8 Literature review 5

1.9 Chapter outline 6

Chapter Two: The concept of FPIC 7

2.1 Introduction 7

2.2 Components of FPIC 8

A) Free 8

B) Prior 8

C) Informed 9

D) Consent 9

2.3 Methodological aspects of FPIC 10

2.4 Verifying consent 12

2.5 The right to FPIC vis-à-vis consultation in good faith 13

2.6 The right to FPIC vis-à-vis State sovereignty and 'national interest' 13

2.7 Particular importance of the right to FPIC to indigenous peoples 16

2.8 Alternatives to FPIC 17

2.9 Conclusion.....18

Chapter Three: International and regional protection of the right to FPIC.....20

3.1 Introduction.....20

3.2 The right to self-determination.....20

3.3 The right to property and culture.....22

3.4 ILO Convention 169.....23

3.5 The Declaration on the Rights of Indigenous Peoples.....24

3.6 The African Commission and its Working Group on the Rights of Indigenous Populations/Communities.....26

3.7 The World Bank.....27

Country Systems.....30

3.8 African Development Bank.....32

Policy on Involuntary Resettlement.....33

3.9 Conclusion.....33

Chapter Four: The right to FPIC in the Ethiopian legal system.....35

4.1 Introduction.....35

4.2 Federal Democratic Republic of Ethiopia Constitution, 1995.....35

A) Non-discrimination.....35

B) Self-determination.....35

C) The right to property.....36

D) The right to development.....36

E) The right to a clean environment.....37

F) Enforcement mechanisms.....37

4.3 Other laws and policy.....38

A) Expropriation of landholdings for public purposes and payment of compensation proclamation no 455/2005.....38

B) Development, conservation and utilization of wildlife proclamation no 541/2007.....39

C) Forest development, conservation and utilization proclamation no 542/2007..40

D) Federal Democratic Republic of Ethiopia: Environmental Policy (2 April 1997)41

4.4 Conclusion.....42

Chapter Five: Conclusion and recommendations 43

5.1 Conclusion 43

5.2 Recommendations 44

Bibliography 46

Chapter One: Introduction

1.1 Background

> It may be asserted that although people other than those who are indigenous have also been ousted in the name of development in the 'national interest', the acuteness of the gloom that is suffered is disproportionately high among indigenous peoples.[1]

Indigenous peoples are among the poorest, most disadvantaged and often excluded populations, and are particularly vulnerable to changes caused by development projects.[2] Fortunately, they have now been recognised in international law and policy.[3] Their existence in Africa and their entitlement to all the rights in the African human rights system has been reaffirmed by the African Commission through adopting the Report of the Working Group. Although not legally binding, the adoption of the Declaration marks a significant step forward in the protection of the rights of indigenous peoples.

The right to self-determination, which was at the heart of the long controversial drafting process, is the most central guarantee in the Declaration.[4] Arguably, international law recognises the right to self-determination of indigenous peoples.[5] As progeny of this right, the Declaration requires FPIC of indigenous peoples over development activities that affect them.[6] This grants indigenous peoples the right to reject decisions made by persons/institutions often unrepresentative of the indigenous peoples, and hence paves the way for greater equity. FPIC functions as a safety valve to the unequal relationship between mighty States and marginalized indigenous minorities.[7]

The right to FPIC apparently gives indigenous peoples the final say on development projects which impact upon their lives. It represents a major shift from ILO 169 which entrenches the right to say 'no' only in the context of relocation.[8] In other cases, ILO 69 only requires consultation in good faith with a frank and meaningful objective of obtaining consent to proposed measures.[9] The WB and the AfDB similarly have policies to ensure that projects which directly affect indigenous peoples are undertaken only with their consultation.[10]

Although African governments generally tend to be impressed with signing and ratifying human rights treaties, they seem reluctant towards ILO 169, the only comprehensive and

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[1] DK Behara ''So-called development' and its impact on the rights of indigenous peoples in India' in CP Cohen (ed) *Human rights of indigenous peoples* (1998) 121.
[2] GA Sarfaty 'The WB and internalization of indigenous rights norms' (2005)114(7) *The Yale Law Journal* 1794.
[3] C Charters 'Indigenous peoples and international law and policy' in BJ Richardson *et al Indigenous peoples and the law: Comparative critical perspectives* (2009)161.
[4] J Burger 'Indigenous peoples and the United Nations' in Cohen (n 1 above) 7.
[5] Charters(n 3 above) 164
[6] Declaration on the Rights of Indigenous Peoples (UN Doc A/C.3/61/L.18/REV.1), art 32.
[7] S Saugestad 'The indigenous peoples of Southern Africa: An overview' in R Hitchock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) 35.
[8] ILO Convention on Indigenous and Tribal Peoples in Independent Countries 1989(No 169), art 16(2).
[9] n 8 above, arts 6(1)(2).
[10] WB OP 4.10 on Indigenous Peoples (10 May 2005).

binding international instrument that currently exists concerning indigenous peoples. No African State has till now ratified this Convention however. It remains to be a notorious exception to this notorious African practice. The Declaration has similarly not drawn the attention of African governments. In fact, its adoption by the UNGA was successfully postponed upon request by the AU before it was finally endorsed in 2007, one of the main reasons being the inclusion of the right to FPIC.[11]

With this continental tendency, African States generally aptly ignore the rights of indigenous peoples and are reluctant to give clear legal recognition to their existence and accompanying rights. Huge dams are built and other development projects undertaken without consultation, and even without compensation, of affected indigenous peoples.[12] In Ethiopia, the situation is not any different. Although the Constitution prohibits discrimination and recognises all languages and cultures, it does not explicitly refer to 'indigenous peoples'.[13] Land and natural resources are State-owned and property, including indigenous property, may be confiscated for 'public interest' reasons.[14]

1.2 Problem statement

One of the main impediments that indigenous peoples face is the absence of legal recognition and with this, their voice, let alone their consent, does not often matter.[15] And even in States that have recognised FPIC, consent is 'frequently engineered and indigenous institutions are outmaneuvered by competing interests seeking access to indigenous peoples' common resources'.[16] The African Commission has taken a bold step in reaffirming the importance of the Declaration to the African human rights system.[17] No comprehensive binding, or even soft, instrument, however, exists at the African level.

Most African States reserve their right to expropriate or undertake/permit development activities on alleged public interest grounds despite their impact on some people. This 'national interest' trumps over the interest of other segments of society including indigenous peoples. The right to FPIC has, however, evolved as an essential component of indigenous

[11] F Viljoen *International human rights in Africa* (2007) 279. .. 'what they do not like is the language in the declaration that gives indigenous peoples rights to their lands and resources, and ensures their FPIC before those rights are impeded upon' 'UN General Assembly Declines Vote on Declaration on the Rights of Indigenous Peoples' Cultural Survival (December 2006).
[12] M Salomon & A Sengupta 'The right to development: Obligations of the States and the rights of minorities and indigenous people' (2003) *Issues Paper* by Minority Rights Group 18.
[13] African Charter on Human and Peoples' Rights, arts 25&39.
[14] Federal Democratic Republic of Ethiopia Constitution, art 40(8).
[15] GW Wachira 'Vindicating indigenous peoples land rights in Kenya' Unpublished LLD thesis, University of Pretoria, 2008 38
[16] M Colchester & F MacKay 'In search of middle ground: Indigenous peoples, collective representation, and the right to free, prior and informed consent' Forest Peoples Programme, paper presented for the tenth conference of the International Association for the Study of Common Property, Oaxaca (August 2004).
[17] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Banjul (2007).

peoples' rights warranting a revisit of the 'national interest' rule. This principle does not require abandoning the 'national interest' tenet; it rather calls for a different mode of application regarding indigenous peoples.

1.3 Research question and objectives

This scholarship endeavors to answer several questions. The main question is on how to strike a balance between 'national interest' in development and the right of indigenous peoples to FPIC. Within this broad embrace, the following are addressed.

- What does FPIC mean? What are the substantive and methodological issues involved?
- Consultation in good faith vis-à-vis right to FPIC;
- Procedural requirements of FPIC;
- How can we ascertain the viability of consent?
- Right to FPIC vis-à-vis State sovereignty and national interest;
- When, if at all, should national interest prevail over the right to FPIC?
- Should this right be understood to impose the same level of obligation on all States regardless of their level of development?
- What is the jurisprudence on the right to FPIC internationally and at the African level?
- What do the policies of the WB and the AfDB say regarding FPIC?
- What are the legal and policy protections granted to indigenous peoples in Ethiopia concerning FPIC?

These questions are analysed considering the improvement introduced by the Declaration pertaining to FPIC over and above ILO 169. Relevant policies of the WB, including its policy on Country Systems, and the AfDB are also consulted. The implications of the lack of a common standard at the African level are considered. Moreover, it explores the level of recognition of FPIC in the Ethiopian legal system.

The general objectives of the research are:

1. To ascertain the meaning and implications of FPIC to States;
2. To identify the difference between meaningful participation and FPIC;
3. To explore the relationship between 'national interest' and the right to FPIC;
4. To analyse the protection of the rights of indigenous peoples, including mainly the right to FPIC, in Ethiopia;
5. To make recommendations concerning the middle ground between 'national interest' and the right to FPIC. It considers how the right to FPIC can be legally recognised in Ethiopia and Africa in general, including particularly by the African Commission, and outlines specific recommendations on the relevant policies of the WB and AfDB.

1.4 Significance of the research

With increasing technological development and the search for resources, the limits of development activities have been immensely stretched and indigenous peoples are increasingly feeling the impacts. This sometimes extends up to displacing them from their homelands. To ensure their continuous survival and in recognition of their right to self-determination, the concept of FPIC has gradually developed. The issue of indigenous rights has attracted some scholarly research and interrogation globally.

However, the number of scholarships on FPIC in the African context is meager. Ethiopia is no exception. Also most of the existing scholarships portray 'national interest' and the right to FPIC as incongruous, which is not necessarily the case. This scholarship hopefully contributes to filling this gap.

1.5 Limitations

This research only focuses on the right to FPIC and does not attempt to establish a definition of indigenous peoples. A working definition is, however, adopted. Concerning the Ethiopian situation, the research primarily addresses the legal and policy framework, although scanty reference to practical situations is made.

1.6 Definition

Both the terms 'indigenous' and 'peoples' are contentious. As such, it is difficult to formulate a universally viable definition that is not grossly under- or over-inclusive.[18] The phrase 'indigenous peoples' is not a precise term of art with a single meaning. Below, I have consolidated characteristics of indigenous peoples into a definition. Nevertheless, a rigid positivist definition may be misguiding and inappropriate.

Indigenous peoples, for our purpose, are any group of peoples who identify themselves as such and whose culture and way of life, social institutions, and mode of production differ considerably from, and are threatened by, the dominant society, and who depend on access and rights to their traditional land and natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other dominant societies which often prevent them from genuinely participating in decisions affecting their future and development.[19]

[18] B Kingsbury ''Indigenous peoples' in international law: A constructivist approach to the Asian controversy' (1998) 92(3) *The American Journal of International Law* 414.

[19] Based on characteristics identified by the Working Group. Also adopted by the African Commission in the Draft Principles and Guidelines on Economic, Social, and Cultural Rights in the African Charter www.achpr.org/english, (Accessed 29 August 2009).

1.7 Methodology

This work primarily relies on literature review. Desktop research constitutes the major portion of the scholarship. While analysing the Ethiopian situation, the author critically comments on relevant statutes and policies.

1.8 Literature review

Unlike ILO 169, the Declaration grants indigenous peoples a veto power on development projects that directly affect them.[20] In the latter, consent is a requirement; whereas in the former, actions of governments may only be challenged where procedures of consultation were not 'appropriate', or insufficiently representative of the stakeholders.[21]

FPIC is designed as an antidote to situations whereby indigenous communities are excluded from decision-making over their development choices. It presents them a formal role and some form of veto power in consultations and ultimate decisions over local development projects.[22] It is a comprehensive right distinct from the commonly used term 'consultation' which implies exchange of views devoid of any decision-making role.[23]

Long before the Declaration was adopted, the CERD Committee called upon States to ensure the effective participation of indigenous peoples in public life and that 'no decisions directly relating to their rights and interests are taken without their informed consent'.[24] Similarly, the IESCR Committee expressed deep concern that 'natural resource extracting concessions have been granted to international companies without the full consent of the concerned communities'.[25] The IACtHR has similarly affirmed the right of indigenous peoples to FPIC over development projects affecting them.[26]

While the WB does not require FPIC, its policy on indigenous peoples exacts indigenous peoples' broad support, and meaningful and good faith consultation and participation through culturally appropriate collective decision-making processes at each stage throughout the life of a project.[27] The WB argues that this is a pragmatic approach on the issue as FPIC is not

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[20] 'ILO Convention on Indigenous and Tribal Peoples 1989(No 169): A Manual, Project to promote ILO policy on indigenous and tribal peoples'(2003)16.
[21] L Strelein 'The price of compromise: Should Australia ratify ILO Convention169?' in G Bird *et al* (eds) *Indigenous peoples and the law* (1996) 73.
[22] S Bass *et al* 'Prior informed consent and mining: Promoting the sustainable development of local communities' (2003) Environmental Law Institute, http://www.elistore.org/reports_detail.asp?ID=10965&topic=Mining (Accessed 29 August 2009).
[23] 'The UN Declaration on the Rights of Indigenous Peoples, treaties and the right to FPIC: The framework for a new mechanism for reparations, restitution and redress' submitted by the International Indian Treaty Council as a Conference Room Paper for the United Nations Forum on Indigenous Issues Seventh Session(UNFII7)(9 March 2008) 5.
[24] General Recommendation XXIII on Indigenous Peoples (1997) UN Doc. CERD/C/51/Misc.13/Rev.4 Para 4(d).
[25] IESCR Committee, E/C.12/1/Add.100, (2004) Para 12.
[26] *Awas (Sumo) Maygna Tingni Community v Nicaragua*, IACtHR, Report No 27/98 (Nicaragua) Para 164.
[27] OP 4.10 (n 10 above) Para. 1, 6(c) & 11.

enshrined in international law, is inconsistent with national laws in many developing countries and is impracticable.[28] Colchester and MacKay criticise this stance by citing actual examples where FPIC has been implemented.[29] The Country Systems on environmental and social policies also has impacts on the protection accorded to indigenous peoples.

Although there is no mention of indigenous peoples in the ACHPR, Kamua interpreted the right to freely dispose of peoples' natural wealth (Article 22) to include the right to FPIC.[30] Nevertheless, indigenous peoples are beneficiaries of all the rights in the ACHPR both individually and in group.[31] The African Commission has also welcomed the Declaration as a relevant instrument. In its legal opinion on the Declaration, the Commission reaffirmed the right to self-determination of indigenous peoples without compromising existing boundaries. The Commission, however, only read the right to be 'consulted in the drafting of laws and programs concerning them'.[32] The Working Group furthermore rejected the mythical perception that indigenous rights grant indigenous peoples 'special rights over and above the rights of all other groups within a State'.[33]

Ferrari and Colchester have concluded that even in States where the right to FPIC is legally entrenched, the consent of indigenous peoples is often secured through flawed procedures.[34] The report of Rodolfo Stavenhagen, ex-Special Rapporteur, strengthens their proposition.[35]

1.9 Chapter outline

This proposal introduces the research and forms chapter one. Chapter two addresses the concept and purpose of FPIC, its particular importance to indigenous peoples, and its relationship with meaningful consultation and state sovereignty. Chapter three explores the international and regional protection of the right to FPIC. The policies of the WB and AfDB are also examined. The place of FPIC in the Ethiopian legal system forms chapter four. The conclusion and recommendations complete this scholarship.

[28] Colchester & MacKay(n 16 above).
[29] As above.
[30] VN Kamua 'Achieving sustainable development and indigenous rights in Africa: Tensions and prospects' Unpublished LL.M thesis, University of Pretoria, 2007 19.
[31] Viljoen(n 11 above) 281&282.
[32] Advisory Opinion (n 17 above) Para 27.
[33] 'Indigenous peoples in Africa: The forgotten peoples?' African Commission Working Group on Indigenous Populations/Communities Report Summary, Banjul, Gambia 2006.
[34] MF Ferrari & M Colchester 'Making FPIC work: Challenges and prospects for indigenous peoples' (June 2007) Forest Peoples Programme, Moreton- in- Marsh.
[35] UN Economic and Social Council, Special Rapporteur, E/CN.4/2003/90, 21 (January 2003) Para 13.

Chapter Two: The concept of FPIC

2.1 Introduction

FPIC has its substantive basis in the right to self-determination and its corollary, the right to participation. Besides, the right to FPIC presupposes adequate recognition of indigenous peoples' rights to land, territories and resources they have traditionally owned, occupied or used.[36] It ensures a more participatory approach to resource allocation and helps democratise natural resource-led development.[37] It is a relatively new concept first recognised by ILO 169 as a manifestation of the right to self-determination.[38] Yet currently the right to FPIC of indigenous peoples over policies, programs, and projects affecting their rights and welfare has increasingly become the subject of discussion in a number of international, regional, and national forums signifying the crystallization of the right to a norm and standard of international law.[39]

The right to FPIC is an empowering tool which grants the real stakeholders the authority to define their own goals and destiny, and to have a meaningful say on development. It is a far-cry from the prevailing historic experience of indigenous peoples, who have been informed of someone else's decision about what will happen to their resources once it has been made.[40] It is designed to cure the exclusion of indigenous peoples from the initiation, negotiation and execution of development activities affecting their lives.[41]

It is now acknowledged as an essential derivative of the exercise of the right to self-determination of indigenous peoples,[42] and serves as the principal determinant of whether there is a 'social license to operate', and to support operations.[43] In fact, without the kind of substantive participation that FPIC mandates, the tenure security of indigenous peoples is always at the mercy of decisions made by others.[44] It ensures that indigenous peoples have

[36] F MacKay 'Indigenous peoples right to FPIC and the WB's Extractive Industrial Review' Forest Peoples Programme (28 June 2004) 32.
[37] K Slack 'Sharing the iches of the Earth: Democratizing natural resource-led development' *Ethics & International Affairs* (Winter 2004) (Publication of the Carnegie Council on Ethics and International Affairs).
[38] Ferrari & Colchester (n 34 above) 2.
[39] Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Population 23rd Session 'Standard Setting Legal Commentary on the concept of FPIC' Expanded working paper submitted by Mrs Antoanella-Iulia Motoc and the Tebtebba Foundation, E/CN.4/Sub.2/AC.4/2005/2 (21 June 2005)2&3.
[40] Treaties & FPIC (n 23 above) 5.
[41] World Resource Centre Box 3.3: Empowering Communities through FPIC. http://www.wri.org/publication/content/8082 (Accessed 18 July 2009).

[42] Treaties & FPIC(n 23 above) 2.
[43] 'Striking a better balance: The WB Group and Extractive Industries', the Final Report of the Extractive Industries Review Vol. I (December 2003) 21
[44] Box 3.3 (n 41 above)

the right to determine their pace of change, consistent with their own vision of development.[45] FPIC addresses the major challenge most indigenous peoples encounter - lack of security over land and material resources over which their perpetuation and development rests.[46] It is the 'operative principle through which the parties establish, in equal and full partnership, the terms, processes, mechanisms and criteria for settling disputes arising from the failure to implement and respect existing Treaties[between States and indigenous peoples]'.[47]

With this background, this chapter introduces the concept of FPIC and elaborates on its meaning and application.

2.2 Components of FPIC

We can easily reckon that FPIC consists of four different but highly interrelated requirements, *viz* '*free', 'prior', 'informed'* and '*consent*'. These requirements are cumulative; failure to fulfill any taints the others and renders consent invalid.

A) Free

This represents the absence of coercion and outside pressure and other 'divide and conquer' tactics. It includes the freedom to say 'no' without fear of any threat or retaliation.[48] Consent should be obtained without fraudulent or deceptive exercises. It also requires avoiding psychological pressures figuring 'yes' as the only choice, or that 'no' does not matter as the activity will be implemented anyway.[49] Furthermore, 'free' implies that consent given by mistake is revocable.

B) Prior

'Prior' demands that indigenous peoples have sufficient time to gather and share all the relevant information and discuss the issues as per their customary institutions and procedures. Time constraints should be avoided.[50] Consent should be a precondition for and precede approval of projects;[51] governments should not approve projects and then venture to acquire consent. This creates the conditions and incentive for circumvention and

[45] R Stavenhagen, Special Rapporteur, 'Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur', E/CN.4/2006/78/Add.4) (26 January 2006) Para 10.
[46] Cohen (n 1 above) 442.
[47] Treaties & FPIC (n 23 above) 4.
[48] n 47 above 5.
[49] n 47 above 6.
[50] As above.
[51] R Goodland 'Free, prior and informed consent and the WB Group' (Summer 2004) 4(2) *Sustainable Development Law and Policy* 68.

manipulation of the process. It guarantees that the process is not too hurried and mechanical.[52]

C) Informed

This requires accessibility to relevant information reflecting all views and positions - one that is right, impartial, balanced and complete enabling meaningful decisions on precautions, mitigation, as well as compensation, if necessary.[53] It ensures negotiation on equal terms with project proponents and hence guarantees that the negotiating parties are not 'overly unbalanced' in power.[54] Equal emphasis should be given to information regarding the negative and the positive impacts of proposed projects for informed cost-benefit analysis. It should divulge risks, benefits, and alternatives to proposed actions 'based on the 'precautionary principle' regarding potential threats to health, environment or traditional means of subsistence'.[55] The information should be accessible in a language and process indigenous peoples understand and should fully disclose the intent, scope and impacts of proposed projects.[56] Primarily, indigenous peoples should be informed of their right to say 'no'.

D) Consent

This is the final outcome of the aforementioned processes. Its legitimacy and acceptability largely depends on whether these processes are fulfilled. It is precisely the demonstration of clear and compelling agreement.[57] To be meaningful, it should include the right to withhold consent to certain proposed development projects.[58] What constitutes consent is, however, debatable and may differ with circumstances. As discussed latter, it is unwise to develop a rigid formula for determining consent insensitive of the heterogeneity of traditional decision-making procedures. In general, agreements should be reached with the full and effective participation of authorised leaders, representatives or decision-making institutions as the indigenous peoples themselves may determine.[59] It should not be 'a game that has no concrete result' for indigenous peoples. Similarly, consent has to be distinguished from a 'no objection requirement',[60] rather is a positive act of saying 'yes'.

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[52] C Bangaan 'FPIC experiences in the Philippines' TebTebba Foundation, Baguio, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and FPIC, Ciboda (2–6 April 2007) cited in Ferrari & Colchester (n 34 above) 12.
[53] D Magraw 'Summary of opening remarks' Sustainable (n 51 above) 3.
[54] Goodland (n 51 above) 66&69.
[55] Treaties & FPIC (n 23 above) 6
[56] Legal Rights and Natural Resources Center, Philippines, 2007, Presentation to the FPP-AMAN Workshop on Indigenous Peoples and FPIC, Cibodas (2–6 April 2007) cited in Ferrari & Colchester(n 34 above) 12.
[57] Treaties & FPIC(n 23 above) 6.
[58] Legal commentary(n 39 above) 12.
[59] n 58 above 5&6.
[60] Goodland (n 51 above) 69.

In summary, information should be complete and States should avoid interfering with customary laws and practices of indigenous peoples.[61] Unfortunately, there is a developing trend to implant fake leaders to obtain consent when customary authorities become opposed to projects; or exclude critical elements in communities from meetings to secure agreements from the rest, and even establishment of alien indigenous organs or duplication of existing ones to undermine the authority of opposing views even in countries that have officially endorsed the right to FPIC.[62]

In conclusion, the underlying premise of FPIC is that indigenous peoples should have a thorough understanding of the promises and pitfalls of a project and be empowered to freely accept or reject it.[63] FPIC should apply to big and small activities, and to both private and public undertakings alike. It should also be approached as a 'process rather than a one-time decision'.[64] It is completely voluntary and discussions should occur prior to, and continue throughout the project's life, and maintain the right to withhold consent at decision-making points during the project cycle. Some regional judicial bodies have, however, created a distinction between projects having a 'major impact' - which require FPIC- and others, which do not.[65] The writers argue that such a trend is futile as it presupposes the existence of hierarchies in the interests of indigenous peoples and creates procedural complexities.

2.3 Methodological aspects of FPIC

The fact that indigenous peoples are heterogeneous makes it difficult to anticipate a single decision-making process.[66] Hence, while determining such process, the primary reference should be the culture and practice of affected indigenous peoples. Procedurally, FPIC requires processes that allow and support meaningful and authoritative choices by indigenous peoples on alternative development paths.[67] States should refrain from implanting new, all embracing modes of decision-making. Consultations should be culturally appropriate recognizing indigenous peoples' own traditional decision-making process.[68] The fact that decisions should be 'free' dictates that States should give indigenous peoples the freedom to decide 'in their own time, in their own ways, in language/s of their own choice and subject to their own norms and customary laws'.[69]

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[61] Ferrari & Colchester (n 34 above) 12.
[62] Bangaan (n 52 above) 12.
[63] Sustainable (n 51 above) 1.
[64] S Metz 'Prior informed consent and protected areas on indigenous territories: Case study Cordillera del Condor, Ecuador' Centre for International Environmental Law(CIEL) Washington DC (March 2006) 52.
[65] See the approach taken by the IACtHR, *Saramawaka People v Suriname* IACtHR (ser. C), No. 172 (28 November 2007).
[66] Goodland (n 51 above) 68.
[67] Legal commentary(n 39 above) Para 55.
[68] MA Orellana Center for International Environmental Law (2008) 102 *American Journal of International Law* 845.
[69] Ferrari & Colchester(n 34 above) 5.

A problem may, however, arise if there are rival decision-making methodologies in a particular community.[70] It is essential that truly legitimate representatives be sought rather than easier-to-identify village elites.[71] The IACtHR found that whether a community granted its consent can only be determined by considering and respecting the customary law and practices of the community.[72]

This, however, does not mean that States should not interfere at all. In many indigenous societies, systems of decision-making are complex and may involve multiple *fora* and institutions. There may be lack of accountability in the sense that whatever the leader/s say/s is taken for granted.[73] Moreover, indigenous peoples' decision-making systems are not infallible and may entail social exclusion of marginal groups, women for instance.[74] In such cases, the State has to circumvent the system to ensure accountability and inclusiveness and fix other obnoxious flaws. But this again should not be imposed rather executed via deliberative exercise with concerned indigenous peoples. Good understanding of the decision-making procedures and the implications of outcomes is particularly imperative for outsiders, including States, while maneuvering the process.[75]

As most commonly understood, the right to FPIC is meant to allow indigenous peoples to reach consensus.[76] Consensus does not, however, mean unanimity; rather it will be determined pursuant to relevant customary laws and practice.[77]

Finally, the right to FPIC should not be individualised. It exists to maintain the tribal and cultural cohesion of indigenous peoples who exhibit collective ethos and lack, or have little, individual perspective.[78] Indigenous rights are *sui generis,* uniquely possessed and exercised communally;[79] hence, decisions should be taken collectively. While consistency with norms of democratic consultation is imperative, FPIC is 'not equivalent to and should not be reduced to individual participation'. It 'fundamentally entails the exercise of choices by peoples as right-bearers and legal persons about their economic, social and cultural development'.[80] Weissner explains the need for emphasis on the collectivity:

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[70] Magraw (n 53 above) 3.
[71] Goodland *(*n 51 above*)* 68.
[72] A Page 'Informed consent in the Inter-American human rights system' Sustainable (n 51 above)17.
[73] For instance, the case of the Bujumbra, Uganda.
[74] Ferrari & Colchester(n 34 above) 1.
[75] n 34 above 5.
[76] n 34 above 1.
[77] MacKay EIR (n 36 above) 15.
[78] P Thornberry (Book Review) Reviewed work 'Indigenous peoples in international law' by SJ Anaya (1998) 47(1) *The International and Comparative Law Quarterly* 244&245.
[79] P Macklem & Ed Morgan 'Indigenous rights in the Inter-American system: The Amicus brief of the Assembly of First Nations in Awas Tigni v Republic of Nicaragua (2000) 22(2) *Human Rights Quarterly* 579.
[80] Legal commentary(n 39 above) 12.

> Understanding this application of group rights is indispensable in order to effectuate a workable system of protection of indigenous peoples, their cultures and ways of life. To 'individualize' these rights would frustrate the purpose they are supposed to achieve.[81]

Hence, the dual concepts of collective rights and self-determination of indigenous peoples are essential in properly understanding and implementing FPIC.[82] Therefore, even when an individual has traditional or customary authority to grant consent representing the community, States should ensure accountability - that he/she is not acting in his/her own personal interest. This should not, however, underrate the interplay between and complementary nature of individual and collective rights as they are not mutually exclusive.[83]

2.4 Verifying consent

Once an entity claims to have obtained FPIC, the next question is to ascertain its soundness as indigenous peoples are particularly susceptible to deception and manipulation by interested groups. As no measure is absolutely foolproof, mechanisms should be set to verify whether consent has been legitimately obtained.[84] Who does the verification? And what should verifiers authenticate in assessing legitimacy?

We can pursue two approaches to identify verifiers.[85] In cases where the right to FPIC is recognised, the verification can be performed by designated government agencies. Here, logically, the role of the verifier is limited to ensuring compliance with legally set requirements on both procedure and outcome. It can also be an independent third party, especially appropriate where FPIC is not legally endorsed but is solely a voluntary undertaking. Here, the reference would be a standard agreed upon by the concerned State or undertaking. If no such standard exists, the independent verifier may rely on general understandings of FPIC. In both cases, however, the independence, objectivity and knowledgeableness of the verifiers in assessing the scientific merits and ethical considerations of projects should be indisputable.[86] Additionally, indigenous peoples' should have access to effective judicial remedies to defy misconduct in the FPIC process.[87] Similarly, there is a need to undertake both monitoring, and review and evaluation of the whole process, in which affected peoples should be fully involved to ensure compliance with whatever strings they have attached.[88]

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[81] S Weissner 'Rights and status of indigenous peoples' (1999) 12 *Harvard Human Rights Journal* 120&121.
[82] Page (n 72 above) 17.
[83] CL Holder & JJ Corntassel 'Indigenous peoples and multicultural citizenship: Bridging collective and individual rights' 20(1) *Human Rights Quarterly* (2002) 143. See also M Mooney 'How the Organization of American States took the lead: The development of indigenous peoples' rights in the Americas' (2006/2007)31(2) *American Indian Law Review* 557.
[84] S O'Reilly draft paper for the 9th Annual BIOECON Conference on 'Economics and institutions for biodiversity conservation' Kings College Cambridge (September 2007) 22.
[85] Ferrari & Colchester(n 34 above)14.
[86] Legal commentary(n 39 above) 16.
[87] G Triggs 'The rights of indigenous peoples to participate in resource development: An international legal perspective' in Zillman, Lucas and Pring (eds) *Human rights in natural resource development: Public participation in the sustainable development of mining and energy resources* (2002) 63.
[88] Goodland *(*n 51 above)68.

2.5 The right to FPIC vis-à-vis consultation in good faith

At this point, it is important to distinguish FPIC from the related concept of 'consultation in good faith'. While the former is essentially a substantive right, the latter is predominantly procedural. Consultation in good faith is principally included in ILO 169 while the right to FPIC is entrenched in the Declaration.[89]

Consultation in good faith only requires States to avoid settled outcomes, and the willingness to negotiate geared towards obtaining consent, not just to explain and convince. It is weak as it only implies 'an exchange of views devoid of any decision making role'.[90] Even the agenda is set by the State; hence, only defective procedures undermine this guarantee.[91]

The right to FPIC, however, limits the State's role to providing the necessary information for indigenous peoples to make appropriate decisions. The final say as well as the determination of the process lie in the discretion of indigenous peoples. No wonder, indigenous peoples are now fighting for the acceptance of their right to FPIC.

2.6 The right to FPIC vis-à-vis State sovereignty and 'national interest'

One of the major arguments against the right to FPIC is that it undermines State sovereignty over natural resources.[92] Similarly, it is argued that elevating the concept of FPIC into a right deprives States of their power to engage in development activities that otherwise serve the 'national interest', activities that will benefit the majority - of which indigenous peoples may or may not be part. This faceoff between the claims of States and indigenous peoples has become an 'intractable problem'.[93] For instance, Japan and the US claimed that the 1993 Draft Declaration was 'too intrusive into national legal systems' as it unreasonably limits the discretion of governments.[94] Nearly all governments adamantly opposed the recognition of indigenous peoples' right to veto any legislative or administrative measure.[95] Similarly, one of the suggestions for amendment by the African Group was to subject the right to land, territories and resources to 'provisions of national law'.[96]

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[89] ILO (n 8 above) Articles 6 &16, and Declaration (n 6 above) arts 10, 11, 19, 28, 30, 32.
[90] Legal commentary (n 39 above) 5.
[91] Strelein (n 21 above) 73.
[92] See for instance, General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.
[93] Holder and Corntassel (n 83 above) 141.
[94] General Statement by the Government of Japan on the Draft Declaration on the Rights of Indigenous Peoples 1; General Comment, United States of America, Draft Declaration on the Rights of Indigenous Peoples (November 1995) cited in RL Barsh 'Indigenous peoples and the UN Human Rights Commission: A case of the immovable object and the irresistible force' 18 (1996) *Human Rights Quarterly* 788.
[95] n 94 above 801.
[96] 'UN Declaration on the Rights of Indigenous Peoples: African Group of States' proposed revised text: A model for discrimination and domination' (15 June 2007) Para 15.

It is true that the right to FPIC may have such consequences. However, the obligations of States defined in international, regional and national human rights law clearly constrain State sovereignty.[97] Moreover, in the contemporary world, no State enjoys unfettered sovereignty.[98] This clearly reveals that the acceptance of the right to FPIC remains to be highly dependent on political will. This is further demonstrated by the fact that some States have already recognised this right domestically.[99] Daes even argues that indigenous peoples have permanent sovereignty over natural resources, and hence the right to FPIC.[100]

The CERD Committee has further noted that 'development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population'.[101] The Committee acclaimed:

> While noting the principle set forth in Article 41 of the Constitution [of Suriname] that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples.[102]

Similarly, the absolute conception of sovereignty has constantly been eroded particularly through the intensive development of international and regional human rights law. It is accepted that 'there is not even the semblance in contemporary international law that [human rights] obligations amount to a derogation of sovereignty'.[103] Similarly, although States in principle have eminent domain[104], it is 'subject to human rights law in the same way as any other prerogative of States and, therefore, should not be granted any special status or exemption to justify denial of the right of FPIC'.[105] Moreover, so long as there is political will, State sovereignty does not necessarily exclude the recognition of other sovereigns within States; this is perfectly in line with international law and policy.[106]

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[97] Legal commentary (n 39 above) 14.
[98] 'The responsibility to protect', International Commission on Intervention and State Sovereignty (Report 2001).
[99] See for instance, Philippines's Indigenous Peoples' Rights Act 1997, Australia's Aboriginal Land Rights Act of 1976, & the 2009 Bolivian Constitution.
[100] Daes 'Statement on 'indigenous peoples' permanent sovereignty over natural resources' before the 2nd session of the Permanent Forum on Indigenous Issues, United Nations, New York City (20 May 2003) www.**un**.org/esa/socdev/unpfii/documents/stmtdaes_en.doc (Accessed 25 August 2009). She argues that GA Resolution(n 97 above) applies to indigenous peoples.
[101] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Suriname CERD/C/64/CO/9/Rev.2, Para 15 (2004).
[102] *n* 101 above Para 11.
[103] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Separate Opinion of Judge Weeramantry (1996) http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm (Accessed 29 August 2009).
[104] Eminent power essentially refers to sovereignty.
[105] MacKay EIR (n 36 above) 53.
[106] EI Daes, Final Report 'Indigenous peoples' permanent sovereignty over natural resources' (E/CN.4/Sub.2/2004/30) & 'Indigenous peoples and their relationship to land' (E/CN.4/Sub.2/2001/21).

The 'national interest' argument poses a rather thornier impasse. Most developing States consider the exploitation of natural resources as the escape route from poverty.[107] This has depleting impacts on the survival bases of indigenous peoples due to accompanying limited political authority.[108] International law generally recognises the power of States to expropriate property in the national interest conditional upon adequate, prompt and effective compensation.[109] Unfortunately, most States tend to ignore the interest of indigenous peoples while assessing this often extolled 'national interest'.[110] The right to FPIC clearly necessitates a revision of this precept warranting an exception whereby the interests of indigenous peoples are given preference to the national interest in certain circumstances. This means indigenous peoples should be treated differently from other individuals or peoples. Suriname, however, argued in the Saramawaka case, that such an approach constitutes discrimination to the rest of the population. But the IACtHR rightly observed that:

> It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.[111]

Similarly, this understanding has been rejected by the Working Group as some forms of acts or omissions happen to be discriminatory to some groups and not necessarily to others.[112] Precisely, equality is not sameness; rather treating different persons and peoples, or persons and peoples under different situations, differently. The Court furthermore reiterated the need for special measures to ensure the survival of indigenous and tribal peoples with their traditions and customs. As discussed below, FPIC is of special importance to indigenous peoples which further substantiates this differential treatment.

In conclusion, FPIC represents the balancing of indigenous rights to land and culture with the State's right to develop.[113] Although State sovereignty and national interest are equally important precepts, the particular vulnerability of indigenous peoples deserves recognition and serious consideration. Hence, the interest of indigenous peoples should be the primary consideration in determining 'public interest' concerning development activities affecting them, even when the right to FPIC has not been recognised. The process of determining 'public interest' should also be clearly framed. Unfortunately, however, indigenous peoples are usually politically excluded with a result that the 'public interest' rarely accounts for their

[107] DC Baluarte 'Balancing indigenous rights and a State's right to develop in Latin America: The Inter-American rights regime and ILO convention 169' (Summer 2004) Sustainable(n 51 above).
[108] Behera (n 1 above) 122.
[109] M Sornarajah *The international law on investment* (2004) 440.
[110] Economic and Social Council, Human Rights Commission 59th session, Report of the Special Rapporteur, Rodolfo Stavenhagen, Para 7.
[111] Saramawaka(n 65 above) Para 103.
[112] Forgotten peoples (n 33 above).
[113] Baluarte (107 above) 13&14.

priorities.[114] National interest is generally interpreted to mean the interest of the majority which subordinates and disregards unrepresented groups such as indigenous peoples.[115]

FPIC is about balancing specific short term interests with a community's long term need for survival.[116] Hence, national interest and indigenous rights should not always be considered as at discord, they may actually be complimentary. FPIC is a manifestation of the trust-like than adversarial relationship between the two.[117] It is argued that the rights of indigenous peoples and the right to development are interdependent and neither should override the other.[118] Consulting indigenous peoples before and during the implementation of development projects is essential to promote and protect indigenous rights within workable models of sustainable development. [119] With the veto power comes the correlative responsibility to negotiate on equal terms with project proponents. This does not, however, mean that a 'single obdurate family can cancel a project; eminent domain should remain available for such cases, but resorted to only sparingly'.[120]

2.7 Particular importance of the right to FPIC to indigenous peoples

An essential characteristic of indigenous peoples is their strong cultural 'embeddedness' and spiritual relationship with their natural environment, and their existence as peoples.[121] Regarding this, the IACtHR observed that:

> For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it onto further generations.[122]

Hence, indigenous peoples are more likely to suffer from development activities than non-indigenous communities. Proneness to suffering, or severe impact, is certainly one criterion for consent.[123] Indigenous peoples are furthermore committed to maintaining and reinforcing their identity and characteristics.[124] It is self-identification that counts most and mainly characterises indigenous peoples.[125] Development activities, however, introduce alien practices which disrupt their ensconced way of life often with impoverishing consequences. In cases of relocation, the right is even more important as indigenous peoples have a strong

[114] Metz(n 64 above) 19.
[115] MacKay EIR(n 36 above).
[116] S Bass, Director of the Environmental Law Institute, Inter-American Program, cited in Sustainable (n 51 above) 1.
[117] Macklem & Morgan (n 79 above) 583.
[118] Salomon & Sengupta (n 12 above) 22.
[119] Baluarte (n 107 above)14.
[120] Goodland *(*n 51 above*)* 66.
[121] O'Reilly (n 84 above).
[122] Awas Tigni (n26 above) Para 149.
[123] Goodland *(*n 51 above*)* 69.
[124] Barsh (n 94 above) 797.
[125] See for instance ILO(n 8 above) art 3.

economic, social, cultural and spiritual bond with their land, territories and resources.[126] That is why most people agree on elevating FPIC as a right at least in the context of relocation.[127]

FPIC also allows indigenous peoples and communities to negotiate fair and equitable terms of revenue or other benefit-sharing schemes. The inclusion of FPIC as a legal condition for financing, investment, or regulatory decisions is, therefore, a critical means to make poverty alleviation programs more sustainable.[128] FPIC is fundamentally related to development effectiveness and poverty alleviation as widely accepted by multilateral development organisations.[129]

2.8 Alternatives to FPIC

We have seen that consultation in good faith provides one option in defining the relationship between States and indigenous peoples. Most States prefer this approach as it grants them a wider space. Quite sadly, major international and regional financial institutions like the WB and AfDB have also insisted on the concept of FPICon.[130]

The IACtHR has developed another option which combines both but under different circumstances. It acknowledges the distinction between consultation and 'consent' and concludes that consent is relevant only regarding development projects that would have a 'major impact' on indigenous peoples.[131] In other cases, the duty to consult subsists. Declaring that the right to property is not absolute, the Court recognised possible limitations without jeopardizing the survival of indigenous peoples as 'peoples'.[132] It further prescribed the requirements of benefit-sharing and appropriate EIA over such development activities.[133]

The Canadian Supreme Court similarly held that the State's duty to consult indigenous peoples is proportionate to expected impacts on traditional lands and resources. Minor impacts beseech a duty to discuss; while full consent pertains to serious issues and impacts.[134]

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[126] M Cobo 'Study of the problem of discrimination against indigenous populations' U.N. Doc. E/CN.4/Sub.2/1986 (1986), also the Declaration, preamble & art 25.
[127] F MacKay 'Free, prior and informed consent for indigenous and local communities: A briefing for WB Executive Directors' (June 2004) 2.
[128] Goodland(n 51 above), & M Kamijyo ' The Equator Principles: Improved social responsibility in the private finance sector' Sustainable (n 51 above) 35-39 .
[129] MacKay Briefing (n 127 above) 2.
[130] OP 4.10(n 10 above) & the AfDB Policy on Involuntary Resettlement.
[131] Saramawaka(n 65 above) Para 134.
[132] n 131 above Para 129.
[133] As above.
[134] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010; *Taku River Tlingit First Nation v. British Columbia*, [2004] SCC 74; *Haida Nation v. British Columbia* (*Minister of Forests*) [2004] SCC 73.

This approach attempts to reconcile competing interests of indigenous peoples and States; it acknowledges the interest of States in development, and does not absolutely overrule the possibility of granting concessions over indigenous resources. IACtHR further created a distinction between those natural resources traditionally used and necessary for the survival and development of indigenous peoples' ways of life, and other resources.[135] FPIC is imperative concerning essential and necessary resources.

Although apparently impressive, this approach begs several questions. First, what criteria determine natural resources indispensable to survival? Second, what standards verify whether a project has a 'major impact'?[136] These questions give wide discretion to States and invite abuse. It also adds freight to the procedure of deciding whether to grant concessions, and creates dangerous vagueness and uncertainties. Only FPIC could safely ensure risk is not imposed but voluntarily assumed.[137]

2.9 Conclusion

In summary, FPIC has both process and outcome dimensions. Although the right to consent might be construed technically as an outcome, failure to view FPIC as a process as well would undermine its utility for project proponents and communities.[138] Nevertheless, FPIC cannot serve as a panacea to all problems indigenous peoples face. It, however, responds to a history of excluding indigenous peoples from decision-making processes that affect them, and blunts possible negative impacts of development activities. Its strength lies in the two-way interaction between indigenous peoples and outside interests, in which indigenous peoples have the right to give or withhold consent through their own customary laws and self-chosen representatives.[139]

While not infallible, FPIC is a huge improvement over forcing 'development' and imposing involuntary conditions on indigenous peoples.[140] Consultation and participation ring hollow if potentially affected peoples cannot say 'no'.[141]

Finally, it is essential to consider whether there should be possibilities where national interest may prevail over FPIC. Most legal experts concede that human rights norms do not provide communities with an absolute right to say 'no' in every context.[142] This is pursuant to States'

[135] Saramawaka (n 65 above) Para 122.
[136] Orellana(n 68 above) 846.
[137] n 136 above 847.
[138] Metz (n 64 above) 9.
[139] Ferrari & Colchester(n 34 above)20.
[140] Goodland (n 51 above)66.
[141] As above.
[142] Metz(n 64 above).

authority to manage natural resources within. There is, therefore, a need to craft a fair balance between aspirations of indigenous peoples and legitimate claims of States. Should a State that has acute power shortage refrain from undertaking a power dam project simply because indigenous peoples have spared their blessings when it has no viable alternative? This poses huge challenges and the answer may depend on the level of impact - both positive and negative - of the project on indigenous peoples, the number of people affected, and the level of development and necessity of the project to concerned States. These and other indicators may lead one to conclude that indigenous peoples have withheld consent unreasonably in certain circumstances.

I suggest that the right to FPIC should be the rule unless and until States prove that consent has been unreasonably withheld on a case by case basis. National interest in exploiting indigenous resources should be recognised without endangering the very existence of indigenous peoples. States should not enmesh indigenous lands and resources for mere ‘public interest’ reasons. Higher standards should be applied than the usual limitation of rights requirements while dealing with indigenous peoples. This approach still is vague and should be resorted to meticulously. It also necessitates establishing monitoring and review bodies, consisting of representatives of indigenous peoples and international and national experts, to approve such narrowly tailored exceptional cases. Any decision should ultimately be subject to judicial scrutiny.

Chapter Three: International and regional protection of the right to FPIC

3.1 Introduction

Chapter two has outlined the conceptual framework of FPIC. Here, we explore the legal protection of the right to FPIC, and the jurisprudence of treaty bodies. The policies of the WB and the AfDB are also dissected.

FPIC is increasingly being recognised as an essential prerequisite to development projects affecting those politically and economically marginalized to defend their own interests.[143] Underneath this evolution is the recognition of the rights of peoples to self-determination and continuing participation in development.[144] Interestingly, FPIC lies at the intersection of norms of human rights law - self-determination - and international law - sovereignty over natural resources.[145]

The ICJ has noted the consensual nature of the relationship between States and indigenous peoples and emphasised the need for FPIC as a precondition for exploiting indigenous peoples' resources.[146] Currently, the right of indigenous peoples to FPIC has found way into the jurisprudence of international and regional human rights treaty bodies, and its observation is hailed as best practice.[147]

3.2 The right to self-determination

This right has political as well as legal dimensions: politically, liberating indigenous peoples from historical subjugation, and legally as a rule of international law.[148] It is a basic right ingrained both in the ICCPR and ICESCR; common Article 1(2) entrenches the right of all peoples to freely dispose of their natural wealth and resources for their own ends. At the core is the right to freely parley the nature and extent of their relationship with States and other peoples as well as maintain and strengthen their cultural and social values and structures.[149]

One of the main objections to the right to self-determination of indigenous peoples is whether they are 'peoples' due to the initially state-centric construction of the right. Self-determination is, however, a broad notion and cannot be solely tied to States and the long-gone decolonization process. This right allows choices as to political and economic systems even

[143] Sustainable (n 51 above) 1.
[144] Legal commentary (n 39 above) Para 33.
[145] O'Reilly (n 84 above) 32.
[146] ICJ, Western Sahara, Advisory Opinion (16 October 1975) *ICJ Reports* 1975. Also, M. Janis 'The International Court of Justice: Advisory Opinion on the Western Sahara' (1976)17 *Harvard International Law Journal* 61.
[147] Ferrari &Colchester (n 34 above)2.
[148] C Tennant 'Indigenous peoples, international institutions and the international legal literature from 1945-1993' (February 1994) 16(1) *Human Rights Quarterly* 4.
[149] Legal commentary(n 39 above) Para 34.

within boundaries of existing States.[150] Moreover, the covenants address all peoples - not just colonized peoples. Hence, 'when a text says that 'all peoples' have a right and then in another paragraph of the same Article says that the term 'peoples' includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense'.[151] The Canadian Supreme Court shares this sentiment:

> It is clear that 'a people' may include only a portion of the population of an existing State….To restrict the definition of the term to the population of existing States would render the granting of a right to self-determination largely duplicative**,** given the parallel emphasis … on the need to protect the territorial integrity of existing States.[152]

That the right to self-determination applies to peoples within existing States also has been confirmed by treaty bodies.[153]

Implicit in this right is the right to FPIC. Although not spelled out plainly, the right to self-determination of indigenous peoples certainly requires FPIC to enable them feely determine their political status and pursue their economic, social and cultural development based on their own preferences.[154] The Committees established to oversee the implementation of these covenants have affirmed this view.

The HRC has explicitly applied the right to self-determination to indigenous peoples. In its 1999 concluding observations on Canada, it noted that:

> …the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Article 1(2))…The Committee recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant (ICCPR).[155]

The IESCR Committee has also aired similar views. It, for instance, expressed concern about 'the precarious situation of indigenous communities in the State party, affecting their right to self-determination under Article 1 of the Covenant' (E/C.12/1/Add.94, Para 11, 39). More specifically, the Committee, in addressing Colombia, observed 'with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem' (E/C.12/1/Add.74, Para 12). It urged Colombia 'to consult and seek the consent of the indigenous peoples concerned prior to the

[150] Legal commentary (n 40 above) Para 34.
[151] J Crawford(ed) *The rights of peoples (1992)* 27.
[152] *Reference re Secession of Quebec* [1998] 1 SCR 217 Para 123.
[153] HRC, General Comment No 12, The right to self-determination of peoples *(Art. 1):* (1984), Para 6. Art 1(3) 'imposes specific obligations on States parties, not only in relation to their *own peoples* but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination', & CERD Committee, Recommendation XXI *(*n 25 above*)*Para 5.
[154] MacKay (36 above)19.
[155] HRC, CCPR/C/79/Add.105.

implementation of projects and on any public policy affecting them, in accordance with ILO Convention No 169' (E/C.12/1/Add.74, Para 33). In 2004, the Committee stated that it is 'deeply concerned that natural resource extracting concessions have been granted to international companies without the full consent of the concerned communities' (E/C.12/1/Add.100, Para. 12).

The CERD Committee has also dealt with the right to FPIC of indigenous peoples. In its General Recommendation XXIII, it calls upon States to 'ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent' (Para 4 (d)). Most important is the recommendation that the Declaration be used as 'a guide to interpret the State Party's obligations under the Convention relating to indigenous peoples' (CERD/USA/CO/6, Para 29, February 2008).

3.3 The right to property and culture

The right to property also provides base for the right to FPIC. This right is guaranteed in the UDHR (Article 17), and ACHPR (Article 14) among others. Accordingly, the CERD Committee reaffirmed the right of indigenous peoples 'to own, develop, control and use their communal lands, territories and resources'.[156] The South African Constitutional Court has similarly recognised that indigenous peoples have a right of communal ownership over their land and the resources beneath.[157] The IACtHR interpreted the right to property as embracing indigenous peoples' collective right to land and resources.[158] The IACtHR and IACmHR have continuously acknowledged the interrelationship between indigenous land tenure, culture, and self-determination.[159] The Court reaffirmed the principle that indigenous peoples have rights over the territory they have traditionally used, acquired or occupied, and that these rights exist autonomously under international law, regardless of domestic protection.[160] In line with this, the Declaration noticeably reaffirms these rights, and requires States to give legal recognition and protection to indigenous forms of ownership and occupation.[161]

As such, the right to self-determination, to participation, to property, the right to culture (see ACHPR, Article 22(1) and (2), and ICCPR, Article 27[162]) and even the right to housing

[156] Recommendation XXIII (n 24 above).
[157] *Richtersveld Community & Others v Alexkor Ltd & Another* (2003)12) BCLR 1301 (CC) Para 51.
[158] Awas Tingni (n 26 above).
[159] Page (n 72 above) 16.
[160] Awas Tingni (n 26 above).
[161] Declaration(n 6 above)art 26.
[162] The HRC has robustly interpreted the right to culture, economic and social relations, including relations with the land. See for instance *Lubicon Lake Band v. Canada*, Communication No. 167/1984, Annex IX.A., U.N. GAOR, 45th Sess., Supp. No.

(ICESCR, Article 11 and SERAC Case) provide the substantive basis for the right to FPIC. Hence, indigenous rights, particularly FPIC, cannot be properly understood without acknowledging this interplay, and communal ownership and self-governance which have profound implications on the way indigenous peoples make decisions related to land or other properties.[163]

3.4 ILO Convention 169

ILO 169 continues to be the only binding international instrument that specifically tackles the concerns of indigenous peoples. Nevertheless, it has had significant impact in advancing the rights of indigenous peoples at the international, regional and national levels.[164] It also served as a minimum reference point from which the Declaration was not meant to descend. Although its relevance for Africa is diluted, as no African States has ratified it, some have argued that it represents customary international law, hence binds all States.[165]

Article 3 guarantees the right to self-determination. The Convention also recognises indigenous peoples' right to determine their own development priorities and to exercise control over their economic, social and cultural development (Article 7). A combined reading unveils the spirit of FPIC.[166] Article 4 further requires special measures for safeguarding the persons, institutions, property, labor, cultures and environment of indigenous peoples in a way consistent with their freely-expressed wishes. It further obliges States to establish mechanisms to ensure free and meaningful participation of indigenous peoples at all levels of decision-making and policy formulation. Though there is no requirement that States and indigenous communities reach a consensus, full participation is imperative.[167] It should be stressed that consultation and participation are the essences of ILO 169; States should 'establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation'.[168]

Article 6(1) requires States to consult indigenous peoples in designing and implementing legislative and administrative measures that affect them through appropriate procedures through their own representative institutions. Paragraph 2 qualifies consultation to be in good faith and in a form appropriate to the circumstances with the objective of achieving consent

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40, Vol. II, U.N. Doc. A/45/40 (Oct. 4, 1990); see also SJ Anaya 'Keynote address: Indigenous peoples and their mark on the international legal system' 31(2) *American Indian Law Review* (2006/2007) 262. Anaya calls this a 'realist approach'.

[163] Page (n 72 above) *19.*

[164] 'Human rights and indigenous issues', Report of the Special Rapporteur, Mr. Rodolfo Stavenhagen, E/CN.4/2002/97 (February 2002) 4.

[165] J Anaya & T Crider 'Indigenous peoples, the environment, and commercial forestry in developing countries: The case of Awas Tigni, Nicaragua' 18(2) *Human Rights Quarterly* (1996) 348. See also J Anaya, 'Indigenous rights norms in contemporary international law' (1991) 8 *Arizona .Journal of International & Comparative Law* 8-15.

[166] Baluarte(n 107 above) 10.

[167] As above.

[168] As above.

to proposed measures. Hence, though consent is not a necessary precondition, consultation processes should be familiar to concerned indigenous peoples. The guarantee essentially is procedural. This is a consequence of the omission of recognition of the right of indigenous peoples to their land and resources.

A higher level of protection is afforded in resettlement cases as it should be an exceptional last measure with their 'free and informed consent' (Article 16). Unfortunately, the guarantee is not conclusive as the provision permits relocation, even without consent, so long as appropriate legal procedures are followed (Article 16(2)). Nonetheless, indigenous peoples should be allowed to return, if possible, and be given land of comparable quality and legal status, or compensation, if preferred, plus damages for any injury or loss suffered.

3.5 The Declaration on the Rights of Indigenous Peoples

After more than 20 years of fierce deliberation, the UNGA adopted the Declaration on 13 September 2007, a year after the Human Rights Council adopted it in 2006. This was in retort to the injustice suffered by indigenous peoples, historically through colonization and currently through dispossession of their lands, territories and resources.[169] The process has been considered as the most inclusive of stakeholders. The delay can be partly attributed to the rift on whether the right to self-determination, with its quintessence FPIC, should be recognised.

Essentially, the Declaration 'outlaws discrimination against indigenous peoples, promotes their full and effective participation in all matters that concern them, as well as their right to remain distinct and to pursue their own visions of economic and social development'.[170] It calls for participatory approaches, and recognition of and respect for diversity. Although the Declaration is merely inspirational and legally not binding, the significance of its full and unqualified recognition of indigenous peoples as peoples with the accompanying right to self-determination for the first time in an international standard has far-reaching implications. It also represents a broad international consensus which articulates and elaborates upon State obligations and, therefore, has a strong moral force on State practice.[171]The fact that the Declaration was adopted almost with unanimity arguably reinforces its status as customary international law.

Article 3 guarantees the right to self-determination including the right to freely determine political status and pursue ones economic, social and cultural development. This right has a

[169] Preamble, Para 6.
[170] 'Indigenous Peoples Indigenous Voices Frequently Asked Questions' http://www.un.org/esa/socdev/unpfii/en/declaration.html (Accessed 19 August 2009)
[171] Anaya, Keynote (n 162 above) 264.

crosscutting relationship with all the rights, making it the most essential guarantee. As the epitome of this right, the right to FPIC is enshrined under several provisions.

Article 19 obliges consultation and cooperation in good faith with indigenous peoples before adopting or implementing any administrative and legislative measure that affects them. Except the formulation, and omission of 'directly', this provision is similar to Article 6 of ILO 169. More specifically, Article 32 entrenches the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands, territories and resources, and requires FPIC before approving any project affecting them.[172] It also obliges States to provide effective mechanisms for just and fair redress of violations, and take appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts. Another novel introduction is the right to restitution of land forcibly taken from indigenous peoples, a right absent in ILO 169.[173]

Neither of these provisions makes FPIC a precondition for anticipated activities however. It only requires an open-minded, undecided consultation processes, and does not buttress the final say on indigenous peoples. Literally, the provisions do not grant veto power, teeth without biting power! To this extent, the Declaration does not represent an improvement over ILO 169. This does not, however, mean that it is not important; as the large majority of States have not ratified ILO 169, it establishes the legal ground to proponents of indigenous peoples' rights in these non-State parties. In any case, the Declaration is only a minimum standard upon which States and regional institutions and organisations should build.[174]

Nevertheless, the Declaration introduces significant improvements in the context of relocation. Article 10 establishes a double requirement - FPIC plus just and fair compensation for measures involving resettlement, and where possible with permission to return. It allows no exceptions, unlike ILO 169.

The Declaration exacts FPIC in determining appropriate redress, including restitution concerning cultural, intellectual, religious and spiritual property, and lands, territories and resources taken, used or damaged without FPIC (Articles 11(2), 28). Article 29(2) also requires States to take effective measures to ensure that hazardous materials are not stored or disposed in the territories of indigenous peoples without FPIC. Article 26 lays down the bedrock by entrenching the rights of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

[172] Note the difference between 'may affect', for administrative and legislative activities - and 'affecting' for projects.
[173] A Eide (Book Review) Cohen (n 1 above) in (2001) 95(1) *The American Journal of International Law* 261.
[174] Declaration (n 6 above) art 43.

Indubitably, the Declaration builds upon and goes beyond ILO 169 as it explicitly guarantees the right to self-determination, accepts the idea of 'peoples' with all its implications in international law, and grants indigenous peoples veto power at least in the context of relocation.

3.6 The African Commission and its Working Group on the Rights of Indigenous Populations/Communities[175]

The right to self-determination is guaranteed under the ACHPR in bald terms.[176] That this right applies outside the colonial context is arguably less controversial in the ACHPR than the two Covenants. Article 20(2) mentions peoples under colonial domination, clearly implying that the reference under sub (1) extends beyond the bounds of anti-colonial struggles.[177] Moreover, the ACHPR boldly enlists group rights which are not sufficiently addressed by UN conventions.[178] The Commission has used the term 'peoples' to refer to both all the people of a particular country, and to ethnic, linguistic or other minorities.[179] In addressing the claims of the Katanga people, the Commission implicitly acknowledged that ethnically identifiable groups can be peoples entitled to self-determination.[180] The Working Group has also affirmed this - but without disrupting effects on the territorial integrity of States.[181] The Commission has accepted this interpretation as it has endorsed the Report of the Working Group.[182]

If we follow the way the Committees under the two Covenants have interpreted the right to self-determination, the ACHPR also guarantees the right to FPIC. The Commission has yet to affirm or reject the right to FPIC. It has, however, found a violation of the right to freely dispose of natural resources in the *SERAC* case. The Commission noted that 'in all dealings with the Oil Consortiums, the Government of Nigeria did not involve the Ogoni communities in decisions that affected the development of the Ogoniland'.[183] It also unequivocally reaffirmed the right to participation. Most importantly, the case recognises the right of the Ogoni to natural resources – the foundation for the right to FPIC. Yet, since the Commission did not explicitly consider the Ogoni as indigenous peoples, it did not raise the issue of FPIC.

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[175] ACHPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Communities in Africa (2000).
[176] 'unquestionable and inalienable right to self-determination', art 20(1).
[177] R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples Rights' (February 2003) 25(1) *Human Rights Quarterly* 229.
[178] Mooney(n 83 above) 557.
[179] *Legal Resources Foundation v Zambia* (2001) AHRLR 84(ACHPR 2001) Para 73, & *Social and Economic Rights Action Centre v Nigeria(SERAC)* (2001)AHRLR 60(ACHPR2001) Paras 1,67,69.
[180] *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72(ACHPR 2000) Para 6.

[181] Forgotten peoples(n 33 above) 20.
[182] See ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/ Communities.
[183] *SERAC* (n 179 above) Para 58.

Hopefully, the Commission will follow the approach of the IACtHR and IACmHR which have continuously upheld the right to FPIC.[184]

Nevertheless, the Commission has started to raise issues of indigenous peoples while analysing State reports.[185] This is commendable as it encourages/pressures States to include information on indigenous rights in future reports.[186] Considering the fact that domestic protection of the rights of indigenous peoples are scarce or ineffective, as they are frequently obviated and bypassed both by States and corporations,[187] the Commission should provide forum for indigenous peoples and endeavor to strengthen the jurisprudence in the area. This way, it can kick-start the process of creating homogeneity in the protection of indigenous peoples' rights which ultimately reduces competition between States to attract investors through undermining indigenous rights. The absence of a common standard breeds a race to the bottom - business at the expense of rights.

The Working Group[188] also has not frequently considered the right to FPIC in its Country Visit Reports.[189] So far, it is only in the Report on Botswana that it relied on the jurisprudence of the CERD Committee to establish the right to FPIC.[190] Nor has it dealt with the concept in its 2003 Report although it subtly mentions 'the right to survive as peoples and to have a say in their own future, based on their own culture, identity, hopes and visions'. A progressive interpretation may support the conclusion that the Working Group has impliedly endorsed the notion of FPIC.

3.7 The World Bank

The WB funds countless development projects that somehow impact on the lives and resources of indigenous peoples. Such impacts are at times conspicuously down-beating.[191] Nevertheless, the WB is a critical figure in shaping State behavior concerning human rights norms.[192] It employs two key weapons: attaching conditions on loans, and incorporating its

[184] For instance *Awas Tingni* (n 26 above).
[185] For instance, during the examination of the reports of Cameroon, Libya and Central African Republic. See IWGIA Report, 39th ordinary session of the African Commission, Banjul, The Gambia (11-25 May 2006) 11.
[186] KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 389.
[187] LA Miraanda 'The U'wa and Occidental Petroleum: Searching for corporate accountability in violations of indigenous land rights' 31(2) *American Indian Law Review* (2006/2007) 654.
[188] The African Commission established the Working Group in 2000 to study issues of indigenous peoples in Africa (n 175 above).
[189] See for instance the Reports of the Working Group on Burundi (March–April 2005), on Congo (September 2005), on Namibia (26 July–5 August 2005).
[190] Report of the Working Group - Mission to the Republic of Botswana (15-23 June 2005) Para 16.4. The Commission used CERD Recommendation no XXIII. The Commission also raised consultation as a right in the 2005 Namibia Report, Para 21.21.
[191] T Griffiths 'Indigenous peoples and the WB: Experiences with participation' Forest Peoples Programme (July 2005) 1
[192] Sarfaty(n2 above) 1792.

OPs (like social and environmental standards) into loan agreements.[193] Its economic leverage provides a powerful tool to influence and contour national legal landscapes, and to enforce international law and standards particularly in developing States. Although the Bank has adopted policies related to indigenous peoples, huge concerns have been toned particularly over improper executions.[194] Moreover, it seemed to be reluctant to seriously take a rights-based approach to development projects that impact on indigenous peoples, mainly alleging that its Articles of Agreement handcuffed it from meddling in the allegedly domestic affairs of States.[195]

This trend has now generally been reversed with the adoption of OP 4.10 on indigenous peoples.[196] This substituted OD 4.20 which required informed participation, mitigation of impacts as well ensuring benefits for indigenous peoples affected by development activities.[197] Although the WB's EIR final report acknowledges the right to FPIC throughout each phase of project cycles, the WB notably continues resistance to this norm.[198]

OP 4.10 has followed the approach of the Declaration in omitting to define 'indigenous peoples'.[199] It rather lists down criteria to identify them.[200] OP 4.10, however, only endorses the concept of FPICon.[201] Consultation should be sought at 'the earliest stage of the project', be free from any manipulation or coercion, and there should be full information disclosure on proposed projects, which should be both 'accessible' and comprehensible to concerned indigenous peoples.[202] The policy has been criticised for failing to uphold the right to FPIC, and for lacking effective provisions to the legal recognition and respect of indigenous peoples' customary rights to their lands, territories and resources.[203] The use of 'consultation' rather than 'consent' deprives indigenous peoples the final say over development projects.

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[193] n 192 above 1795.
[194] F MacKay 'The Draft WB OP 4.10 on indigenous peoples: Progress or More of the same?' (2005) 20(1) *Arizona Journal of International & Comparative Law* 69.
[195] As above.
[196] OP 4.10(n10 above).
[197] Operational Directive 4.20 The WB Operational Manual, Operational Directive: Indigenous Peoples (1991) Para 8.
[198] Striking (n 43 above) 21. The Report considered FPIC as a 'social license to operate'.
[199] The Bank justified this on the absence of a comprehensive universally agreed-upon definition. It also recognizes different terminologies in different countries as 'indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'national minorities,' 'scheduled tribes' or 'tribal groups.'
[200] 'Indigenous Peoples' refers to a 'distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees': • self-identification and identification by others as members of a distinct indigenous cultural group • collective attachment to ancestral territories and to natural resources in these areas • presence of customary social and political institutions • an indigenous language, often different from the national language (OP 4.10 Paras 3 & 4). Indigenous peoples need not fulfill all the criteria to be considered 'indigenous'. Moreover, the Bank is not tied down to use self-identification as the only or primary consideration.
[201] OP 4.10 (n10 above) Para 1.
[202] MacKay (n 194 above) 88.
[203] Griffiths (n 191 above) 8.

FPICon should result in 'broad community support'.[204] The policy, however, does not define what this means. Does it mean 50+ or 2/3 majority or something else? This makes it 'broad, vague and ambiguous'.[205] This is further entangled by the fact that the policy does not determine how consultations will be conducted. It should have made reference to traditional institutions to determine whether broad community support actually exists. The OP simply requires that the consultation method/procedure should be culturally appropriate and must be gender and generationally inclusive.[206]

The Bank preserves the power of review to screen irregularities and ascertain whether broad community support reigns.[207] Monitoring schemes do not exist however. Review merely looks into documents and other secondary sources, and is potentially wasteful as some works may not be easy to undo. Besides, review is conducted by the Bank itself, when it should have been done by independent experts, as the Bank has vested interests in projects it funds. Although the policy requires the involvement of indigenous peoples organisations' and other CSOs, the process and outcome should still be monitored and reviewed by independent experts. The policy, however, only requires expert involvement in identifying indigenous peoples and determining their eligibility for FPICon.[208]

The OP adopts slightly different requirements in cases involving relocation.[209] It requires that relocation be a last resort and earn broad community support.[210] Where possible, resettlement should allow return of indigenous peoples to their natural habitats particularly if the reasons for their relocation cease to exist. In cases where legally designated parks and protected areas overlap with lands and territories of indigenous peoples, involuntary restrictions, in particular access to their sacred sites, should be avoided.[211] This OP has immensely improved the inferior protection afforded to indigenous peoples by the policy on involuntary resettlement.[212]

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[204] OP 4.10(n 10 above) Para 1.

[205] H Rivzi 'Indigenous people want power to veto WB plans' (2005) *Global Policy Forum,* http://www.globalpolicy.org/globaliz/cultural/2005/0531indigenous.htm (Accessed 25August 2009).

[206] OP 4.10(n 10 above) Para 10.

[207] n 206 above Para 11.

[208] n 206 above Para 8.

[209] The bank admits that relocation has particularly acute and adverse impacts on their identity, culture, and customary livelihoods. OP 4.10 (n 10 above) Para 20.

[210] This is in addition to the support for the project as whole.

[211] OP 4.10(n 10 above) Para 21.

[212] OP 4.12 Policy on Involuntary Resettlement (December 2001, Revised April 2004). This policy, though recognizes the special needs of indigenous peoples, only requires mere consultation and no broad community support is necessary. Nevertheless, OP 4.10 applies in all cases involving indigenous peoples unless gaps exist.

Country Systems

Another important feature of OP 4.10 is its reference to Country Systems[213] to address environmental and social safeguard issues.[214] Country Systems are adopted with the belief that they enhance country ownership and project sustainability - WB works more directly with the institutions and mechanisms already in place in borrower countries, including supporting efforts to strengthen them.[215] The rationales for using Country Systems include scaling-up lasting development impacts, and facilitating harmonization by incorporating its policies into countries' practices. [216] The focus is to integrate environmental and social safeguards into Country Systems, without compromising the operational objectives and principles of its safeguard policies.[217]

Before embarking on Country Systems, the Bank assesses the equivalency and acceptability of the country's relevant safeguard systems and reviews its implementation practices, institutions and their track record, and capacity to apply these procedures.[218] Such equivalence is determined on a policy-by-policy basis; hence, the borrower's system may be equivalent and acceptable in specific environmental or social safeguard areas, and not necessarily in other policy areas.[219] This policy encourages borrower States to adopt and implement improvements that meet these objectives.[220] Such planned improvements should not, however, count until the borrower undertakes towards the implementation of relevant project activities.[221]

The Bank is also responsible for appraising and supervising pilot projects using these systems. Without limitation to its responsibility, the Bank may also explore with the borrower - and third-parties as appropriate - the feasibility of establishing alternative monitoring arrangements for overseeing the implementation of projects. [222]

Theoretically, the Country Systems approach is a noble idea, particularly as it aims at strengthening national social and environmental standards and capacity. There are, however, some risks which are particularly acute in environmental and social safeguard

[213] Country Systems mean the borrower country's legal and institutional framework, consisting of its national, sub-national, or sectoral implementing institutions and applicable laws, regulations, rules, and procedures in assessing, *inter alia*, the social and environmental acceptability of a project.
[214] OP 4.10 (n 10 above)Para 5.
[215] 'Expanding the use of Country Systems in Bank supported operations: Issues and proposals, operations policy and Country Services' (4 March 2005).
[216] n 215 above 5.
[217] n 215 above 9.
[218] OP 4.00 Piloting the Use of Borrower's Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects, Para 5.
[219] n 218 above, Para 2.
[220] n 218 above, Para 1.
[221] Country Systems (n 215 above) Para21.
[222] OP 4.00 (n 218 above)Para 5.

areas where Bank policies have been developed over many years of global dialogue and public consultation.[223]

The WB expects national standards to be 'equivalent' to its own safeguard policies. It is not at all clear what this means in practice.[224] Moreover, equivalency assessments may include planned improvements to borrowers' systems, not just existing national capacity. WB evaluations have shown that it is very risky to base projects on promised improvements.[225] Country Systems should not, therefore, be launched until improvements are actually in place.[226] At the very least, it should not be considered unless a 'detailed strategic plan to implement these improvements has been developed, resources have been dedicated to implementing the plan, a clear timeframe for implementation has been developed, and mechanisms made available to impose penalties for failure to implement'.[227]

It might also create inconveniencies in holding the WB responsible through the Inspection Panel; if the responsibility is transferred to borrower countries, the WB escapes liability for projects that negatively impact on communities. The Country Systems might help the WB to shy away from complying with international standards in its projects. Moreover, due to the broad and vague nature of the principles and objectives, which do not provide the 'full picture' of applicable standards, communities will have difficulty determining whether a policy has been debased. [228]

In summary, it is alleged that by presenting opportunities to significantly dwindle applicable standards and weaken supervision and accountability, the Country Systems approach might fail to adequately protect social and environmental standards.[229] It does not require lasting changes in laws or policies that are mandatory beyond the life of a given project. It is, therefore, uncertain that Country Systems is robust enough to ensure high environmental and social safeguards in future projects.[230] Similarly, States may consider WB standards as ceilings when they are not necessarily the best from a human rights perspective. The Bank should use the actual safeguard policies and procedures rather than solely relying on 'objectives and principles' 'stripped of most of the procedural and substantive requirements'

[223] Country Systems (n 215 above).
[224] 'WBs proposed middle income country strategy threatens to weaken social and environmental standards. 186 organizations sign letter in protest' (7 June 2004).
[225] Bank Information Centre and the Centre for International Environmental Law 'Country Systems approach to WB social and environmental safeguards: concerns and challenges' Bank Information Centre and the Centre for International Environmental Law' (December 2, 2004).
[226] B Jenkins, Bank Information Centre, 'Comments on the WB's Country Systems Approach' 1.
[227] Comments on WB's Proposed Country Systems Approach Submitted by the Center for International Environmental Law (January 2005) 1.
[228] CIEL, the use of Country Systems in WB lending: a summary of lessons from the pilot projects and recommendations for a better approach 4.
[229] n 228 above 1.
[230] CIEL Country Systems (n 227 above) 5&6.

in determining equivalency and acceptability.[231] It should also be responsible for assessing equivalency; countries should not be allowed to assess themselves.[232] Moreover, the Bank has been criticised for relying on borrower countries' political or legal stance regarding indigenous peoples.[233] The Bank should, therefore, consistently apply its standards unfettered by borrower countries' laws and policies. It is highly recommended that the Bank use third party experts in ascertaining whether States' systems are equivalent and acceptable.

Regarding indigenous peoples, the Country Systems approach has the same combined and uncertain insinuations. In countries that recognise the right to FPIC, the implementation of the Country Systems presents a leeway for diminishing the level of protection as WB does not require FPIC. In States that provide inferior protection, the approach unwraps opportunities to raise the level of protection of indigenous peoples' rights. This dictates its selective application considering the policy and State concerned. The margin of discretion[234] given to the WB should be exploited so that, when international standards provide better protection than national systems, the Bank should apply the former.

In conclusion, the WB should sanction the right to FPIC and carefully implement its policies concerning indigenous peoples. The Country Systems approach should be employed without compromising applicable substantive and procedural guarantees.

3.8 African Development Bank

The ex-Special Rapporteur recommended international agencies and financial institutions to ensure that all projects in indigenous areas respect the FPIC of indigenous peoples.[235] Unlike the WB, however, the AfDB does not have a dedicated policy on indigenous peoples. It is also unlikely that one will be adopted as the Bank generally considers the concept controversial, although most of its projects impact on indigenous peoples.[236] This does not, however, mean that its other policies do not apply to indigenous peoples. The policy on involuntary resettlement is of particular importance.[237]

[231] Comments CIEL (n 228 above).
[232] Jenkins(n 226 above) 1.
[233] Sarfaty (n 2 above)1803. This has lead to a very poor performance rate in Africa than for instance Latin America.
[234] OP 4.10(n 10 above) Para 5...The flexibility, contained in the word 'may', gives the Bank space to decide whether to employ the Country Systems.
[235] Report of the Special Rapporteur, R Stavenhagen, Addemdum Mission to Kenya A/HRC/4/32/Add.3 (26 February 2007).
[236] E-mail from Prof M Hansungule on 23 June 2009.
[237] AfDB Group Involuntary Resettlement Policy (November 2003).

Policy on Involuntary Resettlement

This policy primarily aims at ensuring that when people must be displaced, they are treated equitably and share in the benefits of projects that involve their resettlement (Para 7). It intends to avoid involuntary resettlement whenever feasible or minimize resettlement impacts where unavoidable (Para 3.2). The policy recognises that involuntary resettlement can threaten the cultural identity of communities (Para 1.1.4).

The primary responsibility for planning, implementing and monitoring resettlement issues rests with borrowing entities (Para 4.3.10). Nevertheless, at the minimum, under the Bank's policy, land, housing and infrastructure should be provided to adversely affected populations, including indigenous groups without prejudice to the borrower's legislation (Para 10).

Concerning participation, the policy requires that affected populations are 'fully informed, consulted and effectively involved in all stages of the project cycle' with special measures to ensure effective participation of disadvantaged groups (Para 4.1.3). The policy also employs the phrase 'meaningful consultation' (Para 3.3.b). Consultation has to be undertaken early during project designing and planning for fairness and transparency reasons as well as in the planning and implementation of resettlement plans (Para 12). Consultation is meaningful if it gives genuine alternatives among technically and economically feasible resettlement alternatives (Para 3.3(b)) and information about the proposed project and plans regarding resettlement and rehabilitation are made available to local people and national CSOs timely and in an understandable manner(Para 3.3.e). The consultation process should also be gender inclusive (Para 1.1.5).

Besides, displaced persons should be compensated for their losses at 'full-replacement' cost prior to their actual taking-off land and related assets or commencement of project activities (Para 3.3(e)). The policy acknowledges legally recognised occupation, title under customary laws, and occupation without legal or customary right over the land (Para 3.4.3). Compensation accrues in the first two cases. The third group, which includes indigenous groups, is entitled to resettlement assistance in lieu of compensation in a bid to improve their living standards (Para 3.4.3).

3.9 Conclusion

In summary, despite the promise to avoid involuntary resettlement whenever possible, economic and other factors weigh more than the interest of affected communities in determining whether projects should ensue. Participation requirements also do not determine how it will be conducted. In fact, participation is oriented more on resettlement plans than in deciding whether the project should be pursued. The policy does not give indigenous

peoples the right to say 'no' even in the context relocation. The reliance on national law in determining whether to grant benefits like land and housing to displaced persons is also unacceptable. Besides, leaving issues of planning, implementation and monitoring resettlement to borrowing agencies gives States the freedom to resolve the extent of compliance. Hence, the Bank should monitor and evaluate the process.

In conclusion, the Bank should adopt a new comprehensive policy (recognising FPIC) on indigenous peoples as involuntary resettlement is but one of the myriad activities, though the most invasive, that impact on indigenous peoples. Indigenous peoples are particularly vulnerable; hence, to apply similar standards to all peoples despite their inherent differences is unfair. As such, the Bank may take lessons from the IADB[238] and the WB which have established polices applicable specifically to indigenous peoples. This harmonizes the policies of powerful financial institutions on indigenous peoples pressuring countries to comply with indigenous rights norms as they will have no alternative funding source.

[238] A Deruyttere 'Perceived challenges to recognition of prior and informed consent of indigenous peoples and other local communities: The experiences of the Inter–American Development Bank' Sustainable (n 54 above) 40. The Inter-American Developmental Bank Strategies and Procedures on Socio-Cultural Development and its 1998 Policy on Involuntary Resettlement provide that it will not support projects affecting tribal lands and territories unless indigenous peoples are in agreement.

Chapter Four: The right to FPIC in the Ethiopian legal system

4.1 Introduction

The Working Group has identified some indigenous peoples in Ethiopia.[239] Although the authenticity of the process of identification has been challenged as ill-informed and unsystematic, the list represents a blurred catalogue of indigenous peoples in Africa.[240] Similarly, some domestic enactments have mentioned indigenous peoples signifying their recognition in Ethiopia.[241]

This chapter assesses Constitutional provisions and other laws and policies that have implications for indigenous peoples' rights, particularly the right to FPIC.

4.2 Federal Democratic Republic of Ethiopia Constitution, 1995

About one-third of the Constitution is devoted to enshrining fundamental rights and freedoms. In fact, one of the underpinning reasons behind the very existence of the Constitution is the need for the full respect of individual and peoples' human rights.[242] It is also novel in blending individual and group rights, and uniquely guarantees the right to self-determination including secession.[243] Although it does not employ the phrase 'indigenous peoples', there are several provisions relevant for indigenous peoples.

A) Non-discrimination

The right to equality and equal protection of the law is guaranteed under Article 25. This provision outlaws discrimination of any sort based on grounds, *inter alia*, of race, social origin, or 'other status'. This extends the equality protection to indigenous peoples.

B) Self-determination

Another relevant guarantee to indigenous peoples is the unconditional right to self-determination up to its most-tip secession. The beneficiaries of this right are 'nations, nationalities and peoples' defined based on 'common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contagious territory'.[244] This provision also entrenches the right of nations, nationalities and peoples to speak, write, and

[239] Forgotten peoples (n 33 above) 15. The Working Group identified the Somalis, Afars, Borena, Kereyu (Oromo) & Nuer, all pastoralists, as indigenous peoples in Ethiopia.
[240] Bojosi & Wachira (n186 above) 400.
[241] Development, conservation and utilization of wildlife proclamation No 541/2007, art 2(10).
[242] The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, preamble, Para 2.
[243] Constitution art 39(1).
[244] Constitution art 39(1) &(5).

develop their language, to express, develop and promote their culture, and to preserve their history.[245] The right 'to a full measure of self-government which includes the right to establish government institutions in the territory that it inhabits and to equitable representation in state [regional] and Federal governments' is sanctioned.[246] This provision equally applies to indigenous peoples as they clearly possess the characteristics.

C) The right to property

Another essential right is the right to property. The Constitution prescribes the right to private ownership of property of every Ethiopian citizen (Article 40). This is, however, an individual right which does not apply to groups like indigenous peoples. Moreover, the right to land and natural resources therein are exclusively vested in the State and the peoples of Ethiopia.[247]

Peasants are specially protected against eviction and are entitled to obtain land without payment.[248] Similarly, Ethiopian pastoralists have the right to freely obtain land for grazing and cultivation, and are guaranteed against displacement. Given that all the indigenous peoples the Working Group identified in Ethiopia are pastoralists, this provision entrenches an essential pledge. The assurance against displacement seems absolute; hence, the right to FPIC features with this package. However, displacement is far from being the only activity that impacts on indigenous peoples.

Another restriction is the State's right to expropriate property for public purposes subject only to advance compensation commensurate to the value of the property.[249] It should be noted that private property does not include land and resources beneath as they belong to the State from the beginning. It similarly does not apply to pastoralist grazing lands. This strengthens the absolute nature of the guarantee against relocation. Hence, pastoralists can be said to have the right to FPIC at least in the context of relocation. For all other indigenous peoples who are not pastoralists, the right to FPIC remains unavailable.

D) The right to development

The right to improved living standards and to sustainable development is also entrenched.[250] The right to consultation of nationals concerning policies and projects affecting their

[245] Constitution art 39(2).
[246] Constitution art 39(3).
[247] Constitution art 40(1), (3).
[248] Constitution art 40(4)& (5).
[249] Constitution art 40(8).
[250] Constitution art 43(1).

communities is an integral part of this right.[251] This however does not echoes any special guarantee for indigenous peoples. Moreover, the right to participation does not pertain to legislative formulation. Most importantly, the guarantee is an individual right which does not recognise the communal life style of indigenous peoples and their collective rights and interests.

E) The right to a clean environment

Article 44 sanctions the right to a clean and healthy environment. It, furthermore, recognises the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance, for persons whose livelihoods have been adversely affected, or displaced by State programs. Though important, this provision does not create the right to FPIC; nor does it apply to programs other than those embarked upon by the State.

F) Enforcement mechanisms

Regarding the forums available for indigenous peoples to enforce their rights, the power of interpreting the Constitution lies with the House of the Federation, which is the upper legislative house, composed of representatives of 'nations, nationalities and peoples'. The House is advised by the Council of Constitutional Inquiry manned with members of the Federal Supreme Court and parliamentarians. The Council receives complaints requiring constitutional interpretation and recommends the House, which has the final say, and is not bound by the recommendations of the Council.[252]

Complaints may be initiated by lower courts or lodged by any interested party. Although this rule on *locus standi* is wide enough to accommodate litigants who do not necessarily have direct interest, the Constitution does not endorse the concept of public interest litigation. This lenient procedure particularly benefits vulnerable groups, including indigenous peoples, who do not have the necessary awareness, financial capacity, physical accessibility and other expertise to institute action before appropriate forums.

A Human Rights Commission is also established to ensure the protection of human rights entrenched in the Constitution.[253] Any person may lodge complaint in the Commission and there is no need to prove vested interest in the case. Similarly, action may be brought against anyone including private individuals. However, the Commission only promotes

[251] Constitution art 43(2).
[252] Constitution arts 83 &84.
[253] Ethiopian Human Rights Commission Establishment Proclamation No 210/2000, art 23-26.

amicable settlement of disputes and may only grant recommendations. Similarly, the Institution of the Ombudsman is established to address complaints of violations of human rights against members of the executive. The standing rules and the remedies the Ombudsman may grant are similar with the Commission.[254] Concerning the right to a clean environment, any member of the public may, without a need to show vested interest, lodge compliant in the Environmental Protection Authority or the appropriate court against any action which causes or threatens to cause damage to the Environment.[255]

4.3. Other laws and policy

A) Expropriation of landholdings for public purposes and payment of compensation proclamation no 455/2005

This legislation is enacted to give effect to Article 40(8) of the Constitution which authorises expropriation for public purposes. It reiterates the State's entitlement to appropriate landholdings for public purposes subject only to advance compensation.[256] 'Public interest' is defined as the use of land in a way which ensures direct or indirect benefits for the people, and consolidates sustainable development.[257]

The Proclamation does not, however, define the process of and role of affected communities in determining public interest. Strikingly, the decision on what constitutes public interest is incontestably left to the untrammeled discretion of implementation agencies. It is not even subject to appeal in courts or superior authorities.[258] Hence, potential victims may not demonstrate that public interest can be served better through different mechanisms, or even to challenge the involvement of public interest in a particular situation. It also does not determine the extent to which the interest of local communities weighs vis-à-vis 'national interest'.

Most importantly, this proclamation takes away the minimum right to consultation entrenched in the Constitution (Article 43). In short, indigenous peoples do not have the simplest say on expropriation of their landholdings.

[254] Institution of the Ombudsman Establishment Proclamation No 211/2000, arts 22-26.
[255] Environmental Pollution Control Proclamation No 300/2002, art 11.
[256] Proclamation 455/2005 art 3(1).
[257] Proclamation 455/2005 art 2(5).
[258] It is only dissatisfaction in relation to the amount of compensation that is subject to appeal to superior administrative bodies or courts of law (art 11).

B) Development, conservation and utilization of wildlife proclamation no 541/2007

This legislation is enacted with the objective of conserving, managing, developing and properly utilizing the country's wildlife resources.[259] It reaffirms the significance of involving local communities in achieving its objectives.[260] This definitely includes indigenous peoples residing in or around protected areas for wildlife conservation. However, the only instance where the proclamation mentions indigenous peoples is in defining one of the protected areas, 'wildlife reserve'- an area designated to conserve wildlife where indigenous local communities are allowed to live together with and conserve wildlife.[261]

This provision is however ambiguous and can be understood in several ways. First, it can mean that indigenous peoples are not allowed to reside in other modes of wildlife protection areas. The fact that permission is expressly mentioned concerning wildlife reserve means that indigenous peoples are not tolerated in other areas as there is no such guarantee - the mention of one excludes the other. However, it can equally be argued that the silence of the legislation concerning other protected areas can still be interpreted as giving appropriate authorities the discretion to decide on the fate of indigenous peoples. This interpretation is viable as the Proclamation does not conclusively overrule the possibility of people living in national parks.[262] This will also be consistent with the right to culture as interpreted by the CERD Committee to include the right to pursue a way of life associated with the use of land, especially in cases of indigenous peoples, and the right to live in reserves protected by law.[263] Unfortunately, the Proclamation does not define, or prescribe characteristics to identify, who indigenous local communities are. Nor can we find a definition anywhere else. This is a major hurdle as it leaves the discretion to whoever is managing wildlife reserves.

This confusion has created problems in relation to the Omo National Park and the Mursi people, for instance. Survival International[264] has particularly expressed concern over the prohibition of the Mursi peoples from accessing the Banks of the Omo River which forms part of the Omo National Park as they used to practice for decades.[265] It is only the second construction of the proclamation which is consistent with the rights of the Mursi to equality before the law, to choose their own residence, and not to be displaced from their own lands

[259] Proclamation 455/2005 art 3.
[260] Proclamation 541/2007 Preamble Para3.
[261] Proclamation 541/2007 art 2(10).
[262] Letter for Mr Peter Feranhead, Chief Executive Officer African Parks Foundation from Survival International http://www.mursi.org/pdf/survival-afp-letter.pdf (Accessed 6 September 2009) 3.
[263] HRC, General Comment No 23, on Article 27 of the ICCPR, Para 7.
[264] Survival is a worldwide organization supporting tribal peoples. It stands for their right to decide their own future and helps them protect their lives, lands and human rights.
[265] Letter (n 258 above) 4.

under the Constitution.[266] This is particularly so as the Mursi were not consulted in establishing the Omo National Park, as well as while transferring its administration to a private undertaking.[267]

In summary, the proclamation nowhere mentions the right to FPIC of indigenous peoples. In fact, it potentially criminalises indigenous activities in areas other than wildlife reserves. Nor does it recognise the right of indigenous peoples to live in protected areas that fall within their traditional territories except in relation to wildlife reserves - defined in terms of 'indigenous local communities' which is not itself defined. Hence, the Proclamation should clearly define these phrases and enshrine the rights of indigenous peoples to FPIC in the creation of protected areas on indigenous territories, and their right to access such areas. The process of creating protected areas should also be outlined establishing to the minimum the right to consultation affirmed in the Constitution.

C) Forest development, conservation and utilization proclamation no 542/2007

This proclamation from the outset acknowledges the benefits of participation and benefit sharing with communities living in or adjacent forest areas for the sustainable utilization of forest resources(Preamble, Para 2). It further requires the participation of local communities in the designation and demarcation of protected and productive forests.[268] Moreover, whenever such designation necessitates eviction of communities, priority is accorded to the protection of communities' interests.[269] The proclamation, however, does not determine the criteria for determining community interest, who decides and how.

Participation should further persist beyond forest designation and demarcation during development, conservation and utilization plans (Article 9(3)). It also demands facilitating the continuity of habitation of local communities previously residing in forests whenever feasible without obstructing its development; if not possible, the inhabitants should be resettled in areas suitable for living (Article 9(8)). Furthermore, considering their realities, local communities may reap grasses, collect fallen woods, utilize herbs, harvest forest products, grass and fruit as well as keep beehives in State forests consistent with management plans upon permission from appropriate bodies (Articles 10(3) and (4)).

Despite the commitment of the legislation towards participation, it does not provide special protection to indigenous peoples who have particular economic and psychological relationship with their forests. Moreover, it does not require community

[266] n 265 above 3.
[267] n 265 above 7.
[268] Proclamation 542/2007, arts 2(7),(8) &8(2).
[269] Proclamation 542/2007 art 8(3)

participation/consultation/consent regarding large-scale farming, mining operations, construction of roads, irrigation, dam construction and other similar investment activities that impact on forests - it only requires government approval (Article 14(5)). It is also a crime to cut trees or remove, process or in any way use forest products (Article 20(1)). This allows no exceptions even to indigenous peoples whose lives might be totally dependent on it and who might have been doing same for centuries. Temporary/permanent settlement, grazing domestic animals or hunting are all outlawed without a written permission from the Ministry of Agriculture and Rural Development (14(3)). This is excessively burdensome to indigenous peoples and the legislation should at least have reversed the burden of proof - permit these activities unless there is a written prohibition.

In summary, the legislation does not define what participation is - a dangerously vague term without any substantive entitlement - and also does not guarantee the right to FPIC in the designation and demarcation of forest lands whenever indigenous peoples are impacted. FPIC does not exist even regarding demarcations that result in relocation. In short, indigenous peoples are mingled with all other local communities and treated exactly alike, which is inconsistent with the differential treatment they should be accorded considering their special relationship with forests and their history of subjugation and vulnerability.

D) Federal Democratic Republic of Ethiopia: Environmental Policy (2 April 1997)

This policy emphasises the need for participatory development in all phases of environmental and resource development and management, from project conception, planning and implementation to monitoring and evaluation.[270] It also aims to prevent manipulation of participation procedures to impose external decisions, and ensure genuine grassroots participation in resource and environmental management. It is gender sensitive as it requires equal participation of women. Interestingly, the policy emphasises information flow by developing both top-bottom and bottom-top data collection and dissemination tools. Concerning environmental education, the policy intends to initiate, encourage and support the involvement of local communities and religious leaders in programs to promote environmental awareness. Community Environmental Coordinating Committees serve as focal points for such purposes.

Of particular importance to indigenous peoples is the recognition and protection of customary rights of access to and use of land and natural resources in a constitutionally acceptable and socially equitable way, and as preferred by local communities. However, this policy does not

[270] Environmental Policy, pages 19&20.

employ the phrase indigenous peoples; nor does it expressly recognise and separately address their needs. Moreover, the policy does not acknowledge FPIC. It rather uses a very pervasive and vague term, 'participation' which might create problems in identifying irregularities.

4.4 Conclusion

In conclusion, the Constitution is novel in requiring consultation of communities over development activities affecting them. However, the guarantee against displacement is granted only to pastoralists who are not the only indigenous peoples in Ethiopia. The laws considered even diminish this constitutional guarantee, at times establishing a mere participation right. The Constitution should recognise the collective composition of indigenous peoples and their consultation as a group. The right to FPIC is not mentioned anywhere in the Ethiopian legal system. Furthermore, none of the statutes guarantees the right to institute court action to challenge potential violations of the right to consultation or participation. Finally, no comprehensive legislation or policy specifically addresses the rights and concerns of indigenous peoples.

Chapter Five: Conclusion and recommendations

This scholarship sets out specific conclusions and recommendations under each theme discussed above. Below is a summary of what came out and what should be done.

5.1 Conclusion

The right to FPIC serves as the ultimate voice for the voiceless in formal decision-making processes and organs. Compared to FPIC, consultation in good faith is a very constricted and easy-to-abuse guarantee. Competing values of national interest and state sovereignty are often invoked as trump cards to outshine the right to FPIC. These are insurmountable considerations but should value and be sensitive to the interest and quandary of indigenous peoples, and should be determined through open and clear processes.

The right to FPIC is not simply rhetoric or mythical without any substantive existence. It has its base in several rights entrenched in international and regional human rights instruments as unequivocally reaffirmed by the respective treaty bodies; it, therefore, constitutes an obligation on relevant State Parties. Besides, the adoption of the Declaration with almost a universal consensus and the subsequent developments suggest that the right to FPIC has evolved into a customary rule of international law. In particular, although the African Commission has not yet dealt with a case involving indigenous peoples, the *SERAC* case and some of its country reports signify that the Commission has the space to recognise the right to FPIC. This is imperative as there is virtually no legal protection in most African States. Nonetheless, the emphasis currently given to indigenous peoples by the Commission is insufficient. The stance taken by the AfDB is likely to encourage states to perpetuate the subordination and exclusion of indigenous rights. The WB policy on indigenous peoples similarly falls short of the burgeoning jurisprudence on the right to FPIC.

Although the level of recognition of indigenous peoples and their right to FPIC is currently in its naïve stages, the Ethiopian Constitution provides ample opportunities to implement their rights. Pastoralist indigenous peoples are particularly favored as the Constitution baldy outlaws their displacement. It is, however, worrying that implementing legislations have eroded the minimal constitutional protection indigenous peoples enjoy. The level of legal and policy protection is obviously inferior compared to international and regional standards. Besides, no attempt has so far been made to identify indigenous peoples in Ethiopia. Moreover, public interest litigation is not permitted regarding complaints lodged before the House of Federation and under subsequently considered laws except in the Human Rights Commission and the Ombudsman which can only grant soft recommendations.

5.2 Recommendations

The recognition of indigenous peoples and their rights is incomplete without proper implementation of the right to FPIC. The following recommendations should be given effect if the historical discrimination and exclusion is to finally be mitigated and ultimately vanish. The orders should not be considered as expressions of levels of significance for all are equally important and complementary.

1. The process and outcome dimensions of the right to FPIC should be acknowledged. Independent monitoring and review bodies should also be established to oversee FPIC processes and detect disservices by greedy state administrations and profit-driven business entities. To secure effectiveness, States should ensure the participation of indigenous peoples in formal administrative and legislative structures.

2. To strike a proper balance between national interest and the right to FPIC, exceptions may be thinly drawn to ensure that consent is not unreasonably withheld. Such exceptions should be resorted to only sparingly; for instance, when utterly necessary to preserve the ecosystem. The right to judicial appeal, with appropriate legal representation and support, should be reserved to challenge any decision to pursue the exception.

3. To pave the way for a binding African instrument on the rights of indigenous peoples, the African Commission should adopt a resolution explicitly endorsing the right to FPIC. The Working Group also should consider the level of recognition and implementation of FPIC while conducting country visits.

4. As the leading financial institution, the WB has a responsibility to ensure that states do not abrogate the rights of indigenous peoples. Hence, it should substitute the FPICon requirement with the right to FPIC. To ensure lasting impacts through the implementation of its policy on Country Systems, the WB should pressurize client States towards recognising and implementing the right to FPIC in their domestic systems. It should also require socio-economic reports on participation and other measures adopted to obtain FPIC.

5. The AfDB should acknowledge the plight its projects are causing, or might cause, to indigenous peoples and adopt a comprehensive policy which should entrench the right to FPIC.

For Ethiopia;

6. Finally, the Ethiopian government should ratify ILO 169 and adopt a new law dealing with the rights of indigenous peoples explicitly recognising their collective right to land and FPIC. It should require identification of existing indigenous peoples based on international and African standards and establish independent monitoring institutions. The Constitution should be amended to guarantee the right to FPIC regarding indigenous peoples. The process of determining public interest, the role of affected communities in such processes and the extent to which their interests weigh should be settled. Measures should also be taken to encourage the participation of indigenous peoples in formal decision making organs. To ensure that the rights of indigenous peoples are properly enforced, standing rules should be relaxed to authorize public interest litigation in human rights matters.

Finally, the realm of human rights of indigenous peoples is pervasive and the problems associated with it are far reaching. The problems identified and the solutions suggested are in no way exhaustive.

Word Count: 17 994, excluding table of contents and bibliography

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