The Principle of Free, Prior and Informed Consent (FPIC): An Appraisal of the International and Domestic Jurisprudence

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Abstract

This article seeks to appraise a number of legal and semi-legal decisions touching on indigenous communities' rights to land and resources and the development of the principle of Free, Prior and Informed Consent (FPIC). Indeed, it is imperative to examine existing case law on FPIC and assess how the courts have interpreted and applied FPIC as a concept in light of the existing cases. The right to FPIC in relation to development projects, resource extraction, and other investment projects within the territory of indigenous peoples is currently being debated within international circles. The basic principles of FPIC are to ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorization or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected. This article explores the development of FPIC within international law. It does so by examining the jurisprudence from regional bodies such as the Inter-American Human Rights System and the African Commission on Human and Peoples Rights. These provide insights into the challenges that exist for indigenous peoples in exercising their participation rights. This article finds that although a customary international legal principle that addresses indigenous peoples' full right to FPIC does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum, States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources. Finally, the discussion of the jurisprudence and the analysis of the cases, studies

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highlight that, for the affected communities, FPIC and other participation rights are not merely administrative processes, but are an exercise in and expression of the right to self-determination.

Keywords: FPIC, indigenous communities, implementation, participation, self-determination, land rights.

1. Introduction

This article seeks to explore a number of legal and semi-legal decisions touching on indigenous communities' rights to land and resources and the development of the principle of Free, Prior and Informed Consent (FPIC). Indeed, it is imperative to examine existing case law on FPIC and assess how the courts have applied and explained FPIC as a concept in light of the existing cases.

The principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.[1] Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources.

In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle.[2]

Modern entrepreneurship and new politics need to develop a culture of democratic dialogue, of full information, transparency in managing affairs and solidarity in all the initiatives proposed to all the inhabitants of their countries.[3]

This paper is divided into four parts. The first part gives an overview of the fundamental nature of the principle of Free, Prior and Informed Consent (FPIC)

1. FAO: "Free, Prior and Informed Consent: An Indigenous Peoples' Right and a good practice for local Communities" (2016), Manual For Project Practitioners. FAO.

2 *Supra* Note 27.

3 *Supra* Note No. 27.

as a principle of International law in the context of indigenous communities. The second part is an analysis of the Inter- American Human Rights System in the context of self-determination of the indigenous communities and the principle of Free, Prior and Informed Consent (FPIC). The third part looks at the African Commission on Human and Peoples' Rights and Court's practice with regard to the rights of indigenous communities in the face of development projects. In the fourth part, the paper makes some concluding remarks.

1.1 The Fundamental Nature of the Principle of Free, Prior and Informed Consent (FPIC)

This article argues that the purpose of FPIC is to give indigenous communities a platform through which they may be able to participate in the FPIC processes, and it is noteworthy to mention that the principle is fast becoming one of the most important concepts in contemporary international law concerning indigenous communities. The article holds that for appropriate assessment of FPIC, it has to be considered together with the substantive rights it is mainly concerned with. These are primarily: the right to self-determination, the right to effective participation, and rights to lands and resources. It is argued in this article that, while FPIC is a procedural right, it is also a process that serves to promote respect for vital rights for indigenous communities, essentially the right to self-determination and rights over lands and natural resources.

While FPIC is an emergent principle or standard in international law, it is becoming one of the most significant and practical tools that would help in implementing the indigenous communities' right to self-determination in natural resource extraction in their lands or near their territories, and is useful in resolving tensions between indigenous communities and other actors like oil and gas companies in complex decision-making processes that may have profound economic, social, and cultural implications.

Therefore, the fundamental nature of FPIC is respect for individual and collective rights, and for people to have a meaningful voice in deliberative decision-making processes about their own development. Indeed, the essence of an FPIC process is building shared values and goals, establishing frameworks, procedures and appropriate terminology for dialogue, discussing project implementation options and possible impacts, negotiating terms and agreements in advance, with a process for revisiting them on a regular basis.[4] Further, the

4 Buxton A, and Wilson E., " FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects' (2013), International Institute for

authors contend that the spirit of FPIC requires the balanced and conscientious consideration of company, community and government interests, and to this end, all parties need to come to the table willing to open their own minds and accommodate the interests of other parties.[5]

Anaya, observes:

> "The Declaration on the Rights of Indigenous Peoples establishes that, in general, consultations with indigenous peoples are to be carried out in 'good faith'…..in order to obtain their Free, Prior and Informed Consent"[6]

This provision of the Declaration should not be regarded as according indigenous Peoples a general "veto power" over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous Peoples.'[7]

Indeed, this article is of the view that maintaining the right to consent as the 'objective of consultation' is intended to redress the imbalance of power and/or capacity between companies and indigenous peoples or local communities by empowering communities, but not encouraging them to make decisions to further political objectives or unreasonable demands.

In order to ensure that a deliberative process works effectively, all the stakeholders would need to come to the negotiating table willing to open their minds to the views of others and see mutually acceptable solutions or agreement. Moreover, a recent BSR report on FPIC and business for example, suggests that the proper implementation of FPIC ultimately requires an application of FPIC principles that effectively balances the expectations of affected indigenous communities, civil society, governments and companies.[8]

Rather than seeing FPIC as a black and white process of achieving a 'yes' or 'no' answer, there is a need for stakeholders to view it as a platform for engagement between communities, companies, and governments to achieve a common agreement on the way forward.[9] On the platform for implementing

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Environment and Development (IIED), London.

5 *Supra*.

6 UNDRIP, United Nations Declaration on the Rights of Indigenous Peoples is an international instrument adopted by the United Nations in 2007. It enshrines the individual and collective rights of Indigenous Peoples, including the right to Free, Prior and Informed Consent (FPIC).

7 UN Report of the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People. A/HRC/12/34. United Nations HRC, New York and Geneva. (2009), Para 46.

8 BSR, Engaging with FPIC (2012) www.bsr.org

9 Buxton A, and Wilson E., FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects, (2013), International Institute for Environment and Development (IIED), London.

FPIC, the authors contend that FPIC is implemented through deliberative processes, and the process is designed flexibly and with community participation to accommodate customary practices, human rights, and the need to reach shared decisions, and that the exercise empowers stakeholders to engage constructively on an equal footing and make informed decisions.[10]

According to Cacas,[11] the principle of FPIC is vital to upholding the human rights of indigenous peoples and local communities. The principle requires that communities be informed through an appropriate and accessible language about the projects that might take place in or near their land and which might have impacts on their livelihoods. Indeed, the principle provides guarantees that they are offered the opportunity to give, withhold or negotiate land use and related issues. As has been indicated herein, "Free," refers to the general principle of law that consent is not valid if obtained through coercion or manipulation of any form. "Prior", refers to meaningful, informed consent sought sufficiently in advance of any activities by a company. "Informed", means that the process must involve consultation and participation by indigenous peoples with full disclosures of a development activity in accessible and understandable forms to affected peoples and communities.[12]

FPIC helps to protect indigenous peoples' rights to consent and self-determination, promotes equitable relationships between indigenous peoples, industries, and governments, and recognizes their rights to have control over their traditional lands.[13] Further, FPIC encompassed not only a procedure to be elaborated, but also a right associated with indigenous peoples' right to self-determination, treaties and indigenous peoples' right to lands, territories and natural resources. And procedures concerning FPIC should recognize indigenous customary law where this is relevant, and address the issue of who represents indigenous peoples. FPIC is an evolutionary process that could lead to co-management and decision-making by indigenous communities on programmes and projects affecting them. FPIC is particularly relevant for the

10 *Supra*

11 Cacas, A. "Prior, Informed Consent in the Convention on Biological Diversity – Bonn Guidelines: National Implementation in Colombia, (2004),"Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV(2): 27 – 28.

12 Tebtebba, Preliminary Working Paper on the Principle of FPIC of Indigenous Peoples in relation to development affecting their lands and natural resources that would serve as a framework for drafting of a legal commentary by the working group on the concept, (2004), E/CN.4/Sub.2/AC.4/2004/4.

13 Tebtebba, (2004).

prevention of conflict and for peace building.[14] Perrault,[15] opines that FPIC consists of giving local people a formal role and some form of veto power in the consultations and ultimate decisions about local development projects, and that it is intended to secure the rights of indigenous peoples and local communities: their rights to self-determination, to control access to their land and natural resources and to share in the benefits when these are utilized by others.

Therefore, in the absence of such informed consent on large scale projects, these rights may be compromised, and if the kind of substantive participation mandated by FPIC, the tenure security of communities is always at the mercy of decisions made by others who do not have the communities' interests at heart. Given the bargaining power that FPIC provisions assures them, communities can therefore demand direct compensation for damages or a continuing share of the profits of resource extraction. In this respect, FPIC is a tool for greater equity and a natural pathway to co-management roles for local communities in large development projects.[16]

According to Bass et al,[17] FPIC is relevant when governments make regulatory decisions, for example, allowing logging in forests traditionally occupied by indigenous peoples or displacing communities in order to carry out development projects. The authors further opine that FPIC is equally important in making decisions about bio-prospecting for genetic resources as it is for making choices about locating major energy projects, from power plants to pipelines. And Cacas,[18] contends that for communities to reap greater benefits from such development, their rights to sustainable livelihoods must be protected, and that rules enforcing these rights will not only promote "cleaner" extraction, but also empower local communities to take the risks and share the benefits of future development. The author further notes that without FPIC, these projects may further the economic marginalization of peoples and communities that are already poor and vulnerable.

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14 Tebtebba, (2004).

15 Perrault, A. "Facilitating Prior Informed Consent in the context of Genetic Resources and Traditional Knowledge." (2004), Sustainable Development Law and Policy, Special Issue, pp 21 – 26.

16 Permanent Forum on Indigenous Issues: Report of the International Workshop on Methodologies Regarding FPIC and Indigenous Peoples. (2005), New York: United Nations Permanent Forum on Indigenous Issues.

17 Bass et al, Prior, informed Consent and Mining: Promoting the Sustainable Development of Local Communities. (2003), Washing DC: Environmental Law Institute.

18 *Supra.*

Requiring FPIC could allow communities to negotiate fair, equitable, and enforceable terms of revenue and other benefit sharing.[19] The inclusion of FPIC as a legal condition for financing, investment, or regulatory decisions could become a critical means to make poverty alleviation programmes more sustainable.[20]

Indeed, a study of the Expert Mechanism under the United Nations General Assembly,[21] on the rights of indigenous peoples, indicates that FPIC has three major rationales as provided for in the Declaration. The first rationale is that it seeks to restore indigenous peoples control over their lands and resources, as specified in article 28.[22] Second, the potential for FPIC to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Third, FPIC has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties as reflected in articles 18 and 19 of the Declaration.

With regard to the nature of FPIC as a human rights norm, the study,[23] observes that, the Declaration recognizes collective rights and protects collective identities, assets and cultural resources. Further, FPIC operates fundamentally as a safeguard for the collective rights of indigenous peoples.[24]

The study further acknowledges the fact that FPIC is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. This constitutes, as has been described in the previous paragraphs in this section, three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources.[25]

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19 Goodland, R., "Free, Prior and Informed Consent and the World Bank Group, (2004)." Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV (2): 66 – 74.

20 Kamijyo, M,, "The Equator Principles: Improved Social Responsibility in the Private Finance Sector,"(2004), Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV (2): 35 – 39.

21 UNGA –A/HRC/39/62 – Disttr:General 10 August 2018, Human Rights Council thirty-ninth Session on promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Human rights bodies and mechanisms. Free, Prior and Informed Consent: A Human Rights-based Approach.

22 *Supra* Note 21.

23 *Supra* Note 21.

24 *Supra*.

25 *Supra*.

In September 2014, the United Nations General Assembly of the World Conference on the Rights of Indigenous Peoples passed a resolution at Paragraph 3[26] thus:

> "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, 2 and our commitments made in this respect to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, in accordance with the applicable principles of the Declaration."

The article will mainly concentrate on the Inter-American Human Rights System of the Organization of American States (OAS). This is informed by the fact that it has provided the most progressive jurisprudential developments over the last decade. It is significant to mention at the onset that, even though other regional bodies have also made contribution towards the development of indigenous communities' rights, there are no particular judgments or decisions on land and participatory rights which have been issued, apart from the decision of the African Commission on Human and Peoples' Rights in the Endorois case.[27] And in as far as the European system is concerned, Koivurova,[28] observes that no landmark case on indigenous peoples land and participation rights has been delivered as of yet, even though the court has jurisdiction over a number of states with indigenous populations. Yet, the human rights bodies of the OAS have delivered quite a number of judgments and decisions that seek to foster a broad and comprehensive system of indigenous land and participation rights. Most significantly, FPIC is clarified and applied extensively within the Inter-American System.

2. The Inter-American Human Rights System: An Analysis in the Context of Self-Determination and FPIC

As has been stated in the preceding section, the most significant legal clarification of self-determination, land rights, and participation norms is found in the framework of the human rights bodies of the OAS. In the last fifteen years or

26 UN Doc.A/RES/69/2.

27 *African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Keny*a, Comm No. 276/2003, 2010.

28 Koivurova T, (2011), "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects," 18 International Journal on Minority and Group Rights 1.

so, both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have made interconnected determinations that have made clear a number of questions and issues concerning indigenous land and participation rights, and which seek to foster a structural framework for the implementation of indigenous self-determination. The said two bodies have established the most comprehensive system of land and resource rights for indigenous communities and as will be seen, effective participation and FPIC perform a fundamental role in the system.

This section will concentrate on the most pertinent of these decisions and determinations, leading up to the most important case with regard to FPIC, the *Saramaka* case.[29] It will be analyzed in more detail since: it is one of the more recent cases on indigenous land rights; it is the first case in which FPIC is clearly dealt with and it is the effect to a more detailed clarification of rights to consultation and consent; it reveals a number of issues needed to be resolved so as to successfully implement FPIC processes and finally, the case is referred to by other regional and international human rights bodies repeatedly.

2.1 Self-determination, Land Rights and Participation in the Inter-American System and Court Practice

2.1.1 Awas Tingni Community v. Nicaragua

This was the first landmark case which dealt specifically with the State's power over natural resources.[30] The government of Nicaragua granted a concession for a large-scale logging of timber and the construction of roads for transportation on indigenous lands to a Korean company. The Awas Tingni, therefore, complained that the land was erroneously considered to be state-owned, yet it was their ancestral land. According to Alvarado,[31] the concession was granted without regard to their previous efforts to obtain legal recognition of the lands, and contrary to domestic legal provisions designed to protect the rights of indigenous communities.

29 *Saramaka People v. Suriname (2007), Inter-American Court of Human Rights* (Ser. No, 172).

30 Barrera-Hernandez, Lila (2006), "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation" 12 Annual Survey of International and Comparative Law 43 at 44.

31 Alvarado Leonardo J, (2007), "Prospects and Challenges in the Implementation of Indigenous peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua" 24 Arizona Journal of International and Comparative Law 609 at 610 – 611.

When the case was brought before the Inter-American Commission, the Commission found that the state had violated the indigenous community's property rights, in conjunction with other human rights, by refusing to grant them legal recognition of their land and by granting the concession for logging. Further, the Commission asserted that Nicaragua had violated the right to judicial protection as enshrined in Article 25 of the Convention.[32] In the report, the Commission concluded that:

> "The State of Nicaragua is actively responsible for violations of the right to property, embodied in article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community".[33]

The Commission was of the view that, not only consultation with the indigenous community is required, but it demands that the state obtain their consent prior to undertaking or permitting any projects aimed at the exploitation of natural resources on indigenous lands, and that it does not proceed without such consent. As a result the Commission decided to file a complaint against Nicaragua before the Inter-American Court of Human Rights. The Court was convinced by the submissions of the Awas Tingni community and the Commission and decided that Nicaragua had violated the law of land ownership, as well as the right to judicial protection.

In its judgment of August 2001, the Inter-American Court held that the international human right to hold property includes the right of indigenous peoples to the protection of their customary land and resource tenure.[34] What commentators have distinguished as "the most significant and far-reaching part of the decision"[35] is the interpretation the Court has given to article 21 of the American Declaration on Human Rights. Indeed, the court understands this provision as going beyond individual right of ownership and encompassing communal property of indigenous peoples in accordance with their customary land tenure. According to Page,[36] the Court in its final ruling of 31 August

32 Inter-American Commission Report No. 27/98 of 3 March 1998.

33 *Ibid*.

34 Anaya, S. J and Grossman C., (2002), "*The Case of Awas Tingni v. Nicaragua:* A New Step in the International Law of Indigenous Peoples,' *Arizona Journal of International and Comparative Law* 19, Page 1.

35 *Ibid*.

36 Page A, (2004), Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System", Sustainable Development, Law and Policy 16, page 16.

2001, reaffirmed that indigenous peoples have rights to their traditionally used and occupied territories, and that these rights arise autonomously under international law.

The rights articulated in international human rights instruments, the Court stresses, have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.[37] Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.[38] Anaya,[39] observes that the Court is not confined in its decision to the scope that is given to the right to property in a domestic context. Instead, it looked into recent developments in international law with respect to the rights of indigenous peoples to property in land, including the jurisprudence of the European Court of Human Rights with regard to the protection of indigenous communal property in the European Convention on Human Rights, and the approaches of other international institutions.

The Court further recognizes that for indigenous communities, relations to the land are not merely a question of possession and production, but a material and spiritual element which they must fully enjoy, as well as a means to preserve their cultural heritage and pass it on to future generations."[40]

Anaya,[41] opines that a further remarkable part of the decision is the separate opinion of *Judge Garcia Ramirez,* in which he makes reference to ILO Convention 169, even though Nicaragua was not a party to the Convention. The author observes that this demonstrates a willingness to take such international instruments into account, independently of the individual states' ratification, as sources of customary international law.[42] The Judge also makes reference to the UN and OAS Draft Declarations, thus demonstrating a willingness to

37 Linde Eva, (2009), Consultation or Consent? Indigenous People's Participatory Rights with regard to the Exploration of Natural Resources according to the UN Declaration on the Rights of Indigenous Peoples, Thesis for LLM, University of Toronto. Page 23

38 *Ibid*.

39 Anaya, S, James, (2005), "Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend" 16 *Colorado Journal of International Environmental Law and Policy* 237.

40 Inter-American Court of Human Rights, Case of Awas Tingni, Ibid at para. 149.

41 Anaya, James S. (2004), *Indigenous Peoples in International Law*, 2nd Ed. (New York: Oxford University Press) at Page 143.

42 *Ibid*.

take those drafts into account as evidence of existing or emerging customary international law.[43]

Page,[44] presents that although FPIC was not yet explicitly used in this case, the Court held that the community's right to its own property prevents the national government from unilaterally exploiting community natural resources. The author further argues that in the Awas Tingni judgment, the importance of the notions of self-determination and collective rights for indigenous peoples is implicit and that the court developed the criterion that the form of the participatory process as possibly entailing consent requirements should be determined by considering and respecting the indigenous practices and customs.[45]

2.1.2. Mary and Carrie Dann v. United States

The complaint was about the introduction of a permit system by the United States Government for grazing cattle on lands which largely belonged to traditional Western Shoshone territory. The Dann sisters refused to comply with the permit requirement and were thus faced with forcible removal and substantive fines.[46] According to Anaya,[47] the US government claimed that the Western Shoshone title to the land had been extinguished through administrative and judicial decisions and the territory now constituted public property.

The Commission's position in this case was that articles XVIII and XXIII of the American Declaration of the Rights and Duties of man were violated, and concluded that:

> In addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Anaya S, James (2005), "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources". 22 *Arizona Journal of International and Comparative Law* 7 at 14-15.

encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands.[48]

It was the Commission's statement that the provisions of the American Declaration should be interpreted and applied with due regard to those human rights principles particular to indigenous peoples' protection.[49]

As concerns the right to property, the Commission decided that the US processes in adjudicating Western Shoshone land rights were not sufficient "to comply with contemporary international human right norms, principles and standards that govern the determination of indigenous property interests."[50] Commenting on the decision of the Commission, Anaya[51] observes that the participatory standard used by the US government was found to be inadequate, and the Commission thus upheld the communal property regime that arises autonomously under international law as developed in the *Awas Tingni* case by the Court, and extended it to the applicable provision of the American Declaration on the Rights and Duties of man.

Most significantly, the Commission framed the core criterion for participation with regard to land rights for indigenous Peoples as thus:

The Commission first considers that articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collective.[52]

Indeed, the Commission in this case, argued that FPIC is an essential criterion for the realization and protection of indigenous land rights. Further, the communal land right doctrine developed by the Court in the *Awas Tingni* case was reaffirmed and broadened in this case, and underscored its dependence

48 IACHR, *Mary and Carrie Dan v. United States,* Case 11.140, Report No. 75/02, Inter-Am. C.H.R., (2001), 27 December 2002, paragraph 124.

49 *Ibid*.

50 *Ibid*.

51 Anaya S J, (2005), "Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend", Colorado Journal of International Environmental Law and Policy 16, page 253.

52 *Ibid*.

on developments and trends within international law in relation to indigenous communities. According to Anaya,[53] the decision is a significant step towards a system of protection of indigenous rights, in which 'the Commission signaled the development of a *sui generis* regime of international norms and jurisprudence concerning indigenous Peoples'.

2.1.3 Maya Indigenous Communities of Toledo District v. Belize

This case concerns the concession for logging and oil extraction granted to companies on Maya traditional land.[54] The Conflict came up when the Belizean government granted the said logging and oil concessions on Maya lands without obtaining the consent of the Maya communities, and according to Page,[55]Belizean law considered these lands under the discretionary authority of government, and the actions taken by the State threatened to inflict severe harm on more than three dozen Maya villages in Southern Belize. The Commission took immediate action in this case and accepted a request for precautionary measures by the indigenous community, calling upon Belize to suspend all permits, licenses, and concessions until it has investigated the substantive claims raised in the case.[56] The Commission, while relying in its decision in the *Awas Tingni Community* case, reaffirmed the statement that American declaration should be interpreted and applied in the context of developments in the field of international human rights law.[57] The Commission states that property rights protected under the Inter-American system are not limited to those property interests that are already recognized under domestic law, but rather the right to property has an autonomous meaning in international human rights law.[58] The Commission further lays out its view on the states' obligation to undergo a process of consultation with regard to logging and oil extraction:

> "The Commission also observes in this connection that one of the central elements to the protection of indigenous property rights is the requirement that states

53 Anaya, James S, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press 2004) at 143.

54 Inter-American Court of Human Rights, Case of *Maya Indigenous Communities of the Toledo District v. Belize*, Case No. 12.053, Report No. 40/04, OEA/ Ser. L/V/II.122 doc rev 1, available at: www.cidh.oas.org /annualrep/2004eng/Belize.12053eng.htm.

55 *Ibid*

56 Anaya, S. et al (2001), "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" 14 *Harvard Human Rights Journal* 33 at 33.

57 *Ibid* at 914, paragraph 86.

58 *Ibid*.

> undertake effective and fully informed consultation with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, articles XVIII and XXIII of the American Declaration specially oblige a member State to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories."[59]

Indeed, at paragraph 143, the Commission stated that there is no evidence that the State conducted effective consultations with the Maya community prior to granting of the logging licenses. The Commission, therefore, concluded that the Maya people of Southern Belize have a communal property right over their lands,[60] and further that by granting oil and logging concessions to third parties, the State of Belize violated this right, as enshrined in article XXIII of the American Declaration by:

> "Failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists."[61]

It is imperative to mention the significance of this case in this study due to the Commission's justification and clarification of FPIC as an essential requirement for altering land rights, and the grounding of this system in the principle of self-determination.

2.1.4 Saramaka People v. Suriname

This case was about a complaint lodged by the Saramaka people against the Surinamese government to the Commission. The Surinamese government had issued a number of concessions for timber extraction to amongst others

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

Chinese logging companies in the mid-1990s, without Saramakas' consent as they were neither consulted nor informed about the said concessions as well as the activities. Indeed, it was their case that they only found out about the concessions when they found loggers already employed on their lands.

The Saramaka people then filed their petition to the Commission after having exhausted the local remedies which actually failed. The Commission then referred the case to the Court in 2006.[62] Their allegation was that the Surinamese government had failed to recognize their land rights, which resulted in violations of article 21 (the right to property) and article 25 (the right to judicial protection) of the American Convention on Human Rights, in particular regarding development projects and investment activities in the area inhabited by the Saramaka.

While the Saramakas could not be seen as "indigenous" or "first inhabitants," the Court asserted that they are subject to the same protection, since they make up a tribal community:[63]

> Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs and/or traditions.

According to Mackay,[64] the reasoning of the Court in this case has wider implications, since it affirms that tribal communities in the OAS region are indeed subject to the same protection as "real" indigenous peoples.

The Court[65] in its decision stated that the right to property is also applicable to tribal peoples, who, like indigenous peoples, deserve special protection under international law, since both groups share distinct characteristics, amongst others regarding the special relation these peoples have with their lands, which requires special measures under international human rights law. Most importantly, the Court stated that the right to self-determination was applicable to indigenous and tribal peoples.[66] Further, that although Suriname had not ratified ILO 169,

62 OAS, Inter–American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of 12 Saramaka Clans, (Case 12.338) against the Republic of Suriname, 23 June 2006.

63 IACtHR., *Saramaka People v. Suriname*, Judgment of 28 November 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 84.

64 Mackay, F (2010), *Saramaka, de Strijd om het Bos* (KIT Publishers), p 27.

65 *Ibid*.

66 *Ibid*.

it was party to a number of other international instruments protecting human rights.[67]

With regard to natural resources, the Court held that members of indigenous and tribal communities have the right to own the natural resources they have traditionally used within their territory since: "without them, the very survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people."[68] Further, the Court explained:

> From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[69]

It was the Court's clarification in relation to gold mining concessions, that although these may not be qualified as 'traditionally used resources' the extraction of those will unquestionably affect other natural resources, which are necessary for the survival of the Saramaka People. Furthermore, the Court emphasized the importance of having collective juridical capacity as a precondition for effective participation and the exercise of the collective right to property and expands its reasoning and applicable remedies in relation to the property rights of indigenous communities[70].

According to the Court,[71] the State must ensure the effective participation of the members of the Saramaka People, in conformity with their customs and traditions, regarding any development or investment plan, that the State must guarantee a reasonable benefit for the Saramaka people from any such plan within their territory, and the State must ensure that no concession is issued until and unless independent environmental and social impact assessment.[72]

With regard to FPIC, the Court stated that in ensuring effective participation of the Saramaka people, the State has a duty to actively consult with the community in a way that corresponds with their customs and traditions. Effective participation thus includes requirements of consultation and consent. It requires the State to accept and disseminate information, and entails

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 Rombouts, S.J.,(2014) at page 261

71 *Ibid.*

72 *Ibid.*

constant communication between the parties in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement.[73] Rombouts,[74] contends that the element of 'prior' is elaborated upon by the court as well whereas the Court noticed that the Saramakas must be consulted at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. Indeed, the Court observed that early notice offers time for internal discussion within communities and the opportunity to provide feedback to the State, which has a duty to ensure that members of the Saramaka are aware of the possible risks involved.[75]

It was the Court's observation that the Saramaka people have a right to enjoy and use their natural resources, and that the logging concessions were found to interfere with the traditional economic activities of the community and therefore threatened the resources necessary for the Saramaka's survival as a people.

Indeed, this case proffers the most far-reaching account of the extent of FPIC so far. The Court explained that obtaining FPIC is mandatory when development projects have a major impact on indigenous communities.

2.1.5 Sarayaku v. Ecuador

In this case, [76] and especially in the 1990s, Petroecuador (the State-owned oil company) signed a prospecting deal with Argentine and US companies for oil exploration, and much of the lands in the deal are traditional lands of the Kichwa community. While protests and domestic legal action had already brought oil exploration to a halt until 2010, there had already been an 'exploration phase' during which a lot of damage had been done to the community's territories. The oil company had already felled a large number of trees, destroyed a sacred site, and polluted several water sources. Moreover, 467 holes had been drilled in the area in which 1,433 kg of high-impact explosives were packed. After the temporary stop of the prospecting project, the vast majority of the explosives remained in Sarayaku territory. Furthermore, the seismic prospecting activities went hand in hand with a militarization of the Sarayaku area.

73 *Ibid*.

74 Rombouts, page 264

75 *Ibid*.

76 IACtHR, Case of *Kichwa Indigenous People of Saryaku v. Ecuador. Merits and reparations*. Judgment of 27 June 2012. Series C No. 245.

In 2003 the Sarayaku community took the case to the Inter-American Commission on Human Rights, who then presented the case to the Inter-American Court in 2006 after the Commission's 2004 precautionary measures requiring the operations to be suspended were ignored by the state.[77]

The Court decided that Ecuador had violated the Kichwa community's right to prior consultation, communal property and cultural identity when the seismic prospecting project was approved. Moreover, the activities threatened the community's members rights to life and personal integrity and Ecuador had violated the community's right to judicial protection.[78]

On the right to consultation, the Court relied on *Saramaka People v. Suriname* in explaining what the duty to consultation entailed. It confirmed the safeguard –criteria from Saramaka – effective participation, prior social and environmental impact assessments, and reasonable benefit sharing – and emphasized that consultation must be carried out in good faith in order to achieve agreement or consent between parties. Consultation of indigenous communities must be conducted in the first planning stages of development projects which will affect their lands and resources.[79]

The Court stated the requirements for effective participation by indigenous peoples in development or investment projects as thus:

The State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this

77 Earthrights International, http://www.earthrights.org/blog/hard-earned-victory-indigenous-rights-latin *america-sarayaku v ecuador.* See also: Order of the Inter-American Court of Human Rights of 4 February 2010, Provisional Measures, Regarding the Republic of Ecuador Matter of the Kichwa Indigenous People of Sarayaku.

78 *Ibid*.

79 *Ibid*.

obligation, or engaging in consultations without having regard to their essential characteristics, compromises the State's international responsibility.[80]

The Court established that the oil company limited itself to offering money and other benefits to the Sarayaku community, in order to obtain its consent, without establishing and implementing a systematic and flexible process of participation and dialogue with them.[81] The Court further noted that the State had contributed to a climate of 'conflict, division and confrontation' between the indigenous communities and discouraged a climate of respect among them. That, by inappropriately delegating its obligation to consultation to a private company, the State had failed to comply with the principle of good faith and its obligation to guarantee the Sarayaku's right to participation. The Court, therefore, concluded that no genuine dialogue as part of the participation process aimed at reaching an agreement was established.[82]

Finally, Barrera-Hernandez,[83] remarks that it has to be noted that not all of the decisions of the Commission are made public, in fact only a small fraction thereof. Therefore, it is possible that many more cases with regard to natural resources have been decided. Linde,[84] opines that the cases described above are sufficient to give an insight into the direction the jurisprudence and recommendations of the Inter-American organs are taking. The author further observes that the said cases paint a vivid picture of the emergence of a new body of international law on indigenous rights.[85] The author contends that instruments such as the ILO Convention No. 169 constitute the body of this new *sui generis* system, which is built upon by modern developments laid down in the UN Declaration and the American Draft Declaration on Indigenous Peoples.[86] We see the Commission and the Inter-American Court departing from restrictive domestic or national laws and give due recognition to the autonomous and flexible meaning of international human rights norms.

80 *Ibid*.

81 *Ibid*.

82 *Ibid*.

83 Barerra-Hernandez, Lila (2006) "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation", 12 *Annual Survey of International and Comparative Law.*

84 *Ibid*.

85 *Ibid*.

86 *Supra*.

2.2 The African Commission on Human and Peoples' Rights and Court Practice

2.2.1 Endorois v. Kenya[87]

The Centre for Minority Rights Development and Minority Rights Group International lodged a complaint before the African Commission on Human Rights on behalf of the Endorois Welfare Council. The Endorois community traditionally inhabited the Lake Bogoria area in the Rift Valley Province of Kenya. The community had practised pastoralism from time immemorial. The Problem arose when the Kenyan government in 1973 gazetted Lake Bogoria area as a game reserve leading to the eviction and relocation of the community. The community's complaint was that they were never consulted prior to declaring the region as a protected area. They were displaced to semi-arid land, which proved to be inadequate for sustaining their livestock. More importantly their access to Lake Bogoria, which is important for religious and cultural purposes, was denied and attempts to access the area were met with harassment and intimidation. Furthermore, there was no proper compensation given to the community for the loss of their traditional territory.

The complainants alleged that the displacement of the Endorois community from their ancestral lands entailed a violation of their rights, as provided for in the African Charter. The accusations comprised the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral way of life and violations of the right to practice their religion and culture, as well as the disruption of the overall process of development of the Endorois people. The complainants complained that the government of Kenya had violated the Endorois community's religious freedom,[88] its right to property,[89]cultural rights,[90] the right to natural resources,[91] and the right to development.[92]

87 African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,* Comm No. 276/2003, 2010.

88 African Charter, article 8.

89 African Charter, article 14.

90 African Charter, article 17(2) & (3).

91 African Charter, article 21.

92 African Charter, article 22.

With regard to FPIC, the Commission held thus: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property."[93]

The Commission proceeded by describing the Saramaka safeguards – effective participation, benefit sharing and ESIA's – and confirmed that these are necessary to guarantee that restrictions on indigenous property rights do not lead to a denial of their survival. Based on these criteria, the Commission concluded, that:

> In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environmental and social impact assessment was not carried out. The absence of these three elements of the "test" is tantamount to a violation of article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.[94]

It was the Commission's assertion that the issue of participation is closely allied with the right to development and proceeded to analyze if the norms regarding effective participation and FPIC were upheld. Therefore, the Commission relied on the *Saramaka* case and states that there is a duty to consult with respect to development or investment plans in indigenous territories. Further, the Commission stated that the consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.[95] While applying the FPIC criteria in the *Endorois* case, the Commission stated that:

> In the instant communication, even though the respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The respondent State did not impress upon the Endorois any understanding that they would be

93 African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,* Comm no. 276/2003, 2010, paragraph 226.

94 *Ibid*.

95 *Ibid*.

> denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.[96]

The Commission tested the different elements of FPIC and concludes that they have not been respected in the present case. Subsequently, it quite literally adopted the important viewpoint from *Saramaka* that:

> Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[97]

The Commission agreed with the complainants that the State did not ensure that the Endorois were accurately informed of the nature and the consequences of the process, which is a minimum requirement from the *Dann Sisters* case.[98] Further, the Commission observed that the case for FPIC was also supported with arguments from the UN Special Rapporteur, who stated that free, prior, and informed consent is essential for the protection of human rights of indigenous peoples in relation to major development projects.[99] Indeed, the Commission argued that the Committee on the Elimination of Racial Discrimination had recommended that both the equitable sharing of benefits and the securing of prior informed consent were essential when such projects are planned on indigenous territories.[100]

The Commission concluded that:

> "The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1975, meet the president to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved

96 *Ibid.*
97 *Ibid.*
98 *Ibid.*
99 *Ibid.*
100 *Ibid.*

> the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained."[101]

The Commission's analysis of the participatory requirements reveals the problems with FPIC and emphasized why it is so important that consent or consultations are conducted in a manner that can be qualified as "free, prior and informed". Gilbert,[102] in his article, observes that the Endorois had highlighted in their complaint that illegitimate consultations had taken place and that the authorities had selected individuals to 'lend their consent' on behalf of the Endorois.

Finally, the Commission concluded that the right to development was also violated and thus stated in its recommendations that Kenya had to recognize rights of ownership to the Endorois and restitute Endorois ancestral lands, ensure unrestricted access to Lake Bogoria, and pay adequate compensation to the community for the loss suffered. Also, the State had to engage in a dialogue with the community to implement the Commission's recommendations.

This is indeed an important decision for a number of reasons,[103] namely: it is the leading example of the aforementioned "judicial dialogue" because the Commission relied on the jurisprudence of the IACtHR. In doing so it recognized that the Court's system is part of international human rights law. This way the decision not only affirms that the Inter-American system is applicable to a wider context which is in line with the universalistic approach of the OAS human rights entities – but also enforces the persuasive power of the Court's reasoning. Additionally, the decision is also of importance to the OAS area, since it affirms that the system is applicable in different contexts, and therefore may diminish reluctance on the part of OAS member states to implement the Court's orders with regard to indigenous and tribal property rights and FPIC.[104]

The Commission's analysis of the FPIC and effective participation requirements in *Endorois* highlighted the importance of "free, prior and informed consent" consultation and consent processes and is an important step in the legal development of FPIC. Indeed, the Commission's view is in line with those of Gilbert,[105] who argues that, the adoption of the right to FPIC by

101 *Ibid*.

102 Gilbert, J, (2011), 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', *International and Comparative Law* Quaterly, Vol. 60, p. 265.

103 Rombouts, S. J,. (2014) p 309.

104 *Ibid*.

105 *Ibid*.

the Commission is important since it is an area of the law where there is little legal adjudication.

Rombouts,[106] has emphasized that the importance of effective participation and FPIC in relation to self-determined development and control over land and resources is firmly acknowledged in the Commission's decision.

2.2.2 Ogiek Decision

The Ogiek are a hunter-gatherer community who inhabit the Mau Forest Complex in the Rift Valley of Kenya. Like the Endorois, their population is considerably small, as they number between 35,000 and 45,000. They have lived in the Mau Forest for hundreds of years and they consider it their ancestral land. As forest dwellers, they depend on it for food, shelter, livelihood and identity. However, their stay in the Mau Forest has always been interrupted by routine forced evictions by the government. These evictions span several decades. At each instance, the Ogiek have resisted and objected to the evictions, including by seeking the intervention of the courts and engaging in advocacy with relevant government authorities. Things escalated in October 2009 when the government issued an eviction notice requiring the Ogiek to vacate the forest within 30 days. The government based the eviction notice on the ground that the Mau Forest was not only a reserved water catchment zone but it was also a designated government land.

Faced with imminent expulsion from their ancestral land, the Ogiek filed a case before the ACHPR in November 2009, challenging the notice, which they argued was a perpetuation of the historical injustices they had long suffered. Invoking its procedure for provisional measures, the ACHPR promptly asked the Kenyan government to suspend the evictions pending the determination of the case. Although the Kenyan government did not follow through with its notice to evict the Ogiek, it did not formally respond to the request for provisional measures. As the situation of the Ogiek was still precarious, the ACHPR decided in July 2012 to refer the case to the ACtHPR, arguing that it revealed serious and massive human rights violations. The case alleged violations of seven rights under the African Charter: the right to property, freedom from discrimination, right to life, freedom of religion, right to culture, right to freely dispose of wealth and natural resources, and the right to development. The Ogiek's prayers in the case included that the Kenyan government recognize

106 *Ibid.*

Ogiek's ownership of their ancestral land and to pay compensation for the loss they had endured for decades.

As a first step, the ACtHPR issued an order for provisional measures similar to the one that the ACHPR had issued in 2009. An eight-year long legal process then ensued. The ACtHPR issued its judgment on 26 May 2017. It found that the Kenyan government had violated all the rights claimed by the Ogiek, except the right to life. The ACtHPR ordered the Kenyan government to take "appropriate measures" within a reasonable time to remedy the violations of the Ogiek's rights and to inform the Court of those measures within six months. Like the *Endorois Decision*, the *Ogiek Decision* was received with much joy and celebration. It is the first decision of the ACtHPR to consider the rights of indigenous peoples. It reasserted the collective rights of indigenous peoples and reaffirmed the obligation of states to promote and protect these rights. On the day it was issued, it made headlines both locally and internationally. The *Ogiek Decision* has also attracted a significant amount of academic interest and there is now a burgeoning scholarly literature on the case.

2.3 The Indian Practice

The Supreme Court of India in its landmark decision in 2013,[107] reinforced the rights of indigenous communities. Indeed, the Court in that case mentioned two key international instruments available for the protection of indigenous communities' rights which are International Labour Organization (ILO 169) and the United Nations Declaration for the Rights of Indigenous People (UNDRIP) (2007) to signify the significance of indigenous peoples rights in development projects. The Court clearly stated that, the State has got a duty to recognize and duly support the indigenous people's identity, culture and interest so that they can effectively participate in achieving sustainable development.[108] In his analysis of the decision, Chartuvedi,[109] opines that like the earlier cases, there is a set goal of development, sustainable or otherwise, and the court suggests that indigenous people have the right to participate in reaching the pre-decided goal.

107 *Orissa Mining Corporation Ltd v. Ministry of Environment and Forests,* (2013) 6 SCC 476.

108 *Ibid*.

109 Chartuvedi I, "A Critical Study of Free, Prior and Informed Consent in the Context of the Right to development – can "consent" be withheld? Journal of Indian Law and Society, Vol. 5: Winter.

3. Conclusion

It is the general conclusion of this article that, although a customary international legal principle that addresses indigenous peoples' full right to FPIC does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources.

The aforementioned cases in the article provide sufficient insights with regard to the jurisprudence and the recommendations made by the Inter-American organs as well as the African Commission pointing to the emergence of a new body of international law on indigenous rights.

Further, from the decisions, while FPIC is an emergent principle or standard in international law, it is becoming one of the most significant and practical tools that would help in implementing the indigenous communities' right to self-determination in natural resource extraction in their lands or near their territories, and is useful in resolving tensions between indigenous communities and other actors like oil and gas companies in complex decision-making processes that may have profound economic, social, and cultural implications. These cases highlight the need for clear domestic legislation modeled after international norms to implement appropriate and meaningful consultations and give adequate protection to indigenous peoples. The cases also demonstrate the need to further develop the standards being applied by the Inter-American system with regard to the three safeguards as developed in the *Saramaka People v Suriname* case. Specifically, there is a need to clarify the distinction between small- and large-scale development projects and their potential to impact the survival of a people. Furthermore, the Inter-American system needs to substantively define what it means by survival.

Finally, the framework of FPIC should be accorded legal recognition in national legislation and enforced through courts, and the interpretation of the principle of FPIC should be entrenched in international human rights instruments, Conventions and the Declarations on the Rights of Indigenous Peoples which provides a comprehensive set of indigenous peoples' rights.