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Indigenous Peoples –  
A Hinder to Development?  
*The Right to Prior Consultation in  
Colombia and Peru*

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>SAMMANFATTNING</b>	<b>2</b>
<b>RESUMEN</b>	<b>3</b>
<b>PREFACE</b>	<b>4</b>
<b>ABBREVIATIONS</b>	<b>5</b>
<b>1 INTRODUCTION</b>	<b>8</b>
1.1 Introduction to the subject	8
1.1.1 <i>Understanding Indigenous Peoples</i>	8
1.1.2 <i>Historical and political background</i>	9
1.1.3 <i>Introduction to the conflict of interests</i>	11
1.2 Research question and delimitation	13
1.2.1 <i>Research question</i>	13
1.2.2 <i>Delimitation</i>	14
1.3 Material, method and structure	14
1.3.1 <i>Material</i>	14
1.3.2 <i>Method</i>	15
1.3.3 <i>Structure</i>	15
<b>2 WHO ARE INDIGENOUS PEOPLES?</b>	<b>17</b>
2.1 General introduction to the need for a definition	17
2.2 Indigenous peoples within the UN	20
2.2.1 <i>The ILO Conventions</i>	20
2.2.2 <i>The UN Indigenous Declaration</i>	23
2.3 The use of Indigenous peoples as a concept within the OAS	24
2.4 The term Indigenous Peoples in Colombia and Peru	26
2.4.1 <i>Colombia</i>	26
2.4.2 <i>Peru</i>	27
2.5 Conclusions	29
<b>3 INDIGENOUS PEOPLES' RIGHT TO LAND</b>	<b>30</b>
3.1 The relationship between Indigenous Peoples and their land	30
3.2 International standards	34

3.2.1	<i>Introduction</i>	34
3.2.2	<i>The ICCPR and the ILO Conventions</i>	35
3.2.3	<i>UN declarations</i>	39
3.3	Regional praxeses	44
3.3.1	<i>The American Declaration and the American Convention on Human Rights</i>	44
3.3.2	<i>The American Draft Declaration</i>	45
3.3.3	<i>The jurisprudence of the Inter-American Court of Human Rights</i>	47
3.4	National initiatives	51
3.4.1	<i>Colombia</i>	51
3.4.2	<i>Peru</i>	54
3.4.3	<i>Conclusions: comparing the protection of the right to land in Colombia and Peru</i>	56
<b>4</b>	<b>THE RIGHT TO PRIOR CONSULTATION</b>	<b>58</b>
4.1	Introduction	58
4.2	International instruments	59
4.2.1	<i>General provisions on the right to consultation</i>	59
4.2.1.1	Provisions in universal UN instruments	59
4.2.1.2	Provisions in the ILO Conventions	61
4.2.1.3	Provisions in the UN Indigenous Declaration	64
4.2.2	<i>Provisions regarding the right to land and prior consultation</i>	67
4.3	Inter-American instruments and the jurisprudence of the IACtHR	69
4.3.1	<i>Inter-American Human Rights and Indigenous Rights instruments</i>	69
4.3.2	<i>The jurisprudence of the IACtHR and the IACHR</i>	71
4.4	Can Free, Prior and Informed Consent in certain cases be a prerequisite for the adoption of measures?	75
4.4.1	<i>What are the consequences of an Indigenous refusal to agree or consent?</i>	75
4.4.2	<i>Current development of the issue</i>	75
<b>5</b>	<b>THE IMPLEMENTATION OF THE RIGHT TO PRIOR CONSULTATION IN PERU AND COLOMBIA</b>	<b>80</b>
5.1	Introduction	80
5.2	Colombia	82
5.2.1	<i>Introduction</i>	82
5.2.2	<i>The Colombian legislation on prior consultation</i>	84
5.2.3	<i>The jurisprudence of the Colombian domestic courts</i>	87
5.2.4	<i>Conclusions</i>	89
5.3	Peru	91

5.3.1	<i>Introduction</i>	91
5.3.2	<i>The jurisprudence of the Peruvian domestic courts</i>	92
5.3.3	<i>The views of the former government of García Pérez</i>	95
5.3.4	<i>The Peruvian legislation on prior consultation</i>	97
5.3.5	<i>Conclusions</i>	99
<b>6</b>	<b>CONCLUSIONS</b>	<b>102</b>
6.1	General conclusions and recommendations	102
6.2	Conclusions on Colombia	104
6.3	Conclusions on Peru	105
6.4	Final words	106
	<b>SUPPLEMENT: PERUVIAN LAW ON PRIOR CONSULTATION WITH INDIGENOUS PEOPLES</b>	<b>108</b>
	<b>BIBLIOGRAPHY</b>	<b>115</b>
	<b>INSTRUMENTS</b>	<b>120</b>
	<b>LEGISLATION</b>	<b>122</b>
	<b>TABLE OF CASES</b>	<b>124</b>
	<b>UN MATERIAL</b>	<b>127</b>
	<b>OAS MATERIAL</b>	<b>134</b>
	<b>INTERNET AND OTHER MATERIAL</b>	<b>135</b>

# Summary

This thesis deals with the following question: *Do the national legislation initiatives of Colombia and Peru, aiming at protecting the Indigenous Peoples' right to land through their right to be consulted prior to any measures that may affect their lives and lands, reach the internationally set standards that these countries have committed to?*

The thesis concludes that the term *Indigenous Peoples* has not been defined in International Law. Today two criteria are being used: subjective and objective elements. Most important is the individuals' Indigenous self-identification but also objective elements such as cultural distinctiveness or special relationship with land is crucial. Today this description is used by the UN, the ILO and most states, among them also Colombia and Peru.

The land is fundamental for most Indigenous Peoples and most states recognize this special relationship, among them also Colombia and Peru. The *right to land* is covered by the ILO Convention 169 as well as implemented and protected in Colombian and Peruvian domestic legislation. The right is though not absolute and the states can restrict it under certain circumstances. The Inter-American Court of Human Rights has dealt with a number of landmark cases related to the Indigenous Peoples' right to land.

The Indigenous Peoples' *right to prior consultation* is not as well-recognized as the right to land. The right to prior consultation has though recently gained more recognition and visibility after a number of landmark cases at the Inter-American Court and in the domestic courts in Colombia and Peru. Even if the Indigenous Peoples don't have the right to veto on any proposed measures, there is a rising consensus among international Human Rights bodies that for certain large-scale projects Indigenous Peoples should have to give their Free, Prior and Informed Consent, prior to any further measures. This is though still debated and many states oppose to this view.

Colombia has no specific legislation on the right to prior consultation. There is certain legislation in place, but this doesn't comply with the provisions of the ILO Convention 169 or the judgments by the Inter-American Court. The Colombian Constitutional Court has dealt with a number of landmark cases related to this right, but the political will still seems to be missing. Peru has a specific law on prior consultation that was adopted in 2011, and which probably is one of the most progressive laws on this matter in the world today. Also the Peruvian Constitutional Tribunal has ruled in a number of landmark cases related to this right. Like in Colombia though, there seems to be a political unwillingness to respect Indigenous rights, especially the right to land in conjunction with the right to prior consultation.

The thesis concludes that the protection of Indigenous' rights has improved, but that financial interests and political unwillingness are still great hindlers.

# Sammanfattning

Denna avhandling behandlar följande fråga: *när den Colombianska och Peruanska lagstiftningen, som syftar till att skydda ursprungsbefolkningars rätt till land genom deras rätt att höras innan beslut fattas som kan påverka deras liv och mark, de internationella standarder och skyldigheter dessa länder åtagit sig till?*

Begreppet *ursprungsbefolkningar* inte har definieras inom folkrätten. Två kriterier används dock idag: ett subjektivt och flera objektiva. Viktigast är individernas självidentifikation som tillhörande en ursprungsbefolkning, men också objektiva faktorer såsom kulturell skiljaktighet eller ett särskilt förhållande med marken är avgörande. Idag används denna beskrivning av FN, ILO och de flesta stater, bland annat också Colombia och Peru.

Marken är grundläggande för de flesta ursprungsbefolkningar och de flesta stater erkänner denna speciella relation, bland annat också Colombia och Peru. *Rätten till mark* omfattas av ILO-konvention 169 samt har implementerats inom den Colombianska och Peruanska lagstiftningen. Denna rätt är dock inte absolut och staterna kan begränsa den under vissa omständigheter. Den Interamerikanska domstolen för de mänskliga rättigheterna har behandlat ett antal prejudikatfall gällande denna rätt.

Ursprungsbefolkningarnas *rätt till att höras innan beslut fattas* som påverkar deras liv är inte lika erkänd. Denna rätt har dock på senare tid nått erkännande efter ett antal prejudikatfall vid den Interamerikanska domstolen och i nationella domstolar i Colombia och Peru. Ursprungsbefolkningar har inte rätt att veto några föreslagna åtgärder, men konsensus växer bland internationella människorättsorgan om att dessa folk borde ha rätt att ge sitt fria och informerade samtycke innan eventuella åtgärder fattas gällande storskaliga projekt. Detta är dock fortfarande omstritt och stater tvekar.

Colombia har ingen specifik lagstiftning gällande rätten till att höras innan åtgärder fattas. Viss lagstiftning finns, men denna inte är förenligt med ILO-konvention 169 eller med den Interamerikanska domstolens domar. Den colombianska författningsdomstolen har behandlat ett antal prejudikatfall angående denna rätt, men den politiska viljan verkar fortfarande saknas. Peru har en specifik lag gällande denna rätt som förmodligen är en av de mest progressiva lagar i världen idag gällande denna rätt. Även den peruanska konstitutionella domstolen har behandlat ett antal prejudikatfall gällande denna rätt. Dock verkar det som att, liksom i Colombia, en politisk vilja saknas för att respektera ursprungsbefolkningars rättigheter, särskilt rätten till mark kombinerad med rätten till att höras innan åtgärder fattas.

Avhandlingen når slutsatsen att skyddet av ursprungsbefolkningarnas rättigheter har förbättrats, men att staternas ekonomiska intressen och den saknade politiska viljan fortfarande utgör stora hinder för dessa folk.

# Resumen

Esta tesis pretende responder la siguiente pregunta: *¿las iniciativas legislativas de Colombia y Perú, que pretenden proteger el derecho a la tierra de los pueblos indígenas a través de su derecho a la consulta previa, respetan el estándar internacional al cual los países se han comprometido?*

El término *Pueblos Indígenas* no ha sido definido en el derecho internacional. Hoy se utilizan dos criterios: un subjetivo y varios objetivos. La más importante es la de la autoidentificación del individuo como persona indígena. Los elementos objetivos son, por ejemplo, una cultura distinguida o la relación especial con la tierra. Esta descripción es utilizada por la ONU, la OIT y la mayoría de los estados, entre ellos también Colombia y Perú.

La tierra es fundamental para la mayoría de los Pueblos Indígenas y la mayoría de los estados reconocen esta relación especial, entre ellos también Colombia y Perú. El Convenio 169 de la OIT trata el *derecho a la tierra*, así como también la legislación colombiana y peruana. El derecho no es absoluto y los Estados pueden restringirlo en determinadas circunstancias. La Corte interamericana de derechos humanos ha tratado una serie de casos relacionados a este derecho.

El *derecho a la consulta previa* todavía no es altamente reconocido, pero el la visibilidad y relevancia de este derecho ha aumentado notablemente tras una serie de casos importantes en la Corte interamericana y en las cortes nacionales en Colombia y Perú. Incluso si los pueblos indígenas no tienen derecho al veto a los proyectos propuestos, el consenso crece entre los organismos internacionales de Derechos Humanos que ciertos proyectos de gran escala requerirían el consentimiento libre, previo e informado. Este derecho aún se discute y muchos estados todavía se oponen a su contenido.

Colombia no tiene una legislación específica sobre el derecho a la consulta previa. El país tiene ciertas leyes relacionadas al derecho a la consulta previa, pero estas no reflejan el contenido de la Convención 169 de la OIT o las sentencias de la Corte interamericana. La Corte Constitucional colombiana ha tratado una serie de casos históricos con respecto a este derecho, pero aun parece faltar voluntad política. El Perú tiene una ley específica sobre la consulta previa, y que hoy probablemente es una de las leyes más progresistas del mundo relacionadas al tema. También el Tribunal Constitucional peruano ha tratado una serie de casos históricos con respecto a este derecho. De todos modos, al igual que en Colombia, en Perú parece haber una falta de voluntad política de respetar los derechos indígenas, especialmente el derecho a la tierra junto con el derecho a la consulta previa.

La tesis concluye que la protección de los derechos indígenas ha mejorado, pero que los intereses financieros y la falta de voluntad política siguen siendo obstáculos notables.

# Preface

*“...all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.”*

UN Declaration on the Rights of Indigenous Persons



# Abbreviations

<b>ACHR</b>	American Convention on Human Rights
<b>American Declaration</b>	American Declaration on the Rights and Duties of Man
<b>American Draft Declaration</b>	Draft American Declaration on the Rights of Indigenous Peoples
<b>American Working Group</b>	Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples
<b>CCC</b>	Colombian Constitutional Court
<b>CEACR</b>	International Labour Organizations' Committee of Experts on the Application of Conventions and Recommendations – Section on Indigenous and Tribal Peoples
<b>CESCR</b>	United Nations Committee on Economic, Social and Cultural Rights
<b>CERD</b>	United Nations Committee on the Elimination of Racial Discrimination
<b>Culture Diversity Declaration</b>	United Nations Educational, Scientific and Cultural Organization's Universal Declaration on Cultural Diversity
<b>ECHR</b>	(European) Convention for the Protection of Human Rights and Fundamental Freedoms
<b>FPIC</b>	Free, Prior and Informed Consent
<b>GA</b>	United Nations General Assembly
<b>GC</b>	General Comment

<b>HCR</b>	United Nations Human Rights Committee
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court for Human Rights
<b>ICCPR</b>	United Nations International Covenant on Civil and Political Rights
<b>ICERD</b>	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	United Nations International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organization
<b>ILO 107</b>	Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries
<b>ILO 169</b>	Convention concerning Indigenous and Tribal Peoples in Independent Countries
<b>ILO Conventions</b>	ILO 107 and ILO 169
<b>Minority Declaration</b>	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
<b>OAS</b>	Organization of American States
<b>PCC</b>	Peruvian Constitutional Court
<b>PCT</b>	Peruvian Constitutional Tribunal
<b>PFII</b>	United Nations Permanent Forum on Indigenous Issues

<b>PLPC</b>	Peruvian Law on the Right to Prior Consultation with Indigenous and Native Peoples, to implement Convention 169 of the International Labour Organization
<b>Special Rapporteur</b>	Special Rapporteur of the United Nations on the situation of Human Rights and fundamental freedoms of Indigenous Peoples
<b>UN</b>	United Nations
<b>UNDG</b>	United Nations Development Group
<b>UNHCHR</b>	United Nations High Commissioner for Human Rights
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UN Indigenous Declaration</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>WCIP</b>	World Council of Indigenous Peoples
<b>WGIP</b>	United Nations Working Group on Indigenous Populations

# 1 Introduction

## 1.1 Introduction to the subject

### 1.1.1 Understanding Indigenous Peoples

Respect is the basis for all understanding. In most cultures respect between individuals or groups of individuals is fundamental; the one who does not respect another cannot demand respect toward himself. Understanding and respect is further the result of active communication and sharing of knowledge. Indigenous Peoples, like all other peoples, expect to be respected. This includes respect for their traditions, customs, lifestyles, and also their lands.<sup>1</sup> Even if this thesis will focus on studying the legal content of the right to prior consultation with Indigenous Peoples in Colombia and Peru, it has to be acknowledged from the beginning that active and effective communication leads to improved understanding between peoples, which in turn can hinder conflicts and create possibilities for development.

Throughout history Indigenous Peoples' and their cultures have been disrespected by other societies. Their lands have been taken away from them, their cultures have been simplified, mocked and attempted to be assimilated to the dominant ones. Indigenous Peoples have for centuries been segregated from the rest of society and seen as not-belonging in the modern world. Indigenous Peoples haven't further been given the right or possibility to develop themselves or their cultures; they have been isolated not only from society, but also from all possibilities to develop themselves. This thesis and its author assume that Indigenous Peoples contribute to humankind; Indigenous Peoples contribute, as all peoples do, to the understanding of cultures, of history and of life on earth. Their knowledge is important, irreplaceable and valuable, and only by adopting special measures will it be possible to assure the continuous existence of these peoples; both their physical existence as well as that of their cultures.

The protection of Indigenous cultures should hence be in the interest of all countries and the extinguishing of Indigenous Peoples' cultures, or any other peoples' cultures, should be condemned and avoided. No unjustified interference with Indigenous Peoples' cultures can be accepted, unless it is committed in accordance with International Law, and after consultation with

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<sup>1</sup> When using the term "land" in this thesis, the author is referring to it as understood and described by the International Labour Organization (hereafter ILO) in ILO, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual*, Geneva, 2003 (revised edition), page 29: "The concept of land usually embraces the whole territory they use, including forests, rivers, mountains and sea, the surface as well as the sub-surface". The concept draws its authority from Article 13(2) of the ILO's *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, adopted the 27<sup>th</sup> of June 1989, entered into force the 5<sup>th</sup> of September 1991, 1144 UNTS 123, OAS Treaty Series No. 36, 9 ILM 673 (1970) (hereafter ILO 169), which states that land shall be understood as including the whole territory including also natural resources.

the peoples affected. Indigenous Peoples are usually more vulnerable than other peoples due to their special relationship with their lands and territories and hence this thesis and its author assume that to preserve these peoples' culture and hence also their existence, special measures are required from states. It is also assumed that states that have committed to protect Indigenous Peoples' rights through the ratification of International Human Rights and Indigenous Peoples' rights instruments are in fact willing and interested in taking concrete steps in order to fulfill their obligations, not only due to their international commitments, but foremost due to their own interest in preserving Indigenous cultures.

## 1.1.2 Historical and political background

In the case of the Indigenous Peoples in Latin America the segregation started with the arrival of the Spanish in the end of the 15<sup>th</sup> century. Even if the worst days of slavery and total segregation are over, still today Indigenous Peoples are often seen as less-worth or "less-human" than other peoples. Often these peoples are seen as not belonging in modern societies, and that they slow down the development of the Latin American countries. As the former president of Peru, Alan García Pérez, expressed himself in a very controversial article related to Indigenous Peoples, natural resources and their objection to the extraction of these resources from their lands: *Those who stand in the way of development (read: Indigenous Peoples) are like the gardener's dog; it doesn't eat but it doesn't let others eat either.*<sup>2</sup>

In some Latin American countries, the recognition of the importance of Indigenous Peoples has developed more than in others. In Peru it seems like politicians and the finance sector has so far had highly conservative views on their Indigenous Peoples; Indigenous Peoples are recognized in the domestic legislation but the treatment they have received has more than once been very questionable. The situation has though improved in the last years. Also in Colombia, Indigenous Peoples have in later years gained more respect and appreciation. Here the domestic legislation on the protection of Indigenous Peoples' rights has developed, even if a lot still can be done. Indigenous Peoples are seen as a contribution to the multicultural and multiethnic Colombian society.

These two countries are of course very different: Peru has an Indigenous population amounting to almost 10 million individuals, about 40% of the population of the country,<sup>3</sup> compared to Colombia that has an Indigenous population consisting of "only" 1.4 million individuals, 3.5% of the

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<sup>2</sup> The linguistic expression is the author's translation from Spanish: "*El perro del hortelano – no come y no deja comer*". García Pérez, Alan, *El síndrome del perro del hortelano*, printed in *El Comercio* the 28th of October 2008, available online on the website of *El Comercio* at [http://elcomercio.pe/edicionimpresa/html/2007-10-28/el\\_sindrome\\_del\\_perro\\_del\\_hort.html](http://elcomercio.pe/edicionimpresa/html/2007-10-28/el_sindrome_del_perro_del_hort.html), visited the 19<sup>th</sup> of February 2012.

<sup>3</sup> ILO, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, International Labour Standards Department, Geneva, 2009, page 23.

country's population.<sup>4</sup> Both Colombia and Peru share Indigenous Peoples in the Amazon area, and both have different types Indigenous Peoples and cultures in the highlands/Andeans. These peoples have though historical and traditional differences which distinguish their cultures. Colombia has further a growing amount of urban Indigenous Peoples.

The discrimination of Indigenous Peoples in Peru has throughout history been severe. The isolation of this population from the rest of society led to a weak and unprotected situation which is still upheld today. Over one third of the country's population recognize themselves as Indigenous;<sup>5</sup> they live in the under-developed parts of the country, right outside of the capital area and in the rural areas of the country.<sup>6</sup> Indigenous Peoples in Peru also live in reservations, but as will be shown in this thesis, these territories are continuously being violated by the government and external parties. It is also outside of the Lima area where all natural resources, which the country is much dependent on, can be found. Hence when controversial decisions regarding the exploitation of these natural resources are taken, the populations that are directly affected are the Indigenous ones. Unfortunately most of the times the Indigenous Peoples in Peru have had to surrender to the pressure of not only the government but also of multinational corporations and other parties. These financial aspects explain partially why the protection of Indigenous Peoples' rights has not developed in Peru like it has in other Latin American countries.

Colombia on the other hand has a much smaller Indigenous population. There the discrimination of Indigenous Peoples has also been severe, but in contrast to Peru where only the Indigenous Peoples have been the main target of discrimination and abuse, in Colombia another big group has also suffered from discrimination and mistreatment throughout history: the Afro-Colombians.<sup>7</sup> The latter group has taken much of the abusive treatment in Colombia, hence taking away some of the focus from the Indigenous Peoples. Both groups though still suffer from discrimination and the armed internal conflict. Even if Indigenous Peoples only form a small part of Colombia's population, they occupy in total about 30% of all the land in the country.<sup>8</sup> The lands they occupy are though reservations and as will be shown below the biggest part of these lands' fertility and usability has been questioned.

Both the Peruvian and Colombian Indigenous Peoples have been the populations that have suffered most from the internal and armed conflicts these two countries have experienced in the past decades or still experience

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<sup>4</sup> Wessendorf, Kathrin, *The Indigenous World 2011*, The International Work Group for Indigenous Affairs, Copenhagen, 2011, page 120.

<sup>5</sup> ILO, *supra note 3*, page 23.

<sup>6</sup> Wessendorf, *supra note 4*, page 159.

<sup>7</sup> ILO, *supra note 3*, page 12.

<sup>8</sup> Anaya, S. James, *The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya, A/HRC/15/37/Add.3, 25<sup>th</sup> of May 2010, paragraph 6.

today. In the case of Peru, the internal conflict that started in the 80's left in total over 70 000 casualties,<sup>9</sup> out of which 75% was individuals of the Quechua speaking Indigenous minority or other linguistic minorities.<sup>10</sup> In total the amount of Indigenous Peoples affected directly or indirectly by the internal conflict, either by casualties or displacement was even higher. Even if the conflict is today considered being over, there are still some active paramilitary groups in the country that from time to time have managed to cause casualties especially among the military or police forces. The impacts of these paramilitary activities are limited, but they have also had an impact on the lives of Indigenous Peoples living in the areas where the paramilitaries still remain active.

In Colombia the armed conflict has been ongoing since the 60's. The figures are only estimations, but some claim that the conflict has by now reached up to 60 000 – 70 000<sup>11</sup> casualties and left up to 4 000 000 persons internally displaced; and the figures keep on growing.<sup>12</sup> The absolute majority of the affected people have been the Indigenous Peoples since the main locations of the conflict have been rural areas. The conflict has among other things lead to a huge internal displacement; the Colombians form today the second biggest displaced population in the world, after the Sudanese population.<sup>13</sup> Among the displaced persons, the Indigenous Peoples are a significant number. Even if positive actions have occurred lately, a solution to the Colombian armed conflict is not in sight in the near future.

### 1.1.3 Introduction to the conflict of interests

According to International Human Rights Law on Indigenous Peoples' rights and standards, Indigenous Peoples have the right to be consulted prior to any legislative or administrative measures that, among other things, may interfere or endanger their lands, cultures or lifestyles. Indigenous Peoples have a very close relationship with their lands and an interference with their lands and territories also affect their possibilities to express their cultures. To most of these peoples, the conservation of their lands is hence essential for their existence and survival. That is why Indigenous Peoples according to International Law don't only have the right to their ancestral lands, but also to be consulted prior to any measures that may affect their lands, lives or cultures.

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<sup>9</sup> Comisión de la Verdad y Reconciliación, *Conclusiones Generales del Informe Final de la CVR*, published the 28th of August 2003, available online at <http://www.cverdad.org.pe/ifinal/conclusiones.php>, visited the 10<sup>th</sup> of May 2012, Paragraph 2.

<sup>10</sup> *Ibid.*, Paragraph 6.

<sup>11</sup> Radio Cadena Nacional Radio, *Por la violencia han muerto 64 mil Colombianos desde 1964*, <http://www.rcnradio.com/node/21533>, visited the 10th of May 2012.

<sup>12</sup> United Nations (hereafter UN) High Commissioner for Refugees (hereafter UNHCR), *Colombia*, available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492ad6&submit=GO#>, visited the 10th of May 2012.

<sup>13</sup> World Food Program Logistics, *Colombia*, available at <http://logistics.wfp.org/country-operations/americas/colombia>, visited the 10<sup>th</sup> of May 2012.

The disputes between Indigenous Peoples and states arise in the many cases when Indigenous Peoples live on or occupy lands where important natural resources can be found. Especially in the cases of developing countries, these natural resources are an essential income source for the country and the extraction of them a top priority among politicians and the business sector. Indigenous Peoples are though seldom consulted prior to the decisions are taken on the granting of extracting rights.

Indigenous Peoples have the right to their traditional lands. The importance of the land is so essential that the non-respect of it in most cases could lead to the extinction of these peoples' cultures. Hence the respect of the right to land is of most essential priority and needs to be protected in a manner different to other property. The International Labour Organization's (hereafter ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (hereafter ILO 169), protects the right to land, but leaves certain issues open for interpretation. This thesis will study the right to prior consultation as an additional tool to ensure the protection of the right to land. Besides adding protection to the right to land of Indigenous Peoples, the right to prior consultation is in itself an independent right that also secures, among other things, the right to participation. This thesis will though mainly focus on the right to prior consultation as an additional tool to protect Indigenous Peoples' lands.

In Peru there are at the moment almost 300 ongoing social conflicts out of which the big majority is between Indigenous Peoples and the Peruvian Government.<sup>14</sup> The conflicts are, among other things, related to environmental issues, land right infringements, and decisions that have been taken against the will of the affected Indigenous Peoples. Also in Colombia the Government is involved in a number of ongoing social conflicts with Indigenous Peoples, even if the amount is not as big as in Peru.<sup>15</sup> It could be assumed, as many Indigenous movements have expressed, that many of the conflicts in Peru and Colombia, or other countries in the region could probably have been avoided if proper consultation with the affected Indigenous Peoples had been committed and agreement was sought before taking any decisions or implementing any legislative or administrative measures.

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<sup>14</sup> El Comercio, *El gobierno de Alan García hubo 191 muertos por conflictos sociales*, published the 28th of August 2011, available at <http://elcomercio.pe/politica/1260138/noticia-gobierno-alan-garcia-hubo-191-muertos-conflictos-sociales>, visited the 10th of May 2012.

<sup>15</sup> In Colombia the civil war that has been going on for over 30 years has taken away much of the focus from other Human Rights issues.



## 1.2 Research question and delimitation

### 1.2.1 Research question

This thesis will focus on one core question:

*Do the national legislation initiatives of Colombia and Peru, aiming at protecting the Indigenous Peoples' right to land through their right to be consulted prior to any measures that may affect their lives and lands, reach the internationally set standards that these countries have committed to?*

It is important to point out that even if the Indigenous Peoples' right to prior consultation has many different aspects, this thesis will only deal with one of them: the aspect that gives the Indigenous Peoples, through the right to prior consultation, one more tool to protect their lands. It can also be seen as one more barrier for governments and other parties that aim at infringing Indigenous Peoples' land rights, without these peoples' prior agreement or consent. Without consultative processes that also include Indigenous Peoples, the right to land would be more vulnerable than what it is when the right to prior consultation is applied in a correct manner.

This thesis will further analyze if an established and recognized international standard for the protection of Indigenous Peoples' right to prior consultation exists. It will become relevant to discuss from where such a standard draws its authority and if this standard has been implemented in Peru and Colombia. In case an international standard exists it will become relevant to study its content and, if and how it has been applied in the Colombian and Peruvian domestic legal and judicial systems.

To answer the core question we also need to deal with certain questions related to Indigenous Peoples' right to land and prior consultation: How is the right to land of Indigenous Peoples recognized and protected in International Law? How is the right implemented in Colombia and Peru? How is the right to prior consultation connected with the right to land? Does the right to prior consultation in Colombian and Peruvian domestic legislation also aim at protecting the rights to land of Indigenous Peoples? Are the domestic legislation efforts enough to efficiently protect the rights of Indigenous Peoples or are further measures required?

This thesis will study the right to prior consultation as a tool to protect the right to land of Indigenous Peoples. Land is of essential importance for Indigenous Peoples and the protection of it is secured through several different aspects, among others the right to prior consultation. It becomes hence relevant to study how developed the protection of the right to prior consultation is in Colombia and Peru, and if it also covers the right to be consulted on land issues.

Also sub-questions related to the process and results of the prior consultation will have to be analyzed: How is successful consultation conducted? Do Indigenous Peoples have the right to veto on certain issues, or is the consultation always just a search for opinion rather than an actual declaration that governments would have to respect? When are actions accepted, even when an Indigenous agreement or consent has not been reached?

The process of prior consultation is relevant in order to assess if the consultation could lead to a true understanding and if the information shared during the consultation truly will be taken into consideration before the decision making processes. The consultation process is also essential in order to assess which actions can be taken after the process is over, especially in the case that the process has not led to an agreement or consent.

This thesis will aim at answering all the above mentioned sub-questions and any other possible questions not mentioned above but still relevant for the topic. By answering all these questions the thesis will be able to come to a conclusion regarding the core question.

## **1.2.2 Delimitation**

This thesis will only focus on the right to prior consultation within Indigenous Peoples' right to land. The right to prior consultation has several aspects, but this thesis will only focus on it as a tool to protect the Indigenous Peoples' right to land. The thesis will further only focus on Peru and Colombia. These two countries represent different approaches of policies towards their Indigenous Peoples. While Colombia has a rather long history of domestic legislation that protects Indigenous Peoples, Peru on the other hand has domestic legislation that is less than a year old. On the other hand both Colombia and Peru are bound by the most core international Human Rights and Indigenous Peoples' rights instruments. Both countries, even if having domestic particularities, can hence be compared to each other, especially taking into consideration that both are bound by the same international and regional Indigenous and Human Rights instruments.

## **1.3 Material, method and structure**

### **1.3.1 Material**

The thesis will focus on primary sources: the most recognized international Human Rights instruments, regional Human Rights instrument, in this case the Inter-American Human Rights system, applicable ILO instruments, and Peruvian and Colombian domestic legislation initiatives. Besides these primary sources the thesis will also use and analyze judgments by the Inter-American Court of Human Rights, and judgments by the domestic courts of

Peru and Colombia. In order to better support the arguments presented in this thesis, the documents published by international monitoring bodies such as the reports by the Special Rapporteur of the United Nations (hereafter UN) on the situation of Human Rights and fundamental freedoms of Indigenous Peoples (hereafter Special Rapporteur), the reports and guidelines by the ILO, as well as the work of recognized scholars' will be used.

### 1.3.2 Method

This thesis assumes that “[a]ll cultures form part of the common heritage of mankind”.<sup>16</sup> Further, “cultural diversity is as necessary for humankind as biodiversity is for nature... [and that] it is the common heritage of humanity... [It] should be recognized and affirmed for the benefit of present and future generations.”<sup>17</sup> Cultural diversity additionally “... widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence.”<sup>18</sup> These statements affirm the importance of preserving cultures, among them also Indigenous Peoples' cultures.<sup>19</sup>

The thesis further assumes that not only the author or reader, but also governments recognize this Indigenous contribution and that they work in order to protect Indigenous Peoples' rights.<sup>20</sup> The author further assumes that governments are in favor of all Human Rights, among them also those Indigenous Peoples' right to land and prior consultation. Taking this into consideration, in case a country has a lacking or insufficient legislation when it comes to any of these rights it must be assumed that the government is willing to work in order to fill the gaps. The governments should of course do this together and in cooperation with the affected Indigenous Peoples.

### 1.3.3 Structure

The thesis introduced in the first chapter the reader to the general importance of protecting Indigenous Peoples' rights. This also included the

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<sup>16</sup> United Nations Educational, Scientific and Cultural Organization's (hereafter UNESCO) *Mexico City Declaration on Cultural Policies*, adopted the 6<sup>th</sup> of August 1982, U.N. Doc. CLT/MD/1, Article 4.

<sup>17</sup> UNESCO *Universal Declaration on Cultural Diversity* (hereafter Cultural Diversity Declaration), adopted the 2<sup>nd</sup> of November 2001, CLT-2002/WS/9, Article 1.

<sup>18</sup> *Ibid.*, Article 3.

<sup>19</sup> *Ibid.*, Article 4.

<sup>20</sup> These assumptions rise from the fact that the *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly of the UN (hereafter GA) the 13<sup>th</sup> of September 2007, Resolution A/RES/61/295, A/61/L.67/Annex (hereafter UN Indigenous Declaration), received great support among the absolute majority of all UN members when adopted in 2007.

historical and political background to what has affected the legislation on Indigenous issues in Peru and Colombia. In chapter number two the author will introduce the reader to the concept of Indigenous Peoples and compare different international, regional and national definitions and characteristics of these peoples. Chapter number three will present the Indigenous Peoples' right to land, and how it becomes relevant in the present case. Also regional and domestic legislation and jurisprudence related to the right to land will be presented and discussed.

In chapter number four the right to prior consultation will be presented. A general overview will be given as well as a thorough analysis of the parts that are relevant for the right to land. An international standard for the right to prior consultation will be analyzed and discussed, as well as a regional aspect to the issue. This chapter will also discuss the practicalities of the consultation; how consultation shall be done and what the outcomes of the consultation should be. The fifth chapter will analyze the implementation of the right to prior consultation, relevant for the protection of the right to traditional lands, in the cases of Peru and Colombia. The chapter will study whether the Peruvian and Colombian legislation implement in a sufficient manner the international standard for the right to prior consultation, as well as how this affects the right to land. Some concrete examples will be studied as well as the consultation methods that the countries have used so far.

The sixth chapter will summarize all previous findings, gather some general conclusions on the Peruvian and Colombian legislation regarding the protection of Indigenous Peoples' right to land and prior consultation, and make some general recommendations.

## 2 Who are Indigenous peoples?

### 2.1 General introduction to the need for a definition

The term *Indigenous Peoples* has not been defined in international law.<sup>21</sup> Even if proposals for definitions have been presented, no proposal has reached an established consensus among scholars or the affected Indigenous Peoples. The question to be asked is then: does the term Indigenous Peoples really need to be defined? Three groups can be identified: those in favor of a clear definition, those against any attempt to define the term and those that want to see a definition that is descriptive without being limiting.<sup>22</sup>

Those that reject any attempt to define the term Indigenous Peoples argue that this would lock the term to a specific definition and hence decrease the flexibility that the description of the term enjoys today.<sup>23</sup> This would also mean that it would become harder to make any changes to the term in the future, if such would be needed. As with other Human Rights' definitions, after a definition has been agreed upon it can become very difficult to later try to modify it.<sup>24</sup> The clear risk is that a too narrow definition would lead to certain peoples that recognize themselves as Indigenous and fulfill some but not all of the possible characteristics would fall outside of the scope of the definition due to the narrowness or inflexibility of the agreed definition.<sup>25</sup>

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<sup>21</sup> Even if *Indigenous Peoples* is the international term that the UN and International Law uses, regional and national variations to this term do exist. Terms such as aboriginals, first nations, tribes or nomads are commonly used by certain countries and media. Even if certain countries use different terms, all these categories still fall within the international term Indigenous Peoples. Hence the simple use of a different term does not lead to the non-existence of such peoples within a state, or to the lack of responsibility towards these peoples. See United Nations Permanent Forum on Indigenous Issues (hereafter PFII), *Who are indigenous peoples?*, factsheet, available at [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf), visited the 3<sup>rd</sup> of April 2012.

<sup>22</sup> Dr. Eyassu Gayim, referring to Benedict Kingsbury's categorization, calls those in favor of a clear definition "positivists" and those against "constructivists". Gayim, Eyassu, *People, Minority and Indigenous: Interpretation and Application of Concepts in the Politics of Human Rights*, Erik Castrén institute of international law and human rights, Helsinki, 2006, page 149. Kingsbury, Benedict, "'Indigenous Peoples' in International Law: A Constructive Approach to the Asian Controversy", *American Journal of International Law* Vol. 92, 1998, No. 3, pages 414 and 415.

<sup>23</sup> See among others Kingsbury, *ibid.*, page 414, and Makkonen, *Identity, Difference and Otherness: The Concept of "People", "Indigenous People" and "Minority" in International Law*, The Erik Castrén Institute of International Law and Human Rights, Research Report 7/2000, Helsinki, Helsinki University, 2000, page 136.

<sup>24</sup> The changing of the definition could also lead to the decreasing of its value or authority in International Law.

<sup>25</sup> As could be seen from the rejection of *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted the 26<sup>th</sup> of June 1957, entered into force the 6<sup>th</sup> of February 1959, 328 UNTS 247, ILOLEX Convention Nr. 107 (hereafter ILO 107), originally from the

Hence most scholars argue for a descriptive, rather than defining indigenous identity. Indigenous Peoples are indeed not a homogeneous group; there is a big diversity of Indigenous Peoples, and hence it is rather hard to try to gather them all under one definition.

Those in favor of having a clear defining of the term point out that the vague description that is used today in fact weakens the protection of these peoples. Indeed several countries have implemented their own definitions or interpretations of the term, hence creating a different level of protection for Indigenous Peoples, depending on in which country these peoples happen to live in.<sup>26</sup> It is not uncommon either that countries have tried to limit the recognition of their Indigenous Peoples in a manner that does not comply with the minimum standards described by the ILO 107 and the ILO 169 (hereafter the ILO Conventions), and the UN Indigenous Declaration. As will be demonstrated below, also the former Peruvian government of Alan García Pérez tried to limit the protection of Indigenous Peoples in Peru by only recognizing a minor part of their Indigenous Peoples as actually falling within the scope of ILO 169. In case a clear definition would be established such cases could probably be avoided. Those in favor of a clear definition hence argue for an equal treatment through a common understanding of the term.

Much of the work related to Indigenous Peoples' rights can be traced back to Special Rapporteur José Martínez Cobos'<sup>27</sup> preliminary report from 1982, regarding the discrimination of Indigenous Peoples.<sup>28</sup> In this complete study the Special Rapporteur besides identifying the problems Indigenous Peoples faced and the lack of legal protection, he also proposed a "working definition" to the term Indigenous Peoples:

*Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and*

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late 50's but replaced by ILO 169 in the end of the 80's, attitudes towards Indigenous Peoples change, and so could also the concept of Indigenous Peoples do. Locking the term into a specific definition would hence not contribute to the flexibility that was sought in the ILO 169 and ILO 107 (hereafter ILO Conventions) nor in the UN Indigenous Declaration.

<sup>26</sup> Many of the states that invoke abuse of the flexible definition and that argued for the implementation of a strict definition in the UN Indigenous Declaration were from third world countries. See Gayim, *supra* note 22, page 150.

<sup>27</sup> Former UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

<sup>28</sup> Martínez Cobo, José: *Study of the Problem of Discrimination against Indigenous Populations*, Preliminary Report Submitted by Jose R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/SUB.2/L.566, 1972.

*cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant.*<sup>29</sup>

Even if this definition is the foundation of the description of the term Indigenous Peoples in the ILO 169, the definition in itself was not adopted since it was seen as limiting the flexibility sought and also that it didn't completely cover all relevant and necessary aspects. When it comes to the lack of certain aspects, it can for example be noted that the definition only applies to peoples that have experienced colonization, and hence disregards the existence of Indigenous Peoples in, among other places, certain parts of Asia.<sup>30</sup> The definition also falls short on recognizing the existence of African Indigenous Peoples due to the criteria identifying Indigenous Peoples as those who "were here first"; in the African context it can be hard to recognize the existence of certain peoples before others.

Due to the critique that the proposed definition received, the Special Rapporteur tried to improve the definition, among other things also including Indigenous Peoples that hadn't experienced colonization, hence including certain additional requirements that these peoples had to fulfill.<sup>31</sup> These later improvements to the definition were anyway still not seen as totally taking into consideration all relevant aspects and hence the definition proposal was not implemented in the later work of the ILO or other organizations that work with Indigenous Peoples' rights.

Even if no all-covering definition has been found or agreed upon, the trend seems to be moving towards a combined definition of the term. This "unified approach", as Dr. Eyassu Gayim<sup>32</sup> calls it, tries to find a compromise between the positivistic and the constructivist approaches, and hence the approach both describes objective criteria but also includes the subjective, self-identifying, criterion.<sup>33</sup> This approach is supported by the

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<sup>29</sup> *Ibid.*, paragraphs 34 and 45.

<sup>30</sup> Bose, Tapan K., "Definition and Delimitation of the Indigenous Peoples of Asia", in Erni, Christian (ed.), *...Vines that Won't Bind...*, International Work Group for Indigenous Affairs Document no. 80, International Work Group for Indigenous Affairs, Copenhagen, 1996, pages 44 to 46.

<sup>31</sup> The later definition stated that peoples that hadn't experienced colonization could even be considered Indigenous Peoples in case: "(a) they are the descendants of groups, which were in the territory at the time when other groups of different cultures or ethnic origin arrived there, (b) precisely because of their isolation from other segments of the country's population they have almost preserved intact the customs and traditions of their ancestors which are similar to those characterised as indigenous, (c) they are, even if only formally, placed under a state structure which incorporates national, social and cultural characteristics alien to their own.". Working Group on Indigenous Populations (hereafter WGIP), 1983, FICN. 41Sub.211983121 Add. paragraph 3 79.

<sup>32</sup> Eyassu Gayim is a Juris Doctor researching at the Erik Castrén Institute of International Law and Human Rights at Helsinki University.

<sup>33</sup> Gayim, *supra note* 22, page 149.

current Special Rapporteur and other scholars.<sup>34</sup> Neither the ILO Conventions nor the UN Indigenous Declaration has tried to define the term.<sup>35</sup> According to Erica Irene Daes,<sup>36</sup> Indigenous Peoples have suffered throughout history of discriminatory definitions imposed on them by others, for example requiring parentage links or blood quotient – which disregards the Indigenous Peoples’ right to identify and recognize their own members, and the UN Indigenous Declaration would hence not continue this tradition.<sup>37</sup>

The UN system has indeed not tried to define the term but instead agreed upon certain characteristics that peoples have to fulfill in order to be considered Indigenous. Hence the UN system has gone from trying to define, to trying to identify these peoples. This is the approach that also other actors on the international level have taken.

## 2.2 Indigenous peoples within the UN

### 2.2.1 The ILO Conventions

Neither the ILO 107 nor the ILO 169, the only two international binding treaties that deal with specifically Indigenous Peoples rights,<sup>38</sup> defines Indigenous Peoples. These instruments though describe the peoples to be protected by the treaties. Since the ILO 169 replaced the ILO 107<sup>39</sup> in 1989, and the ILO 169 is also the treaty that applies for Colombia and Peru, this

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<sup>34</sup> Rosen, Lawrence, “The Right to be Different: Indigenous Peoples and the Quest for a Unified Theory”, Book Review: *Multicultural Citizenship: A Liberal Theory of Minority Rights* by Will Kymlicka; *Indigenous Peoples in International Law* by S. James Anaya, *Yale Law Journal*, Volume 107, 1997, No. 1, page 232.

<sup>35</sup> It should be mentioned though that the World Bank (hereafter WB) has its own definition of the term Indigenous Peoples, established in Operational Directive 4.20 from September 1991, but that this definition only applies within the WB and has not been adopted by other international nor national bodies relevant for this thesis.

<sup>36</sup> Chairperson and Rapporteur of the WGIP; the UN body that negotiated and drafted the UN Indigenous Declaration.

<sup>37</sup> Daes, Erica-Irene, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples – New Developments and General Discussion of Future Action*, by the Chairperson-Rapporteur of the Working Group on Indigenous populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples, E/CN.4/Sub.2/AC.4/1995/3, paragraph 6.

<sup>38</sup> Several other internationally binding instruments mention and in certain cases give Indigenous Peoples additional rights, but the ILO Conventions are the only ones that deal specifically and only with Indigenous Peoples. See for example the UN *Convention on Biological Diversity*, adopted the 5<sup>th</sup> of June 1992, entered into force the 29<sup>th</sup> of December 1993, 1760 UNTS 142, or the UN’s *International Covenant on Civil and Political Rights* (hereafter ICCPR), adopted the 16<sup>th</sup> of December 1966, entered into force the 23<sup>rd</sup> of March 1976, 999 UNTS 171, UN Doc. A/6316 (1966).

<sup>39</sup> Even if ILO 107 is still in force for 17 countries (mostly Middle East, African and Asian countries), ILO 169 is today used as the benchmark for Indigenous Peoples rights. ILO 169 has only a few more ratifications than ILO 107 (22 ratifications in total), but these are mostly from Latin American countries and hence apply also in the case of the states of Colombia and Peru.



thesis will mostly focus on study the ILO 169. Article 1(1)(b) of the ILO 169 state that the convention applies to:

*...peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*<sup>40</sup>

Article 1(1)(2) of the same convention continue stating that “*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply*”.<sup>41</sup>

It is important to note, as it is also stated in Article 1(1)(3) of the ILO 169, that Indigenous Peoples are not independent “*peoples*” like the term is generally used in International Law.<sup>42</sup> Hence Indigenous Peoples don’t enjoy the same right to independence and external self-determination as other peoples in International Law.<sup>43</sup>

From the description that can be found in the ILO 169 and the later praxis that the UN Human Rights system has adopted, we can identify the following main characteristic that individuals or peoples have to fulfill in order to be recognized as Indigenous:

- *Self- identification as indigenous peoples at the individual level and accepted by the community as their member;*
- *Historical continuity with pre-colonial and/or pre-settler societies;*

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<sup>40</sup> ILO 169, article 1(1)(b). Even if the ILO 107 uses a little bit different wording, the description of Indigenous Peoples in that instrument is similar to the one of ILO 169. ILO 107 is though considered to be outdated and is no longer open for ratification since the language and content aimed at the assimilation of Indigenous Peoples to modern societies. The ILO 169 and International Law has on the other hand for a while already focused on the protection of the cultures and traditions of these Indigenous Peoples, without the assimilationist approach.

<sup>41</sup> ILO 169, Article 1(1)(2).

<sup>42</sup> ILO 169, Article 1(1)(3). The international definition of the term “*peoples*” that the ILO 169 refers to is the one that can be found for example in the Charter of the United Nations, adopted the 26<sup>th</sup> of June 1945, entered into force the 24<sup>th</sup> of October 1945, T.S. 993, Articles 1(2) and 55; Articles 1 and 25 of the UN International Covenant on Economic, Social and Cultural Rights, adopted the 16<sup>th</sup> of December 1966, entered into force the 3<sup>rd</sup> of January 1976, 993 UNTS 3, UN Doc. A/6316 (1966) (hereafter ICESCR); and Articles 1 and 47 of the ICCPR.

<sup>43</sup> Even if maybe most Indigenous Peoples aren’t interested nor strive for independence from the countries in which they exist (most Indigenous Peoples never marked nor created borders on their lands as Western cultures historically have done), Governments have not been willing to accept Indigenous Peoples as independent peoples with the right to external autonomy or self-determination due to the fear that these peoples would start claiming independence from the states in which they currently exist.

- *Strong link to territories and surrounding natural resources;*
- *Distinct social, economic or political systems;*
- *Distinct language, culture and beliefs;*
- *Form non-dominant groups of society; and*
- *Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.*<sup>44</sup>

Even if the United Nations Permanent Forum on Indigenous Issues (hereafter FPII) has not clarified if these criteria are accumulative it seems hard to argue in favor of it; the definition would be too narrow if all these criteria were to apply.<sup>45</sup> It seems more appropriate to identify only certain main criteria, such as the self-identification, which would be the subjective one, in combination with a number of objective criteria, for example the cultural distinctiveness or non-dominant position in society. Hence one of the most important characteristics probably is the self-identification of the persons and the communities. This implies not only the self-identification of the individual as an Indigenous person, but also that the community accepts this self-identification and themselves too identify this individual as a member of their community. The individual Indigenous persons jointly build the community due to the notion that they originate and belong to the same culture and together create a joint community or people. It is though not until fulfilling both the subjective and certain additional objective criteria that such a community can be considered to be Indigenous.

The characteristic of cultural distinctiveness is also essential. In International Law Indigenous Peoples are seen as different subjects partially due to the cultural distinctiveness they represent, compared to the majority of the societies in which they exist. Practically speaking it could be argued that all cultures are actually different from each other and hence the differentiation between Indigenous and non-Indigenous cultures wouldn't make sense.<sup>46</sup> According to International Law Indigenous Peoples' cultures are though different from other cultures in the societies in which they exist and this is one of the characteristics that justify their identification as a separate and distinguishable community within an specific societal context.

As can be seen from the description above, the connection with territories and other natural resources is also affirmed as one of the most important characteristics that Indigenous Peoples have to preserve. Hence the loss of contact with these lands and resources could lead to the loss of the status as an Indigenous People. Here it though becomes relevant to take into consideration the difference between self-chosen and forced lack of contact

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<sup>44</sup> FPII, *supra* note 21.

<sup>45</sup> For example the criteria of strong link to territories or natural resources don't apply anymore in all cases for Indigenous Peoples living in urban areas, without these peoples still having the possibility to be considered Indigenous.

<sup>46</sup> It may indeed become rather hard to prove that a greater cultural distinctiveness exists between a certain Indigenous People towards the majority of society than towards another Indigenous People with a different culture within the same country since all cultures are different from each other; the degree just varies.

with these natural resources. If Indigenous Peoples independently chose to leave their ancestral lands and hence give up their Indigenous status this is of course totally allowed; Indigenous Peoples just like any other peoples have the right to choose how they want to develop. On the other hand if Indigenous Peoples are forced to leave their lands due to eviction by the Government in order to for example fulfill national development or other projects, as is often the case in Peru, or due to an armed conflict that puts the existence of the community at risk, as is often the case in Colombia, it should not be seen as these Indigenous Peoples have lost their status as Indigenous, even if they have lost the contact with their ancestral lands.<sup>47</sup> Indigenous Peoples can hence withhold the status as Indigenous even in the cases where they don't have access to the land they traditionally have occupied, due to the fact that they still withhold a spiritual and cultural connection to the lands they at the moment don't have physical access to.<sup>48</sup> This is in addition to the fact that Article 16(3) of the ILO 169 gives Indigenous Peoples the right to return to their lands, hence even if current access to the traditional access is not possible, the states should take effective measures in order to secure the possibility for Indigenous Peoples to return to these lands.

For this thesis the most relevant characteristics of the article describing Indigenous Peoples in ILO 169 are the aspects related to self-identification, cultural distinctiveness and the connection of these peoples to their ancestral lands and natural resources. Hence even if all the other characteristics described are also relevant and important, they will not be further discussed here but assumed as internationally recognized and applicable for states when identifying Indigenous Peoples.

## 2.2.2 The UN Indigenous Declaration

Besides the two ILO Conventions, the third most authoritative document related to Indigenous Peoples' rights is the UN Indigenous Declaration from 2007.<sup>49</sup> The instrument is not binding for any state and hence no government can be declared responsible for acting against any of the provisions in the instrument. The UN Indigenous Declaration is still important since it in many ways updates the understanding of the ILO 169 which dates back to 1989. The UN Indigenous Declaration hence shows the direction in which the work of the UN towards Indigenous Peoples is heading. The UN Indigenous Declaration also gives the member states of the UN one more authoritative document to interpret and to take into

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<sup>47</sup> It should though not be forgotten that urban Indigenous Peoples might not have similar special relationship with lands, but still are considered to be Indigenous.

<sup>48</sup> See for example the case of the *Moiwana Community v. Suriname*, IACtHR, Judgement of the 15<sup>th</sup> of June 2005, paragraphs 95 and 97.

<sup>49</sup> The Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations the 13<sup>th</sup> of September 2007, Resolution A/RES/61/295, A/61/L.67/Annex, had the support of Peru and 142 other states. Colombian abstained but has at a later stage adopted the declaration.

consideration when implementing national and local policies that affect Indigenous Peoples. International bodies working with Indigenous Peoples' rights often make reference to the UN Indigenous Declaration and hence the instrument is valuable to understand the international development of Indigenous Peoples' rights.

The UN Indigenous Declaration though abstains almost totally from defining or even describing Indigenous Peoples. The only provision dealing with the subjects of the instrument is Article 33(1) of the UN Indigenous Declaration that states that "*Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.*"<sup>50</sup> Besides this element of self-identification the UN Indigenous Declaration leaves it up to the states to independently interpret who the subjects of the UN Indigenous Declaration are. This interpretation shall of course be done in conformity with the ILO Conventions, for those countries that have ratified any of these two instruments, but the UN Indigenous Declaration clearly confirms that states are today given a greater margin of interpretation of the term. The UN Indigenous Declaration hence takes a different approach than the ILO Conventions since it is neither descriptive nor defining.

It will though be interesting to follow the development of this discussion since, as already Special Rapporteur Martinez Cobos pointed out in his preliminary report, the interpretation of the term Indigenous Peoples vary a lot between states, in some cases there are even no definitions or descriptions at all, which leads to a weaker protection of these peoples in certain cases.<sup>51</sup> Studying the discussions when drafting the UN Indigenous Declarations one can notice that there were several proposals presented for a definition but that the article defining the term was in the end left aside the official proposal submitted to the General Assembly (hereafter GA). This underlines the fact that there are different points of view and that no universal consensus has yet been reached.

## **2.3 The use of Indigenous peoples as a concept within the OAS**

Stepping aside from the UN system for a moment and going to the regional efforts made in the Inter-American Human Rights system, we have the Draft American Declaration on the Rights of Indigenous Peoples (hereafter American Draft Declaration) which also deals with the issue of the definition of Indigenous Peoples.<sup>52</sup> As the name states, the American Draft

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<sup>50</sup> UN Indigenous Declaration, Article 33 (1).

<sup>51</sup> Martinez Cobo, José: *Study of the Problem of Discrimination against Indigenous Populations*, Final Report (Supplementary Part) submitted by the Special Rapporteur Mr. José Martínez Cobo, E/CN.4/SUB.2/1982/2/Add.6, submitted the 20<sup>th</sup> of June 1982. paragraphs 259 – 324.

<sup>52</sup> Draft American Declaration on the Rights of Indigenous Peoples (hereafter (Draft American Declaration)). Latest version of the declaration can be found in: Working

Declaration is only a draft document and has hence not been yet accepted by the member states of the Organization of American States (hereafter OAS).<sup>53</sup> The OAS has been working on this instrument since 1989 but has still not managed to adopt a final version of the instrument.

Like the UN Indigenous Declaration, the American Draft Declaration does not try to define nor describe the American Indigenous Peoples. Hence the American Draft Declaration doesn't compare to the two ILO Conventions, but instead its approach is similar as the one of the UN Indigenous Declaration. Article I(1) of the American Draft Declaration simply state that the declaration shall apply to all Indigenous Peoples in the Americas.<sup>54</sup> Article I(2) of the same draft declaration continues confirming that self-identification as Indigenous Peoples, both of the individual as well as of the community, shall be a fundamental criteria to define who the American Draft Declaration applies to.<sup>55</sup> Hence also the American Draft Declaration leaves it up to the member states of the OAS to interpret the term Indigenous Peoples and apply it in the domestic legislation.

The freedom of interpretation that the UN Indigenous Declaration<sup>56</sup> and the American Draft Declaration gives can of course be debated since it again gives the states a wide margin to interpret the term Indigenous Peoples. The countries are of course limited by International Law and Customary International Law; in this case it could be argued that maybe the interpretation of the characteristics of Indigenous Peoples has reached some kind of customary status.<sup>57</sup> This paper will not argue in favor or against such a claim, but simply specify that the situation is not perfect since today there are different levels of protection for Indigenous Peoples, depending on in which country the peoples happen to exist in. As mentioned above, the American Draft Declaration is only a draft, but the first Article dealing with the scope of the declaration has already reached consensus in 2006. This

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Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples (hereafter American Working Group), *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, as of the 3<sup>rd</sup> of December 2009, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 5. See also *proposed American Declaration on the Rights of Indigenous Peoples*, approved by the Inter-American Commission on Human Rights the 26 February, 1997, OEA/Ser.G and CP/doc.2878/97 (1997).

<sup>53</sup> Even though the American Draft Declaration has not yet been adopted, which leaves it with a limited legal authority, it can be interesting to follow the negotiations of this instrument in order to understand in which direction the American countries are heading.

<sup>54</sup> American Working Group, *Supra note 52*, Article 1(1).

<sup>55</sup> American Draft Declaration, article 1(2). See also American Working Group, *Document of the Chair on Proposals Regarding Work for the Special Meeting: dedicated to evaluating and strengthening the negotiation process and proposing specific measures for addressing the topics in the American Declaration on the Rights of Indigenous Peoples December 2008*, GT/DADIN/doc.357/08 rev. 1 corr. 1, 24<sup>th</sup> of November 2008.

<sup>56</sup> UN Indigenous Declaration. Article 33(1).

<sup>57</sup> On the other hand, the fact that no characteristics were mentioned in the UN Indigenous Declaration shows rather clearly that there is no explicit consensus among the states and that most probably there is no customary practice when it comes to the characteristics of Indigenous Peoples.

doesn't mean that the provisions couldn't still be contested, but for now it has reached consensus among the drafting parties and its support will be tested when the vote on adoption of the American Draft Declaration reaches the OAS General Assembly, if it ever does.

## 2.4 The term Indigenous Peoples in Colombia and Peru

### 2.4.1 Colombia

In Colombia several terms are used when referring to Indigenous Peoples. The Colombian Constitution from 1991 uses three terms: *Indigenous Peoples*,<sup>58</sup> *Indigenous Communities*,<sup>59</sup> and *Native Communities*.<sup>60</sup> <sup>61</sup> All three terms refer to Indigenous Peoples and their content doesn't vary even if different terms are used. The Constitution clearly recognizes the existence of Indigenous Peoples within its territory.<sup>62</sup> Besides simply mentioning certain rights that the Indigenous Peoples shall enjoy, the Colombian Constitution recognizes in Article 7 the existence of these peoples and the need to protect them by stating that “[t]he state recognizes and protects the ethnic and cultural diversity of the Colombian Nation”.<sup>63</sup> On the other hand, the Constitution doesn't define any of the terms mentioned above.

Neither the Colombian legislation nor the jurisprudence of the domestic courts has provided a national definition to any of the terms referred to above. Instead it is possible to note that the authorities always point to the ILO 169 definition of the term.<sup>64</sup> The country has translated to Spanish and incorporated the whole text of the ILO 169 through law 21 of 1991; hence the convention is directly applicable in the country.<sup>65</sup> The lack of a clear domestic definition has given the authorities and the domestic courts the

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<sup>58</sup> Author's translation from Spanish: “*Pueblos Indígenas*”.

<sup>59</sup> Author's translation from Spanish: “*Comunidades Indígenas*”.

<sup>60</sup> Author's translation from Spanish: “*Comunidades Nativas*”.

<sup>61</sup> Constitución Política de la República de Colombia (hereafter Colombian Constitution), published in La Gazeta Constitucional No. 116, the 20th of July 1991.

<sup>62</sup> The Constitution is though not the only legislation that recognizes the existence of Indigenous Peoples, already *ley 89 de 1890, por la cual se determina la manera como deben ser gobernados los salvajes que vayan reduciéndose a la vida*, de 25 de noviembre 1890, recognizes the existence of Indigenous Peoples within its territory since it gives these peoples the right to be counted autonomously in the official census.

<sup>63</sup> Colombian Constitution, Article 7. Author's translation from Spanish: “*El Estado reconoce y protege la diversidad étnica y cultural de la Nación Colombiana*”.

<sup>64</sup> Among other the Colombian Ministry for Culture, *Pueblos indígenas*, available at <http://www.mincultura.gov.co/?idcategoria=26027>, visited the 5th of April 2012; or Departamento Nacional de Planeación, *Aspectos Básicos Grupo Étnico Indígenas*, February 2010, page 1.

<sup>65</sup> See *ley 21 de 1991, por medio de la cual se aprueba el Convenio número 169 sobre pueblos indígenas y tribales en países independientes, adoptado por la 76a. reunión de la Conferencia General de la O.I.T., Ginebra 1989*, adopted the 4th of March 1991, Diario Oficial No. 39.720., marzo 6 de 1991.

possibility to interpret the ILO 169 definition in disputed or borderline cases.

Difference of opinions on the interpretation of the ILO 169 definition is though clearly visible in the praxis of the authorities and the opinion of civil society. While the government of Colombia has officially recognized the existence of 87 Indigenous Peoples within its territory, the latest national census from 2005<sup>66</sup> recognizes that 93 Indigenous Peoples exist in Colombia. The Colombian Indigenous Organization<sup>67</sup> argues on the other hand that an even higher number, at least 102 Indigenous Peoples, can be found within Colombian territory.<sup>68</sup> This shows that the definition of the ILO 169 is interpreted in different ways and that the domestic courts will need to intervene even more in order to create a clear image of the scope of this term in Colombia.

## 2.4.2 Peru

Peru uses a range of different terms when dealing with Indigenous Peoples. The Peruvian Constitution<sup>69</sup> mentions in Article 191 the term “*native communities and aboriginal peoples*”.<sup>70</sup> The term “*farmer and native communities*” is used in Articles 88, 89 and 149.<sup>71</sup> Even if for example the former Peruvian Government of García Pérez argued that some of these groups shall not be recognized as Indigenous Peoples within the scope of the ILO 169,<sup>72</sup> later legislation has proven that also these group are included in the peoples to be considered to be Indigenous. Neither of the terms is clearly defined in the Constitution, but part of the content of the terms can be understood when studying some later Peruvian legislation dealing with Indigenous Peoples.

The latest and one of the most important Peruvian legislation acts that protects Indigenous Peoples’ rights is the Law on the Right to Prior Consultation with Indigenous and Native Peoples, to implement Convention 169 of the International Labour Organization (ILO) (hereafter Peruvian Law

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<sup>66</sup> Hernández Romero, Astrid, *La visibilización estadística de los grupos étnicos colombianos*, Departamento Administrativo Nacional de Estadísticas, 2005, available at [http://www.dane.gov.co/files/censo2005/etnia/sys/visibilidad\\_estadistica\\_etnicos.pdf](http://www.dane.gov.co/files/censo2005/etnia/sys/visibilidad_estadistica_etnicos.pdf), visited the 11th of May 2012.

<sup>67</sup> Author’s translation from Spanish: “*Organización Indígena de Colombia (ONIC)*”.

<sup>68</sup> Colombian Ministry for Culture, *supra* note 64.

<sup>69</sup> Constitución Política del Perú (hereafter Peruvian Constitution), adopted the 31<sup>st</sup> of December 1993, entered into force the 17<sup>th</sup> of November 2004, Ley No. 28389.

<sup>70</sup> Peruvian Constitution, Article 191. Author’s translation from Spanish: “*comunidades nativas y pueblos originarios*.”

<sup>71</sup> Peruvian Constitution, Articles 88, 89 and 149. Author’s translation from Spanish: “*comunidades campesinas y nativas*”.

<sup>72</sup> 142-2010-DP/SCM, García Pérez, Alan – Presidente Constitucional de la Republica & Velásquez Quesquén, Javier – Prime Minister, 21<sup>st</sup> of June 2010, section 6, page 7. In this document the former government of García Pérez argued that Andean and Coast farmers (author’s translation from Spanish: *Comunidades campesinas andinas y costeñas*) should not be considered to be Indigenous Peoples.

on Prior Consultation or PLPC).<sup>73</sup> This legislation identifies that “*indigenous and aboriginal peoples*” have the right to prior consultation.<sup>74</sup> The term is not defined in the legislation, but it does determine certain characteristics that these peoples have to fulfill:

- *Direct descendants of aboriginal peoples within the Peruvian territory;*
- *Spiritual and historical link to the territories they use or occupy;*
- *Own customs and institutions;*
- *Different lifestyles compared to those of the rest of the national population.*
- *Self-identification as indigenous or aboriginal communities.*<sup>75</sup>

Besides describing the characteristics or criteria of Indigenous and aboriginal peoples, the legislation goes further and mentions certain peoples that could be considered to fall within this term: “*farmer or Andean communities, and native communities or Amazonian peoples*”.<sup>76</sup> The legislation act mentions that the right to prior consultation is implemented within the framework of the ILO 169; no mentioning is though made about if the peoples that the legislation apply on also fall within the framework of the ILO 169.

A previous Peruvian legislation act that was proposed in 2004, but that was never enacted, also dealt with the definition of Indigenous Peoples. The Law on Aboriginal Peoples<sup>77</sup> specified that aboriginal peoples were composed of farmer and Indigenous communities, and other forms of independent organizations.<sup>78</sup> The legislation act continues by specifying that Indigenous Peoples exist in the coast, mountain and jungle areas of the country, but that also peoples living in urban areas and that identify themselves as Indigenous could be considered Indigenous within the framework of the mentioned legislation act.<sup>79</sup>

As can be seen from the examples above not only are several different terms used to describe Indigenous Peoples in Peru, but their acceptance has also varied depending of the Government in power. The view of the current President Ollanta Humala’s government, that all the above mentioned peoples shall be considered as Indigenous Peoples, seems the most correct,

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<sup>73</sup> Author’s translation from Spanish: “*Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio No 169 de la Organización Internacional del Trabajo (OIT)*”, Ley No. 29785.

<sup>74</sup> *Ibid.*, Article 7. Author’s translation from Spanish: “*pueblos indígenas u originarios.*”

<sup>75</sup> Peruvian Consultation Law, Article 7. Author’s translation from Spanish.

<sup>76</sup> Peruvian Consultation Law, Article 7. Author’s translation from Spanish: “*Comunidades campesinas o andinas, y comunidades nativas o pueblos amazónicos*“. The distinctive method of categorizing the Indigenous Peoples in Peru comes from a tradition to categorized these peoples according to in which part of the country they live or what kind of activities they commit.

<sup>77</sup> Anteproyecto de Ley de Pueblos Originarios, 18th of October 2004.

<sup>78</sup> Anteproyecto de Ley de Pueblos Originarios, Article 1. Author’s translation from Spanish: “*comunidades campesinas e Indígenas y otras formas de organización propia*”

<sup>79</sup> Anteproyecto de Ley de Pueblos Originarios, Article 5.



taking into consideration the description of the term Indigenous Peoples in the ILO 169.

## 2.5 Conclusions

As can be noted from the above chapter, several different international, regional and also national variations to the definition, description and use of the term Indigenous Peoples exist. The author does not find the clearly defining, nor the descriptive approaches to best take into consideration the flexibility and need of the Indigenous Peoples. Hence, in order to have a common understanding of the term in this thesis, the author suggests the following approach to the term: when using the term Indigenous Peoples in this thesis it shall be understood as a combination between the descriptive approach of the ILO 169's articles 1(1)(b) and 1(2), though also taking into consideration the different historical circumstances and cultural differences that affect or might have affected these peoples and that might not always be covered by the ILO 169 description. The Indigenous self-identification, both of the individual as well as of the group, shall be considered as the most fundamental criteria. This request for a flexible approach to the ILO 169 descriptive definition can also be found in the preamble of the UN Indigenous Declaration.<sup>80</sup>

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<sup>80</sup> Preamble of the UN Indigenous Declaration: “**Recognizing** that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.” Bold added by author; original text in italics.

## 3 Indigenous Peoples' right to land

### 3.1 The relationship between Indigenous Peoples and their land

It is widely recognized that most Indigenous Peoples live in a very special relationship with their lands.<sup>81</sup> Most Indigenous Peoples don't recognize land as a simple object that can be owned or measured in Peruvian Soles or Colombian Pesos. These peoples consider land to be something higher than human or living and that cannot be owned by Indigenous Peoples or any other individuals. Indigenous Peoples consider that they have the right to use these natural resources according to their traditions and beliefs, and that they hence need to respect them, especially so that also future generations are able to enjoy them. Indigenous Peoples are very much dependent on their lands and hence they take care and protect their natural recourse very carefully.<sup>82</sup>

The World Council of Indigenous Peoples has expressed itself about the special relationship between Indigenous Peoples and their land in the following way:

*The Earth is the foundation of Indigenous Peoples. It is the seat of spirituality, the foundation from which our cultures and languages flourish. The Earth is our historian, the keeper of events and the bones of our forefathers. Earth provides food, medicine, shelter and clothing. It is the source of our independence, it is our mother. We do not dominate her: we must harmonize with her. Next to shooting indigenous peoples, the surest way to kill us is to separate us from our part of the Earth.*<sup>83</sup>

The lands of Indigenous Peoples are linked not only with the mere physical existence of these peoples, but also the spiritual and cultural existence. It is true that most Indigenous Peoples live from fruits of their lands,<sup>84</sup> but to most Indigenous Peoples these natural resources also give them the spiritual reason to exist. Indigenous Peoples worship *Pachamama*,<sup>85</sup> *Tata Inti*,<sup>86</sup>

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<sup>81</sup> Doyle, Cathal & Gilbert, Jérémie, "A new dawn over the land: Shedding Light on Collective Ownership and Consent", in Allen, Stephen & Xanthaki, Alexandra (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford, 2011, page 289.

<sup>82</sup> Das, J.K., *Human Rights and Indigenous Peoples*, A.P.H. Publishing Corporation, New Delhi, 2011, pages 59 and 60.

<sup>83</sup> Burger, Julian: *Report from the frontier: The state of world's Indigenous Peoples*, Zed Books, London, 1987, page 14. Bold added by author; original text in italics.

<sup>84</sup> A large part of Indigenous Peoples live on very basic agriculture, but also hunting, fishing and collecting the fruits of earth. Hence the access to the lands they have traditionally used or occupied is essential. See also Das, *supra note* 82, page 60.

<sup>85</sup> "Mother earth" in Quechua.

*killa*<sup>87</sup> and other nature gods; they worship landscapes, mountains and other natural formations; they make sacrifices to their gods so that the agriculture and hunting shall be prosperous; they believe their gods' communicate to them through natural phenomenon like earthquakes, solar and eclipses. Most Indigenous Peoples' spiritual believes, their traditions and cultures are linked to the areas where their ancestors have traditionally habited.<sup>88</sup>

Indigenous Peoples' efforts to protect their current lands or regain lands they have lost throughout history are not simple demands for property or a source of income; it's a demand for their right to their traditional existence.<sup>89</sup> Land is where Indigenous Peoples seek the meaning with their existence, it's the channel through which knowledge has been transferred from one generation to another and it plays a central role in most of the Indigenous Peoples' holy myths and traditions. Land is hence a bank where Indigenous Peoples store and develop their traditions, history, cultures and identities.

Special Rapporteur Martinez Cobos has also stated in his study on the problems that Indigenous Peoples face that:

*It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture... for such people, the land is not merely a possession and a means of production... Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.*<sup>90</sup>

Hence, if Indigenous Peoples are denied the access to these ancestral lands, their possibility to express their culture and traditions are at risk. Expressing their culture is one the ways Indigenous Peoples maintain their heritage alive; if deprived from this possibility these cultures will most probably lack existing. The lack of access to land in itself does not hinder the continuation of culture in general, but it does puts a limit to the Indigenous Peoples' possibility to express themselves as they have traditionally done.

Indigenous Peoples' right to land is also essential in the sense that it is not only an independent right; the right is complex and intervenes with also other rights of these peoples. It can become very hard for Indigenous Peoples to enjoy their other Human Rights if the right to land is not fulfilled and respected. Hence the right to land becomes a pre-requirement for a

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<sup>86</sup> "Father sun" in Quechua.

<sup>87</sup> "Moon" in Quechua.

<sup>88</sup> Das, *supra* note 82, page 59.

<sup>89</sup> *Ibid.*, page 60.

<sup>90</sup> Martinez Cobo, José, *Study on the Problem of Discrimination Against Indigenous Populations*, Report submitted by the Special Rapporteur Mr. José Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Document No.E/CN.4/Sub.2/1986/7/Add.1, paragraphs 196 and 197.

number of other Indigenous rights to be accomplished.<sup>91</sup> Among others, Professor Pablo Gutiérrez Vega<sup>92</sup> has stated that Indigenous Peoples will not be able to fully enjoy, among other things, the right to self-determination unless they also fully enjoy their right to land.<sup>93</sup> For Indigenous Peoples the right to self-determination involves both the rights of the individuals as well as of the community, meaning that these subjects have the right to take decisions on their future in accordance with their own priorities and interests. The right to self-determination is also linked with the right to prior consultation. Decisions affecting the lives of Indigenous Peoples intervene directly with their right to freely decide on their own priorities for the future. This explains partially why the recognition of former and current lands has been one of the strongest and loudest demands by Indigenous Peoples in the last two – three decades; without a proper protection of the right to land it becomes very hard to also be able to secure the protection of also other Indigenous rights.

The UN, international instruments as well as national documents and statements recognize the important link between Indigenous Peoples and their lands.<sup>94</sup> In Article 13 of the ILO 169 it is stated that: “[g]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories... and in particular the collective aspects of this relationship.”<sup>95</sup> The UN Indigenous Declaration on the other hand states in Article 25 that: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>96</sup> The bodies of the ILO reiterate often the existence of a close relationship and few, if anybody, challenges the actual need for special measures to protect this relationship.<sup>97</sup> The UN Permanent Forum on Indigenous Issues has also underlined the importance of the land for Indigenous Peoples.<sup>98</sup>

The Inter-American Commission for Human Rights (hereafter IACHR) and the Inter-American Court for Human Rights (hereafter IACtHR), both

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<sup>91</sup> Gutiérrez Vega, Pablo: *The Indigenous and the Environment: On the Environmental Rights of the Indigenous Populations*, guest lecture at Åbo Akademi University’s Institute for Human Rights, the 28<sup>th</sup> of March 2008.

<sup>92</sup> Professor Gutiérrez Vega is an associated professor at the law department of the University of Sevilla, Spain.

<sup>93</sup> Gutiérrez Vega, *supra* note 91.

<sup>94</sup> Åhren, Mattias, “The Provision on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction”, in Charters, Claire & Stavenhagen, Rodolfo (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, International Working Group for Indigenous Affairs (hereafter IWGIA), Copenhagen, 2009, pages 202 and 203.

<sup>95</sup> ILO 169, Article 13.

<sup>96</sup> ILO 169, Article 25.

<sup>97</sup> ILO, *supra* note 3, page 91, and ILO, *supra* note 1, page 29.

<sup>98</sup> Doyle & Gilbert, *supra* note 81, page 291, footnote 7.

bodies of the OAS, have also recognizes this special relationship.<sup>99</sup> In the *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* case (hereafter *Awas Tingni* case),<sup>100</sup> one of the most important Indigenous land right cases within the Inter-American Human Rights system, the Court stated that: “... *the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*”<sup>101</sup> Similar provisions can also be found in other judgments of the IACtHR.<sup>102</sup> The IACtHR has further stated in the *Awas Tingni* case that “*the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities [regarding the right to land] is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.*”<sup>103</sup>

On the national level we can see that in the Colombian case the Governmental institutions when dealing with Indigenous Peoples often refer to the special relationship that these peoples have with their ancestral lands, and that this in fact is one of the characteristics that differentiate them from other peoples within the Colombian territory.<sup>104</sup> A similar approach was unfortunately not possible to be found among the statements of the Peruvian authorities.

Taking into consideration the direct link between the mere existence of Indigenous Peoples and their access to their ancestral lands, it is not hard to understand why much of the focus of the Indigenous movement has been put on the demand for land rights. Throughout history Indigenous Peoples have been deprived of their ancestral lands, and also in the cases of

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<sup>99</sup> Organization of American States’ (hereafter OAS) Inter-American Commission on Human Rights (hereafter IACHR), *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II., Doc. 56/09, adopted the 30<sup>th</sup> of December 2009.

<sup>100</sup> Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (hereafter *Awas Tingni* case), Inter-American Court of Human Rights (hereafter IACtHR), Judgement of the 31<sup>st</sup> of August 2001.

<sup>101</sup> *Ibid.*, paragraph 149. The IACtHR has also in later judgments recognized the special and important relationship between Indigenous Peoples and their lands. See, among other cases, the case of the *Yakey Axa Indigenous Community v. Paraguay* (hereafter *Yakey Axa* case), IACtHR, Judgement of the 17<sup>th</sup> of June 2005, and case of the *Plan de Sánchez Massacre v. Guatemala* (hereafter *Plan de Sánchez* case), IACtHR, Judgement of the 19<sup>th</sup> of November 2004.

<sup>102</sup> Case of the *Sawhoyamaxa Indigenous Community v. Paraguay* (hereafter *Sawhoyamaxa* case), IACtHR, Judgement of the 29<sup>th</sup> of March 2006, paragraph 118, and *Yakey Axa* case, paragraph 137.

<sup>103</sup> *Awas Tingni* case, *supra* note 100, paragraph 121.

<sup>104</sup> Colombian Ministry for Culture, *supra* note 64.

Colombia and Peru these peoples have lost most parts of their lands during or after the Spanish colonization.<sup>105</sup> Additionally to this, these peoples were before the last two or three decades not well protected under International Law and it is only very recently that they have got the legal framework and strong political recognition that makes it possible for them to protect and claim back their ancestral lands.

## 3.2 International standards

### 3.2.1 Introduction

The Indigenous Peoples' right to land is today recognized as a Human Right.<sup>106</sup> The right was for a very long time debated, but the recognition in the last two decades is significant due to hard lobbying from Indigenous movements and their supporters. Even the UN organization has in the last two decades improved their work with Indigenous Peoples and the recognition of the right to land. The recognition of the right as a Human Right has been of essential importance and it has had very positive implications for Indigenous Peoples.<sup>107</sup>

The World Council of Indigenous Peoples drafted in 1984 a declaration stating some of their main principles for the protection of Indigenous Peoples' rights. As can be seen, among the main principles several dealt with land and natural resources:

- *Indigenous peoples shall have exclusive rights to their traditional lands and its resources;*
- *Where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned;*
- *The land rights of an indigenous people include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law;*
- *No action or course of conduct may be undertaken which directly or indirectly, may result in the destruction of land, air,*

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<sup>105</sup> Preamble of the UN Indigenous Declaration: "*indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.*"

<sup>106</sup> Lillian Aponte, Miranda, "The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law", *Lewis & Clark Law Review*, Volume 11, Number 1, 2007, page 141. See also Åhren, *supra note* 94, page 204.

<sup>107</sup> Lillian Aponte, *Ibid.*, page 142.

*water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected.*<sup>108</sup>

Especially the second bullet dealing with returning of lands that have been taken away from Indigenous Peoples without their consent has been controversial. Without a more specific explanation this would mean that Indigenous Peoples that lost their lands during the Spanish colonization should have the right to claim them back today. As we will see below, neither the ILO 107 nor the ILO 169 support the returning of such Indigenous lands, even if the land was taken from the peoples without their free consent.<sup>109</sup> The only clear exception to this rule is when the loss of land has taken place in *recent times*.<sup>110</sup>

### 3.2.2 The ICCPR and the ILO Conventions

Article 27 of the UN' International Covenant on Civil and Political Rights (hereafter ICCPR) state that “...States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” Even if Indigenous Peoples are not as such mentioned in the Article, they still fall within the scope of the Article since they often besides being Indigenous also are consider to be minorities within the countries in which they live.<sup>111</sup> The ICCPR is not the most important binding Human Rights instrument for Indigenous Peoples and hence this thesis will not go further than recognizing that also the ICCPR and the UN Human Rights Committee give Indigenous Peoples additional legislative substance to protect their lands and culture.

Before going into the ILO Conventions it should be mentioned that the right to land is directly linked with two other sets of rights: cultural rights and property rights.<sup>112</sup> The ILO Conventions, the ICCPR, the UN Indigenous Declaration and in any other instrument that deals with Indigenous Peoples' right to land links hence this right with either culture or property.

Simplifying the connection of each right it could be said that Indigenous Peoples' right to land is linked with the right to culture due to the fact that

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<sup>108</sup> Declaration of the World Council of Indigenous Peoples at the Fourth General Assembly of the World Council of Indigenous Peoples (hereafter WCIP), September 1984, UN Doc. E/CN.4/Sub.2/1985/22/ Annex. III, Principles 9, 10 and 12, as quoted by Das, *supra note* 82, pages 58 and 59.

<sup>109</sup> As we will see below though, the interpretation of the ILO Conventions has today lead to the claims of some Indigenous Peoples and scholars to all previously lost lands, without mattering when the land was lost.

<sup>110</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations' (hereafter CEACR) use of the term *in recent times* will be discussed below in chapter 3.2.2.3.

<sup>111</sup> Åhren, *supra note* 94, page 203.

<sup>112</sup> *Ibid.*, pages 202 and 204.

Indigenous peoples have the right to express and develop their own cultures, something that would, for most Indigenous Peoples, not be possible without access to their lands. On the other hand the right to land is linked with the right to property since Indigenous Peoples have in many cases occupied certain lands for a very long period of time and in most domestic legislations this would lead to the official acquiring of that property. In the latter case, if Indigenous Peoples don't enjoy the right to property on the same terms as the rest of society, a different treatment could amount to a violation of the right to non-discrimination.<sup>113</sup> Taking into consideration these two aspects of the right to land it is now appropriate to identify how the ILO Conventions and other international instruments deal with the right to land and how the two aspects are taken into consideration.

The two ILO Conventions, ILO 107 and ILO 169, are the only international binding instruments that grant specifically Indigenous Peoples the right to land. The older convention, ILO 107, is very general in its approach since in its Article 11 it simply states that: "*The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.*"<sup>114</sup> Besides this provision, the convention deals in Article 12 with removal of Indigenous Peoples from their lands, in Article 13 with the transmission of Indigenous Peoples' land rights and in Article 14 with agrarian programs for Indigenous Peoples. Since the ILO 107 does not apply in the cases of Colombia or Peru,<sup>115</sup> the above-mentioned article is not directly relevant for this thesis, except for the comparative value it has.<sup>116</sup>

In the general provisions of the ILO 169 it is mentioned that states shall adopt special measures "*as appropriate for safeguarding the property... cultures and environment*" of Indigenous Peoples and that "*[s]uch special measures shall not be contrary to the freely-expressed wishes of the peoples concerned*".<sup>117</sup> Hence states shall adopt special measures to protect the land of Indigenous Peoples, since the land is where these peoples develop their culture and their lands is the environment in which they inhabit.

In the ILO 169 a full chapter, in the convention called *Part II*, is dedicated to the land rights of Indigenous Peoples. The chapter on land rights is the second chapter right after the chapter covering the General Policy and includes Articles 13 to 19.<sup>118</sup> Even if the ILO was the UN agency responsible for the drafting of the two ILO Conventions and is still today the agency responsible for the implementation of these conventions, the chapter

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<sup>113</sup> *Ibid.*, pages 203 and 204.

<sup>114</sup> ILO 107, Article 11.

<sup>115</sup> Both countries have ratified the ILO 169.

<sup>116</sup> Comparing the provisions on land rights of the ILO 107, the ILO 169 and the UN Indigenous Declaration one can appreciate a significant development of the right in International Law.

<sup>117</sup> ILO 169, Articles 4(1) and 4(2).

<sup>118</sup> ILO 169, Part II (Articles 13 – 19).



covering labor rights is dealt with after the land rights; this partially shows the priority that land rights was given in the ILO 169.<sup>119</sup>

Article 13(2) of the ILO 169 clarifies that *land* shall not only be understood as the mere surface, but also as *territory*, which includes the total environment on the areas occupied or used by the indigenous peoples.<sup>120</sup> This is especially important since Indigenous Peoples should not only have right to access to the lands they have traditionally occupied or used, but also to the natural resources on these lands. Article 15 of the ILO 169 though limits the rights of Indigenous Peoples and states that states can withhold the right to ownership of mineral, sub-surface or other resources on their lands.<sup>121</sup> Even if the latter would apply, the Indigenous peoples always have the right to participate in the use, management and conservation of the resources.<sup>122</sup>

Indigenous Peoples have though argued against the above mentioned approach claiming that also natural resources and subsurface rights should be part of the right to land. As was already quoted above, the World Council of Indigenous Peoples stated in its declaration that Indigenous Peoples shall have surface, subsurface and other material rights on the lands they have traditionally occupied or used. The ILO 169 does not support nor hinder this view; it is hence left up to the states to decide on their own the approach that they will implement on the national level. The UN Indigenous Declaration though does limit the right by stating that “*Indigenous peoples have the right to the lands, territories and resources which they have **traditionally** owned, occupied or otherwise used or acquired.*”<sup>123</sup> Indigenous Peoples have traditionally not owned or used sub-surface resources and hence these fall out of the scope of the right to land. With the provisions of the UN Indigenous Declaration being clear it seems rather hard to argue that Indigenous Peoples should have right to also other than land and surface resources, also in the ILO 169.

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<sup>119</sup> One may wonder why the ILO, the UN agency specialized in labor rights and labor issues, was given and is still today entrusted with the task to follow the situation of Indigenous Peoples in the world. The historical explanation is that the ILO was one of the first UN agencies to identify the gross discrimination that Indigenous Peoples were undergoing, especially at work. The agency studied the discrimination finding also other gross violations of Indigenous Peoples’ rights and was later given the mandate by the whole UN organization to from then on take care of Indigenous Peoples’ issues. Even if other UN agencies today work with Indigenous Peoples’ rights and assisted in the drafting of the ILO Conventions (among others the Food and Agriculture Organization of the UN (hereafter FAO), UNESCO, and the UN’s World Health Organization (hereafter WHO) are mentioned in the preamble of the ILO 169), the ILO still remain the most important UN agency for Indigenous Peoples since it is the ILO that is responsible for the implementation of the two ILO Conventions.

<sup>120</sup> ILO 169, Article 13(2).

<sup>121</sup> ILO 169, Article 15(2). The financial value of natural resources on certain Indigenous lands is so high that states when drafting the ILO 169 refused to give away the control over these natural resources. It is though very common in the Latin American context that the states are the owners of the sub-surface resources.

<sup>122</sup> ILO 169, Article 15(2).

<sup>123</sup> UN Indigenous Declaration, Article 26(1). Bold added by author; original text in italics.

The main part of the right to land can be found in Article 14 of the ILO 169. The Article states that:

1. *The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised... [M]easures shall be taken... to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities...*
2. *Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*
3. *Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.*<sup>124</sup>

As can be seen, it is stated that states shall recognize Indigenous Peoples' land as their possessions. This does not only cover land that they presently possess or occupy, but also land that they have traditionally had access to. The intent of this provision was clearly to safeguard the situation of nomadic people that might not regularly have access or occupy a certain land. The situation is though also important for such Indigenous Peoples that might recently have been reallocated from their traditional land. The Indigenous Peoples' right to land shall though only be understood as the land that they use or have access to, that they have traditionally used or had access to, or that they have recently lost or been reallocated from. It is important to note that the loss or reallocation has been interpreted as to have had to happen *in recent times*.<sup>125</sup> Without actually defining more precisely how *in recent times* shall be understood, the convention doesn't seem to protect land lost a *long time ago*.<sup>126</sup>

Article 14 covers the two types of rights that are connected to the right to land. The first part of the paragraph establishes the right to land seen from the property aspect – the peoples have for a period of time occupied and used the land, hence they should have the right to it.<sup>127</sup> The second sentence of the first paragraph on the other hand establishes the rights to land connected with its cultural value – the peoples have used the lands for their subsistence and traditional activities hence the land should be recognized as Indigenous and protected in order for those peoples that express themselves

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<sup>124</sup> ILO 169, Article 14.

<sup>125</sup> ILO, *supra* note 3, page 94.

<sup>126</sup> The IACtHR has though dealt with this issue in the *Sawhoyamaxa* case where it came to the conclusion that "...the spiritual and material basis for indigenous identity is mainly supported by their unique relationship with their traditional lands. As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse." See the *Sawhoyamaxa* case, paragraph 131.

<sup>127</sup> ILO 169, Article 14(1).

through their lands to be able to continue practicing their traditional activities also in the future.<sup>128</sup>

Even if the reallocation of Indigenous Peoples is prohibited, unless it is done after the affected Indigenous Peoples' consent, this has happened throughout history. Due to this the second sentence of the second paragraph of Article 14 tries to cover these situations.<sup>129</sup> As shown above, it becomes important to establish if the reallocation happened *in recent times* or a long time ago. If reallocated recently the Indigenous Peoples should have the right to claim back their lands; if reallocated a long time ago, it will be more difficult to claim this rights. Indigenous Peoples are though still today claiming lands they lost very long time ago. This is not directly supported by the wording of the ILO 169 and states haven't been too willing to accept these demands.<sup>130</sup> Both Indigenous Peoples and NGO's working with Indigenous issues have expressed that at least their "*desire to regain possession and control of sacred sites must always be respected*".<sup>131</sup>

The second paragraph is quite clear in its wording: states have the duty to actively assist Indigenous Peoples in the process to maintain ownership and possession rights of their traditional lands. There is on the one hand a duty to assist in the identification of Indigenous Peoples' lands, and on the other hand there is a duty to guarantee effective protection of this established ownership or possession, for example through legislative measures. Paragraph 3 in the Article underlines the need for appropriate methods to resolve land claims by Indigenous Peoples. These methods shall of course take into consideration the traditions and legal systems of the indigenous peoples.

The right to property is though not absolute. In cases where the general interest of society as a whole can be argued to rule over the interests of the Indigenous Peoples, the rights to property of the latter can be restricted upon. The expropriation or limitation of the property or the reallocation of the Indigenous Peoples has to though always take into consideration the Indigenous Peoples affected by these decisions and after consultation with the affected peoples offer them territorial or monetary compensation.<sup>132</sup>

### 3.2.3 UN declarations

Even if the UN Indigenous Declaration is the most relevant non-binding instrument for Indigenous Peoples, also another UN declaration could

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<sup>128</sup> ILO 169, Article 14(2).

<sup>129</sup> ILO 169, Article 14(2).

<sup>130</sup> Das, *supra note* 82, page 63.

<sup>131</sup> Hannum, Hurst, "New Developments in Indigenous Rights", *Virginia Journal of International Law*, Volume 28, No. 649, 1988, pages 669 and 70. See also UN Indigenous Declaration, Articles 11 and 12.

<sup>132</sup> As we will see below there might though be cases where revoking of the property is not allowed in any cases, unless the affected Indigenous Peoples give their consent.

become relevant: the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>133</sup> Indigenous Peoples are not mentioned in the UN Minority Declaration, and they can't either as such be seen as minorities since the latter instrument deals with individuals not peoples.<sup>134</sup> Indigenous individuals though still fall in many cases within many of the groups that the UN Minority Declaration deals with: at least National, Ethnic and Linguistic minorities. In the UN Minority Declaration's first Article it is stated that:

*States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.*<sup>135</sup>

For Indigenous Peoples the most effective way to protect their cultures is the protection of their land rights, and hence it can be argued that also this right can fall within the obligations that are imposed on states within the UN Minority Declaration. It is also relevant to point out that Article 1 underlines the preservation of the identity of the minorities, not only the mere physical existence.<sup>136</sup> Since the identity of the Indigenous Peoples is directly linked with their access to their ancestral lands, the declaration is again relevant when demanding Indigenous land rights.

The most important instrument is though the UN Indigenous Declaration that was adopted in 2007, after over 25 years of drafting. As the long drafting time period can show, there were certain rights that were very much debated and the mere adoption of the new UN Indigenous Declaration in itself did not unify all of these different views.<sup>137</sup> There are still today many parts of the Indigenous Peoples' rights that are not very precise and that have been left up to the states to interpret. This is not the best option, but it

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<sup>133</sup> UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereafter Minority Declaration), adopted by the GA the 18<sup>th</sup> of December 1992, Resolution A/RES/47/135.

<sup>134</sup> It is important to note that while the UN Indigenous Declaration deals with both individual and group rights, the UN Minority Declaration only deals with individual rights. Another important difference to take into consideration is that while minorities are considered minorities within the majority of society, Indigenous Peoples in many cases construct their views on society as belonging to a society separate to that of the dominant one. Hence the UN Minority Declaration only applies to Indigenous individuals and only in cases where these can be argued to being a minority within the majority of society. See Åhren, *supra* note 94, pages 201 and 202.

<sup>135</sup> Minority Declaration, Article 1(1).

<sup>136</sup> Minority Declaration, Article 1. For the recognized importance of cultures and the preservation of them see the Cultural Diversity Declaration, Articles 1 and 4.

<sup>137</sup> Even if several topics raised a lot of discussion throughout the drafting process of the UN Indigenous Declaration, the final proposed version was accepted by the GA with 143 votes in favor (among them Peru), 4 against (USA, Canada, Australia and New Zealand – all these countries have by today changed their votes and are now in favor) and 11 abstains (among them Colombia, who recently has also accepted the declaration, though making some controversial reservations to it). Hence the support for the declaration by the GA was in the end very strong.

has become many times the only option due to the impossibility to find a common standing point among the UN member states.

The UN Indigenous Declaration is not binding as such since it's only a declaration, but it's a step forward in the interpretation of International Law since it clearly shows the development of International Law on Indigenous Peoples' rights.<sup>138</sup> International Human Right bodies as well as national authorities have already recognized the importance and interpreted the UN Indigenous Declaration in several occasions; hence the instrument has taken an important place in International Law together with the two ILO Conventions.

The Preamble of the UN Indigenous Declaration states that the GA is: "*[c]onvinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions...*"<sup>139</sup> This statement clearly shows that Indigenous Peoples are capable of making the necessary decisions regarding their environment and that their right to self-determination will lead to the protection of their institutions, cultures and traditions. It must be understood as Indigenous Peoples are themselves in the best position to identify their own needs. Hence these peoples should be consulted on these matters, prior to any legislative or administrative measures. The next paragraph of the Preamble also states that the "*respect of Indigenous knowledge... contributes to sustainable and equitable development and proper management of the environment*".<sup>140</sup> Hence Indigenous Peoples have knowledge that is valuable not only within their own communities but also for whole humankind. It is clear that states should take measures in order to secure that Indigenous Peoples themselves take all decisions that are related to their own lands and existence.

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<sup>138</sup>Special Rapporteur James Anaya has stated in his report that "*[a]lbeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States... and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.*" Anaya, S. James, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, A/HRC/9/9, the 11<sup>th</sup> of August, 2008, Paragraph 41.

<sup>139</sup> UN Indigenous Declaration, preamble.

<sup>140</sup> See also UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted the 20<sup>th</sup> of October 2005, entered into force the 18<sup>th</sup> of March 2007, 2440 UNTS 311, Preamble: "*Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development...*", and Article 2(3), on the Principle of equal dignity of and respect for all cultures, "*The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.*"

The most core articles dealing with the right to land of Indigenous Peoples in the UN Indigenous Declaration are Articles 25, 26 and 28. Article 26 contains three different paragraphs stating that:

1. *Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
2. *Indigenous Peoples have the right to own, use, develop and control the lands... that they possess... or use, as well as those which they have otherwise acquired.*
3. *States shall give legal recognition and protection to these lands.... Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*<sup>141</sup>

In the same way as Article 14 of the ILO 169, also the UN Indigenous Declaration separates the cultural and property aspects of the right to land. While the first paragraph in Article 26 of the UN Indigenous Declaration deals with the cultural aspects of the right to land, paragraph two of the same article deals with the property aspect of the right.<sup>142</sup> The Article though clearly expands the right to land of Indigenous Peoples compared to Article 14 of the ILO 169. While the right to land in ILO 169 only affected lands that Indigenous Peoples own, occupy or use, or that they have lost recently, the UN Indigenous Declaration's Article 26 does not time-wise limit the loss of the lands. On the other hand it could also be argued that the Declaration doesn't actually introduce any new provisions but that it simply codifies common current praxis.<sup>143</sup> Reading the first and second paragraph of the Article 26 together, it could be argued that the first actually limits the second one time-wise. This is the approach that most scholars and states have adopted.<sup>144</sup> Still some scholars argue that the ILO 169 as well as International Law has evolved during this time and that today cases of Indigenous lands that were lost long time ago could also be covered by the UN Indigenous Declaration.<sup>145</sup>

It is important to point out though that the first paragraph of Article 26 is general in its approach mentioning that Indigenous Peoples have the right to the lands they currently occupy, or that they have traditionally occupied or used. The second paragraph on the other hand clearly marks out that Indigenous Peoples have the right to "own" the lands, but in this paragraph only lands that they possess or have acquired is mentioned, hence not taking into consideration lands that Indigenous Peoples don't possess or use at the

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<sup>141</sup> UN Indigenous Declaration, Article 26.

<sup>142</sup> Åhren, *supra note* 94, page 209.

<sup>143</sup> Åhren, *supra note* 94, page 212.

<sup>144</sup> Xanthaki, Alexandra, "Indigenous Rights in International Law over the Last 10 Years and Future Developments", *Melbourne Journal of International Law*, Volume 10, Issue 1, 2009, page 36; and Davis, Megan, "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples", *Melbourne Journal of International Law*, Volume 9, Issue 2, 2008, page 465.

<sup>145</sup> Åhren, *supra note* 94, page 212.

moment. Even if it could be seen as Indigenous Peoples don't have the right to claim ownership to the lands they have traditionally owned, but have lost against their own free will, this perception is wrong since Article 28 deals exclusively with the restitution of lands lost against their free will. As was mentioned earlier Indigenous Peoples though have, according to the ILO 169, the right to lands they have lost in recent times.

Article 28 of the UN Indigenous Declaration, which is unique in the sense that a similar Article can't be found in the ILO 169, states that:

1. *Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*
2. *Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources.*<sup>146</sup>

Even if the ILO 169 does not contain a similar article, the ILO Committee of Experts on the Application of Conventions and Recommendations – Section on Indigenous and Tribal Peoples (hereafter CEACR) has later pointed out that Indigenous Peoples under the ILO 169 have a general right to restitution in certain cases. These cases arise especially when Indigenous Peoples have recently lost land they have traditionally occupied.<sup>147</sup> Hence there is not in practice a big difference between the content of the ILO 169 and the UN Indigenous Declaration on restitution of lost lands.

In general the UN Indigenous Declaration does not present any new rights for Indigenous Peoples, neither does it expand any of the existing ones; the UN Indigenous Declaration simply codifies already existing provisions.<sup>148</sup> The importance of the UN Indigenous Declaration must still be recognized taking into consideration that it's a modern instrument that received almost unanimous support. The instrument also clearly shows how the rights of Indigenous Peoples have evolved from the time when the ILO 169 was drafted, to how these provisions are understood and implemented in International Law today.

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<sup>146</sup> UN Indigenous Declaration, Article 28.

<sup>147</sup> ILO, *supra note 1*, page 30.

<sup>148</sup> Åhren, *supra note 94*, page 212.

## 3.3 Regional praxeses

### 3.3.1 The American Declaration and the American Convention on Human Rights

In the American Declaration of the Rights and Duties of Man (American Declaration), Article XXIII deals with the right to property. The article stipulates that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>149</sup> The American Declaration is not binding, but the IACtHR has interpreted it as a source of international legal obligations for the member states of the OAS and hence it has an interpretative importance in the Inter-American Human Rights system. The Article is rather different from the article related to the right to property in the American Convention on Human Rights (hereafter ACHR)<sup>150</sup> or in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR).<sup>151</sup> The American Declaration though sets some restrictions on all rights: “*The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.*” It is questionable whether this actually applies to all of the rights in the American Declaration since at least some of them have reached the status of *Jus Cogens*.<sup>152</sup> The right to property can though not be said to yet be a *Jus Cogens* in International Law or in the Inter-American Human Rights system.

The ACH, which has been ratified by both Colombia and Peru, has in its Article 21 stipulated the right to property. The article is quite similar to the first article of the first Optional Protocol of the ECHR.<sup>153</sup> The ACHR Article 21 states that:

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

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<sup>149</sup> American Declaration on the Rights and Duties of Man (hereafter American Declaration), adopted by the Organization of American States the 30<sup>th</sup> of April 1948, O.A.S. Res. XXX, Article XXIII.

<sup>150</sup> American Convention on Human Rights (hereafter ACHR), adopted the 22<sup>nd</sup> of November 1969, entered into force the 18<sup>th</sup> of July 1978, 1144 UNTS 123, OAS Treaty Series No. 36, 9 ILM 673 (1970), Article 21.

<sup>151</sup> (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ACHR), adopted the 4<sup>th</sup> of November 1950, entered into force the 3<sup>rd</sup> of September 1953, ETS 5, 213 UNTS 221.

<sup>152</sup> The ACHR defines in Article 27(2) that certain rights are not derogable under any circumstances. In this list, the right to property is not mentioned. The recognition of the right has neither reached the same level as the rights listed as non-derogable. Hence it could be hard to argue that the right to property could have reached a *Jus Cogens* status in the Inter-American Human Rights system.

<sup>153</sup> (Optional) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted the 20<sup>th</sup> of March 1952, entered into force the 18<sup>th</sup> of May 1954, ETS 9, Article 1.



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

3. *Usury and any other form of exploitation of man by man shall be prohibited by law.*<sup>154</sup>

Even if the wording of the Article may refer to the individual's right to property, *his property*, the Inter-American Court of Human Rights has in the *Awás Tingni* case concluded that also collective property such as the one of Indigenous Peoples' property fall within the scope of the Article.<sup>155</sup> Hence in that case the IACtHR recognized that the Article when applied on Indigenous Peoples' lands could be seen as apply also to collective or communal property.<sup>156</sup>

It should be noted that the IACtHR in the *Awás Tingni* case and in later cases, read the Article 21 of the ACHR in the light of the obligations of the governments towards their Indigenous Peoples, taking into consideration the international standards of the ILO 169. Hence, the IACtHR has used the ILO 169 in order to interpret the scope of the ACHR and to further develop the understanding and protection of Indigenous Peoples' rights in the Americas. As will be shown below and in the following chapter, the IACtHR has in the last ten years been involved in a high number of other important cases dealing with Indigenous Peoples' land and other rights.

### 3.3.2 The American Draft Declaration

In the Americas, the IACHR has been working for a longer period of time on the drafting of the American Draft Declaration. The work on drafting the American Draft Declaration started already prior to the drafting of the UN Indigenous Declaration, but still today there are several issues debated between the member states of the OAS. The adoption of the UN Indigenous Declaration gave hope that also the American Draft Declaration would reach agreement and that it could be adopted, but this has not been the case so far. The continuous work with the drafting of the instrument is though important since the document elaborates on certain issues not much developed in the UN Indigenous Declaration.<sup>157</sup> The continuous work is also important taking into consideration that countries such as the USA and Canada that haven't ratified the ILO 169 and formerly objected to the adoption of the UN Indigenous Declaration are at the moment taking part of the drafting of

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<sup>154</sup> ACHR, Article 21.

<sup>155</sup> *Awás Tingni* case.

<sup>156</sup> Courtis, Christian, "Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous", *International Journal on Minority and Group Rights*, Volume 18, No. 4, 2011, page 444.

<sup>157</sup> In general the American Draft Declaration is more specific than the UN Indigenous Declaration or the ILO Conventions, which adds a value to the understanding of the provisions in the earlier adopted and already approved instruments.

the American Draft Declaration, hence trying to find a version that would also be acceptable for them. To find such an agreement would be useful not only for Indigenous Peoples in the above mentioned countries, but also for Indigenous Peoples in the entire region and maybe even beyond.

Even if the American Draft Declaration has not yet been adopted, a considerable amount of the articles and provisions have already found consensus or been approved<sup>158</sup> and hence the American Draft Declaration already gives an idea on where the OAS member states stand on Indigenous Peoples' rights' issues. Unfortunately the provisions dealing with land rights are among the most debated ones and hence very few of them have yet reached consensus or been approved. A minor number of them have though already reached consensus or been approved and hence the most relevant of these provisions will be presented below.<sup>159</sup>

The preamble recognizes the special relationship between Indigenous Peoples and their lands,<sup>160</sup> as well as the general contribution that Indigenous Peoples and their knowledge gives to mankind.<sup>161</sup> Article XII(1), dealing with cultural identity, states that "*Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible...*".<sup>162</sup> The second paragraph of the same article has not been approved yet, but it deals with the reparation and restititon of the cultural heritage of Indigenous Peoples, in the cases where these peoples have been dispossessed from their cultural heritages against their will.<sup>163</sup> Article XV(3), dealing with Indigenous spirituality, recognizes that Indigenous Peoples have the right to their sacred sites and objects, but the member states have not yet been able to find a consensus on the extent of this right.<sup>164</sup> Article XVIII(2) of the American Draft Declaration, dealing with healthy environment, states that "*Indigenous peoples have the right to conserve, restore, recover, manage, use, and protect the environment, and to the sustainable management of their lands*".<sup>165</sup> This provision has also been proposed to include "territories" and "resources", but these proposals have not yet been approved.

The Article XXIV of the American Draft Declaration deals with the right to land, territory and resources.<sup>166</sup> Unfortunately neither the full Article XXIV nor any part of it has yet found consensus or been approved and hence the reading of the provisions can only be guiding without giving them any legal authority. The first paragraph state that:

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<sup>158</sup> American Working Group, *supra note 52*.

<sup>159</sup> If not otherwise mentioned, all provisions presented have either reached consensus or been approved.

<sup>160</sup> American Draft Declaration, Preamble section 4.

<sup>161</sup> *Ibid.*, Preamble introduction.

<sup>162</sup> *Ibid.*, XII(1).

<sup>163</sup> *Ibid.*, XII(2).

<sup>164</sup> *Ibid.*, XV(3).

<sup>165</sup> *Ibid.*, XVIII(2).

<sup>166</sup> *Ibid.*, XXIV.

*Indigenous peoples have the right to the recognition of their property rights and ownership rights with respect to the lands and territories that they historically occupy, as well as the use of the lands to which they have traditionally had access for carrying out their traditional activities and for sustenance, respecting the principles of the legal system of each state.*<sup>167</sup>

Even if the article recognizes only current possession of lands it should though be understood as complying with the standards of the UN Indigenous Declaration and the praxis of International Law and hence also applying to lands recently lost. The Article also limits the provisions to the framework of the legal systems of each member state. This is a step backwards since it gives the member states the possibility to nationally hinder the adoption of internationally accepted standards. The text is only a draft and hopefully the further negotiation will lead the American Draft Declaration in the direction of the UN Indigenous Declaration's provisions.

Unfortunately the negotiations of the American Draft Declaration are rather stuck due to the repeated objections of the USA and Canada. It is only fair to say that the USA and Canada are hindering the adoption of the American Draft Declaration since all other OAS member states have actively recognize Indigenous Peoples' rights by supporting or at least not objecting the adoption of the UN Indigenous Declaration and declaring that this instrument should be the guiding document also for the negotiations of the American Draft Declaration.<sup>168</sup> Regarding certain topics being negotiated at the moment, it seems the American Draft Declaration is taking steps backwards instead of forward; this is of course not acceptable and has been criticized by the Indigenous Caucus.<sup>169</sup> Even if the USA and Canada have in later years changed their position towards and adopted the UN Indigenous Declaration, it unfortunately doesn't seem like the adoption of the American Draft Declaration will happen in the near future, at least not by consensus – the aim of the negotiations.

### **3.3.3 The jurisprudence of the Inter-American Court of Human Rights**

This section will focus on the jurisprudence of the IACtHR, but it must though also be mentioned that it's not only the IACtHR that has had the opportunity to directly deal with the interpretation of the ILO 169 and how it affects the Human Rights provisions of the ACHR; also Constitutional and lower domestic courts have in certain cases had the task to interpret the ILO 169 in order to rule on cases brought up by Indigenous Peoples. As we will see below, Colombia's Constitutional Court (hereafter CCC) has been

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<sup>167</sup> *Ibid.*, XXIV.

<sup>168</sup> *Ibid.*, Appendix I, *Response of the Indigenous Peoples' Caucus of the Americas April 15, 2008: The Positions of Canada and the United States Expressing Reservations and Opposing Consensus are Unacceptable.*

<sup>169</sup> *Ibid.*

very active within this field, but so has also the courts in Peru, Argentina and other South American countries.<sup>170</sup>

The IACtHR deals with petitions regarding Human Rights violations in the Americas. The IACtHR is special in the sense that it, besides interpreting the ACHR, also has the power to interpret other Human Rights instruments that the individual member states of the ACHR have ratified, in order to better understand the scope of the ACHR and the rights of the individuals and peoples of the Americas. Since Indigenous Peoples from a wide range of American countries have filed cases claiming violations of their Human Rights, the IACtHR has in several occasions had the opportunity to interpret the ACHR, and study the ILO 169 and other Human Rights instruments that impose obligation on the individual American states. In all the cases dealing with Indigenous Peoples the IACtHR has recognized that it must refer to the ILO 169 “*as the appropriate interpretative standard*”.<sup>171</sup>

Since the right to land is one of the most important rights for Indigenous Peoples, and it has repeatedly been violated in the American continent, the IACtHR has in a number of cases had the opportunity to interpret this right.<sup>172</sup> Many of these judgments are today considered precedent cases and apply not only for the states parties to the cases but also for other states in the region. The influence of these judgments is significant also in other regions of the world.<sup>173</sup>

Among the most important cases of the IACtHR dealing with the right to land of Indigenous Peoples in the Americas we have the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>174</sup> *Yakye Axa Indigenous Community v. Paraguay*,<sup>175</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*,<sup>176</sup> *Saramaka People v. Suriname*,<sup>177</sup> and *Xakmok Kasek Indigenous Community v. Paraguay*.<sup>178</sup>

The *Mayagna (Sumo) Awas Tingni Community* case was the first case by an International Human Rights court where the judgment recognized the

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<sup>170</sup> See for example the case of *Aboriginal community of Quera and Aguas Calientes – Cochino People v. Jujuy Province*, First Chamber of the Civil and Commercial Court of Appeals of Jujuy, 14<sup>th</sup> of September 2001, Argentina.

<sup>171</sup> Courtis, *supra* note 156, page 444.

<sup>172</sup> Courtis, *supra* note 156, page 444.

<sup>173</sup> Rodríguez-Pinero, Luis, “The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement”, in Allen, Stephen & Xanthaki, Alexandra (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford, 2011, pages 458.

<sup>174</sup> *Awas Tingni* case.

<sup>175</sup> *Yakye Axa* case.

<sup>176</sup> *Sawhoyamaxa* case.

<sup>177</sup> Case of the *Saramaka People v. Suriname* (hereafter *Saramaka* case), IACtHR, Judgment of the 28<sup>th</sup> of November 2007.

<sup>178</sup> Case of the *Xakmok Kasek Indigenous Community v. Paraguay* (hereafter *Xakmok Kasek* case), IACtHR, Judgment of the 24<sup>th</sup> of August 2010.

Indigenous Peoples' right to collective property.<sup>179</sup> The IACtHR came to the conclusion that Article 21 of the ACHR, through an evolutionary interpretation and studying the *travaux préparatoires*, also included the right to communal property of Indigenous Peoples.<sup>180</sup> In the judgment of the case, the IACtHR stated that “*Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.*”<sup>181</sup> This led the IACtHR to rule that Article 21 also covers collective property rights of Indigenous Peoples.

In the judgment of the *Awa Tingni* case the IACtHR also underlined that the Nicaraguan constitution itself recognized the right to communal property of Indigenous Peoples.<sup>182</sup> As we will see below this last statement is also accurate and important in the cases of Colombia and Peru; both countries recognize the Indigenous Peoples' right to collective property in their respective constitutions. Taking into consideration these findings, the IACtHR found that the state of Nicaragua had violated Articles 21, on property rights, and 25, on judicial protection, of the ACHR.<sup>183</sup>

In the more recent case of *Saramaka People vs. Surinam*, the IACtHR had to deal with a case where the government of Surinam had granted third parties the right to exploit resources within the territory of the Saramaka People without these people being consulted or giving their consent to the measures.<sup>184</sup> The IACtHR stated in the judgment 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*”.<sup>185</sup> Here again the IACtHR confirms that only such natural resources that have been traditionally used by the Indigenous Peoples are covered by their right to property. Hence, other natural resources are property of the governments and can be exploited, respecting certain limitations. In the *Saramaka* case the IACtHR found a violation of the right to judicial protection in conjunction with the right to property<sup>186</sup> as well as a violation of the right to Indigenous communal property as prescribed and protected by Article 21 of the ACHR.<sup>187</sup>

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<sup>179</sup> Anaya, S. James & Grossman, Claudio, “The Case of *Awas Tingni v. Nicaragua*: A Step in the International Law of Indigenous Peoples”, *Arizona Journal of International and Comparative Law*, Volume 19, Number 1, 2002, page 2 and Xanthaki, 2007, page 32.

<sup>180</sup> *Awas Tingni* case, paragraph 148.

<sup>181</sup> *Ibid.*, paragraph 149.

<sup>182</sup> *Ibid.*, paragraph 148.

<sup>183</sup> The violation of Article 25 was found due to the lack of effective systems through which Indigenous Peoples' lands could be delimited, demarked and titled.

<sup>184</sup> *Saramaka* case.

<sup>185</sup> *Awas Tingni* case, paragraph 122.

<sup>186</sup> *Saramaka* case, paragraph 185.

<sup>187</sup> *Ibid.*, paragraph 214(1).

The IACtHR further specified six measures, simply as examples not as an exhaustive list of measures, when states need to consult with their Indigenous populations.<sup>188</sup> These were:

1. *The process of delimiting, demarcating and granting collective title over the territory...;*
2. *The process of granting the members... legal recognition of their collective juridical capacity, pertaining to the community to which they belong;*
3. *The process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right... to the territory... [Indigenous Peoples] have traditionally used and occupied;*
4. *The process of adopting legislative, administrative and other measures necessary to recognize and ensure the right... to be effectively consulted, in accordance with their traditions and customs;*
5. *Regarding the prior environmental and social impact assessments, and*
6. *Regarding any proposed restrictions of the... [Indigenous] people's property rights, particularly regarding proposed development or investment plans in or affecting... [their] territory.*<sup>189</sup>

In the judgment the IACtHR reiterated that the right to property is not absolute and that “a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society”.<sup>190</sup> The IACtHR though also stated that the states are limited when balancing the rights of the Indigenous Peoples and those of society in general. The IACtHR listed a number of safeguards that states must take into consideration when balancing the rights or before taking any measures: “[to] ensure effective participation of the affected people in the decision; guarantee that the affected peoples will receive a reasonable benefit from such a plan; and ensure that prior to granting any concession, independent and technically sound environmental and social impact assessments be undertaken to mitigate any negative effects”.<sup>191</sup> The

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<sup>188</sup> *Ibid.*, paragraph 194.

<sup>189</sup> IACHR, *supra* note 99, paragraph 179.

<sup>190</sup> *Saramaka* case, paragraph 127. See also the cases of the *Sawhoyamaya* case, paragraph 137; *Yakye Axa* case, paragraphs 144 and 145; the case of *Ricardo Canese v. Paraguay* (hereafter *Ricardo Canese* case), IACtHR, Judgment of the 31<sup>st</sup> of August 2004, paragraph 96; the case of *Herrera Ulloa v. Costa Rica* (hereafter *Herrera Ulloa* case), IACtHR, Judgment of the 2<sup>nd</sup> of July 2004, paragraph 127; and the case of *Ivcher Bronstein v. Peru* (hereafter *Ivcher Bronstein* case), IACtHR, Judgment of the 6<sup>th</sup> of February 2001, paragraph 155.

<sup>191</sup> Wand, Tara, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law”, *Northwestern University Journal of International Human Rights*, Volume 10, Issues 2, 2011, page 8.

first safeguard deals with the right to prior consultation and will be discussed in the next chapter. The *Saramaka* case is very interesting in the sense that the IACtHR adopted the approach of the Special Rapporteur and also concluded that states might in cases of larger development projects not only have the obligation to consult with Indigenous Peoples, but also to obtain the affected Indigenous Peoples' Free, Prior and Informed Consent (hereafter FPIC).<sup>192</sup> This issue will also be discussed further in the next chapter.

The IACtHR is at the moment dealing with another case that might come expand the interpretation of the right to Indigenous collective property even more. The IACtHR is still evaluating the case of the *Kichwa People of Sarayaku vs. Ecuador*,<sup>193</sup> but the prior ruling of the IACHR determined that the government of Ecuador had violated the right of property of the Kichwa People, in conjunction with Article 13, the right to freedom of thought and expression, and Article 23, the right to participate in government.<sup>194</sup> The case is unique not only due to the facts and content of the case, but also due to that it's the first time that the IACtHR was invited to visit the scenes of a case and *in situ* gather evidence and hear statements from the affected Indigenous Peoples and the government.<sup>195</sup> The visit was arranged by the government of Ecuador and during the visit the delegation of the government also expressed that it recognized responsibility for the events in the case as well as the violations, and that the government was willing to search for methods to repair the caused damages.<sup>196</sup>

The case is very important for the understanding of the scope of the rights of Indigenous Peoples, not only to property but also consultation,<sup>197</sup> and no matter the outcome of the judgment by the IACtHR, the case will add up to the already notable amount of jurisprudence on Indigenous matters dealt with by this International Human Rights body.

## 3.4 National initiatives

### 3.4.1 Colombia

In Colombia the constitution from 1991 deals with both private properties in general as well as with the specific case of Indigenous Peoples' land

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<sup>192</sup> *Saramaka* case, paragraphs 134 – 137.

<sup>193</sup> Case of the *Kichwa People of Sarayaku and its members v. Ecuador* (hereafter *Kichwa People* case), IACHR, Decision of the 26<sup>th</sup> of April 2010, paragraphs 56 – 69.

<sup>194</sup> *Kichwa People* case, paragraph 259.

<sup>195</sup> IACtHR, *Comunicado de prensa - Paso Histórico: Diligencia en el Pueblo Indígena Kichwa De Sarayaku en el Amazonas Ecuatoriano*, published the 25th of April 2012, CorteIDH\_CP-07/12, available at [http://www.corteidh.or.cr/docs/comunicados/cp\\_07\\_12.pdf](http://www.corteidh.or.cr/docs/comunicados/cp_07_12.pdf) visited the 11th of May, 2012.

<sup>196</sup> *Ibid.*

<sup>197</sup> The content of the *Kichwa Peoples* case regarding the right to participation and consultation will be discussed further in the next chapter.

rights.<sup>198</sup> Next the provisions in the constitution will shortly be presented and analyzed.<sup>199</sup>

In Article 58 it is stated that the constitution guarantees private property, but also that when this right stands in conflict with *public utility*<sup>200</sup> or *social interest*<sup>201</sup> then the latter ones shall overrule; hence in certain cases it becomes accepted to restrict on the right to private property.<sup>202</sup> Further it is stated that the state shall protect and promote associative and solidary forms of property.<sup>203</sup> Expropriation of property is accepted in the Constitution, as long as it is described by the domestic legislation, that the expropriation is done due to any of the two categories mentioned above and that the affected communities and individuals are consulted.<sup>204</sup>

Article 329 recognizes that *Indigenous territorial entities*<sup>205</sup> exist and that specific legislation on territorial arrangement shall define it.<sup>206</sup> It is stated that the government is responsible for the delimitation of these territorial entities and that also the Indigenous Peoples shall participate in the delimitation of them.<sup>207</sup> These territorial entities are further defined as being collective property and alienable as such.<sup>208</sup> Article 330 of the constitution further involves Indigenous Peoples in the decision making and the right to self-governance by stating that these Indigenous territorial entities shall be governed by Indigenous councils. The councils shall be formed by Indigenous communities and their work shall follow Indigenous traditions and praxis.<sup>209</sup> Article 330 additionally states that natural resources on Indigenous territorial entities can be exploited, as long as the exploitation does not affect the cultural, social and economic integrity of the affected peoples.<sup>210</sup> The Government shall propitiate the participation of Indigenous Peoples when exploitation of resources is being committed on these peoples' territories.<sup>211</sup>

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<sup>198</sup> Colombian constitution.

<sup>199</sup> This thesis will mostly focus on the Constitutional level and only touch upon other legislation on the right to land in Colombia and Peru. Latin American countries have a tradition with rather detailed constitutions that are changed often, compared to European and especially Nordic constitutions, and hence a brief overview of the constitutions in these countries will give a general idea on the right to property and land of individuals as well as Indigenous Peoples.

<sup>200</sup> Author's translation from Spanish: "*utilidad pública*".

<sup>201</sup> Author's translation from Spanish: "*interés social*".

<sup>202</sup> Colombian constitution, Article 58.

<sup>203</sup> *Ibid.*, Article 58. Author's translation from Spanish: "*El Estado protegerá y promoverá las formas asociativas y solidarias de propiedad.*"

<sup>204</sup> Colombian constitution, Article 58.

<sup>205</sup> Author's translation from Spanish: "*Entidades territoriales indígenas*".

<sup>206</sup> Colombian constitution, Article 329. Author's translation from Spanish: "*Ley Orgánica de Ordenamiento Territorial*".

<sup>207</sup> *Ibid.*, Article 329.

<sup>208</sup> *Ibid.*, Article 329.

<sup>209</sup> *Ibid.*, Article 330.

<sup>210</sup> *Ibid.*, Article 330.

<sup>211</sup> *Ibid.*, Article 330.



Unfortunately even if the Constitution already in 1991 prescribed the need for legislation that would identify and manage Indigenous territories through the legislation on territorial arrangement,<sup>212</sup> it was only 20 years later, in June 2011 that this piece of legislation was finally adopted.<sup>213</sup> Bartolomé Clavero<sup>214</sup> has described the situation as a mockery towards Indigenous Peoples, not only because these peoples had for 20 years been deprived their constitutional right to defined Indigenous territorial entities, but also because the legislation on territorial arrangements after finally being adopted doesn't deal with the issue at all. The legislation simply states that a special law on the matter of Indigenous territorial entities shall be drafted and presented within 10 months of the adoption of the legislation on territorial arrangement.<sup>215</sup> Any draft version of such a piece of legislation has not yet been adopted nor presented. Worse than the actual postponing of the legislation that would define Indigenous territorial entities is though the fact that the legislation on territorial arrangement is general in its approach and could even be seen as weakening some of the Indigenous Peoples' rights. This is due to the fact that the legislation could be seen as handing over responsibility on certain issues to authorities instead of maintaining the decisive power with the Indigenous bodies.<sup>216</sup> All this shows the unwillingness of the Colombian government to fulfill its obligations towards the Indigenous Peoples in Colombia, as stated in the ILO 169, the UN Indigenous Declaration and even in the own constitution.

In Colombia though international Human Rights instruments among them also the ILO 169 and other instruments that offer Indigenous Peoples protection, are hierarchically above domestic laws. This means that the domestic courts have the authority to interpret international instruments applicable in Colombia in order to better understand the scope of the domestic legislation. So far, especially the CCC has in a great number of cases denounced the lack of protection that Indigenous Peoples have suffered and called on the government to correct its behavior.<sup>217</sup> As we will see in the next chapter the Colombian courts have been especially involved in the Indigenous Peoples' right to prior consultation.<sup>218</sup>

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<sup>212</sup> *Ibid.*, Article 329.

<sup>213</sup> *Ley por la cual se dictan normas orgánicas sobre ordenamiento territorial y se modifican otras disposiciones (Ley Orgánica de Ordenamiento Territorial), Ley 1454 de 2011*, adopted the 28th of June, 2011, Diario Oficial No. 48.115 the 29th of June 2011.

<sup>214</sup> Professor at the Law faculty at the University of Sevilla, Spain.

<sup>215</sup> Clavero, Bartolomé, *Colombia y otros Países Andinos: Ordenamiento Territorial, Autogobierno Indígena, Derecho a la Consulta*, published online 13th of July 2011, page 1, available at <http://clavero.derechosindigenas.org/wp-content/uploads/2011/07/Colombia-OrdenamientoTerritorial-paraPDF1.pdf>, visited the 17th of April 2012.

<sup>216</sup> *Ibid.*, page 2.

<sup>217</sup> The Special Rapporteur has praised the Colombian courts stating that they have created a "world-class model of jurisprudence". Anaya, *supra note 8*, Paragraph 7.

<sup>218</sup> As an example the Colombian Constitutional Court concluded in an early case that "recognition and protection of the territorial rights of the indigenous peoples are crucial for establishing sustainable conditions of peace and ensuring the survival of the indigenous peoples". Case of Rogelio Domicó Amaris, Organización Nacional Indígena

The Special Rapporteur, after a special mission to Colombia in 2010, confirmed that there is a lack of legal instruments protecting Indigenous Peoples, stating that “[d]espite some progress on indigenous issues, in general the laws, programmes and policies of the Government do not result in effective protection of the human rights of the indigenous peoples in Colombia”.<sup>219</sup> According to the Special Rapporteur, the CCC has between 1993 and 2006 found at least 18 cases where Indigenous Peoples’ land rights had been violated by larger infrastructure projects; this shows the low amount of legal protection that Indigenous Peoples enjoy as well as the unwillingness of the government to improve the legislation in order to avoid similar violations in the future.<sup>220</sup>

Even if legislation-wise the protection of Indigenous Peoples’ lands needs to be improved in Colombia, in reality the situation is a little bit better. The Special Rapporteur confirmed in his report that the country “has moved forward in the recognition of the land rights of the country’s indigenous peoples”.<sup>221</sup> The country has also increased the amount of Indigenous reservations to 710, covering in total almost 30% of the total territory of the country.<sup>222</sup> Less than 8% of the land is though situated in agricultural areas and in total over two-thirds of all Indigenous Peoples live there.<sup>223</sup> This naturally complicates the life of the Indigenous Peoples living in these areas that, besides being limited in territory also are said to have low fertility and often being affected by floods.<sup>224</sup> A high number of cases where Indigenous Peoples have demanded lands are also still unsettled and affect the daily life of a high number of Indigenous Peoples in Colombia.<sup>225</sup>

### 3.4.2 Peru

In the same way as in Colombia, the Peruvian Constitution from 1993 also deals with the general right to property and also with specific provisions regarding Indigenous Peoples’ lands.

The general right of every human being to his or her property is stipulated in Article 2(16) of the Constitution.<sup>226</sup> Besides this, Article 60 also recognizes that the national economy is based on the coexistence of diverse forms of

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de Colombia, Comisión Colombiana de Juristas, Alirio Pedro Domicó y otros v. the Government of Colombia, Judgement T-652/98 of the 10th of November 2010, Colombian Constitutional Court. Translation of the quotation found in Anaya, *supra* note 8, paragraph 40.

<sup>219</sup> Anaya, *Ibid.*, paragraph 6.

<sup>220</sup> *Ibid.*, paragraph 41.

<sup>221</sup> *Ibid.*, paragraph 36.

<sup>222</sup> *Ibid.*, paragraph 6.

<sup>223</sup> *Ibid.*, paragraph 37.

<sup>224</sup> *Ibid.*, paragraph 37.

<sup>225</sup> *Ibid.*, paragraph 38.

<sup>226</sup> Peruvian Constitution, Article 2(16).

property.<sup>227</sup> Even if Article 70 states that the right to property is inviolable, the Constitution states that when the law so allows, property can be expropriated; this is though only allowed in cases where national security or public necessity comes into play, and appropriate monetary restitution shall in all cases be paid for any possible damage, prior to expropriation.<sup>228</sup>

The Constitution has a separate chapter<sup>229</sup> that deals specifically with farmer and native communities.<sup>230</sup> Article 88 supports the agrarian development and guarantees the right to property of land in its different forms: private, communal, or any other form of associative property.<sup>231</sup> Article 89, besides recognizing the legal existence and capacity of farmer and native communities, also recognizes that these communities are autonomous in their organization, use and disposal of their lands.<sup>232</sup> Article 89 further states that these lands are inalienable, except in the cases they are abandoned, and that the state will respect the cultural identity of the mentioned communities.<sup>233</sup>

The CEACR has in its latest report on the implementation of the ILO 169 in Peru come to the conclusion that the legal protection of Indigenous Peoples' land rights, even if it has been improved, is not yet sufficient.<sup>234</sup> The CEACR pointed out that some of the legislation that the Peruvian government mentioned as protecting Indigenous Peoples' land rights was in fact not applicable on Indigenous Peoples at all. According to the CEACR there was also a gap in the protection, specifically in the cases where Indigenous Peoples' lands hadn't yet been formally handed over to the mentioned peoples but these only occupied them without being the legal owners of the resource.<sup>235</sup>

As is stated in the 2009 alternative report<sup>236</sup> to the CEACR,<sup>237</sup> the Indigenous Peoples of Peru hold at the moment about 25% of the lands in

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<sup>227</sup> *Ibid.*, Article 60.

<sup>228</sup> *Ibid.*, Article 70.

<sup>229</sup> *Ibid.*, Chapter VI, Articles 88 and 89.

<sup>230</sup> As was presented above, the Peruvian Constitution doesn't mention Indigenous Peoples in the Constitution or in its legislation, but uses alternative terms like farmer and native communities. These alternative terms are considered to fall under the definition of Indigenous Peoples of the ILO 169.

<sup>231</sup> Peruvian Constitution, Article 88.

<sup>232</sup> *Ibid.*, Article 89.

<sup>233</sup> *Ibid.*, Articles 88 and 89.

<sup>234</sup> ILO, *Perú: Convenio sobre pueblos indígenas y tribales, 1989 (núm. 169)*, Report by the Committee of Experts on the Application of Conventions and Recommendations (hereafter CEACR), Indigenous and Tribal Peoples' section, 2011, available at [http://www.justiciaviva.org.pe/webpanel/doc\\_int/doc24022011-175808.pdf](http://www.justiciaviva.org.pe/webpanel/doc_int/doc24022011-175808.pdf), visited the 18<sup>th</sup> of April 2012, Article 14.

<sup>235</sup> *Ibid.*

<sup>236</sup> Confederación General de Trabajadores del Perú (CGTP), *Informe Alternativo 2009 sobre el cumplimiento del Convenio 169 de la Organización Internacional del Trabajo, Sobre Pueblos Indígenas y Tribales en el Perú*, drafted by Organizaciones Indígenas y de la Sociedad Civil, submitted by the CGTP, available at [http://servindi.org/pdf/informe\\_alternativo\\_2009\\_final.pdf](http://servindi.org/pdf/informe_alternativo_2009_final.pdf), visited the 18<sup>th</sup> of April, 2012.

the country.<sup>238</sup> Even if the numbers can't be compared *per se*, it must be noted that the percentage of the population that consider themselves Indigenous is many times higher than the percentage of the land they occupy. As has been stated by the CEACR, the amount of Indigenous Peoples that have not yet been granted official recognition and status is also notable and hence the government has not been able to implement the provisions of Article 14 of the ILO 169 adequately.<sup>239</sup>

Even if the legislation is partially in place, the weakest part of the protection of the right to land and other Human Rights of Indigenous Peoples in Peru is the actual praxis of the government. Several large, both private and public, development projects have been established on Indigenous lands. The government indeed invests a lot of time and money on attracting foreign investments that in most of the cases disrupt the life of Indigenous Peoples. The government has also adopted a number of legislation acts that are in conflict with the right to land as established by the ILO 169. The government has further neglected the obligation to consult the affected Indigenous Peoples prior to taking decision on these large projects or foreign investments, as well as before adopting the legislation that affected the peoples. Hence, in the name of national development and eradication of poverty, the Peruvian governments have repeatedly violated Indigenous land rights and refused to recognize how these projects have affected the peoples living and using these lands.<sup>240</sup> In Peru there is hence not only a gap in the legislation, but also a lack of political will in correcting this gap. This conclusion is especially accurate for the former government of García Pérez, but also the current government has not yet taken major steps to correct all existing legal and implementation gaps.

In late years the Peruvian Constitutional Court (hereafter PCC) has though in several occasions supported Indigenous Peoples claims raised against the Peruvian government, especially regarding the lack of consultation prior to enacting legislation or administrative measures that have or could have affected Indigenous Peoples. In the fifth chapter of this thesis the most important cases of the PCC and other domestic Peruvian courts will be presented and discussed.

### **3.4.3 Conclusions: comparing the protection of the right to land in Colombia and Peru**

Comparing the Colombian and Peruvian protection of the Indigenous Peoples' right to land we can see certain similarities: both countries have ratified the ILO 169 and made some efforts to implement its provisions in their domestic legislation; both countries have though gaps in the actual

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<sup>237</sup> Author's translation from Spanish: "*Confederación General de Trabajadores del Perú*".

<sup>238</sup> CGTP, *supra note* 236, section 2.7, page 28 and 29.

<sup>239</sup> ILO 169, Article 14.

<sup>240</sup> CGTP, *supra note* 236, section 2.7, pages 29 and 30.

protection of the right to land and this has been pointed out by their Indigenous Peoples as well as the CEACR and other international bodies such as the Special Rapporteur; both countries' government have been highly unwilling to improve the legislative gaps that have been clearly recognized and criticized; the constitutional courts in both countries have had to deal with the repeated violations of Indigenous Peoples' land rights and call upon their respective governments to improve their legislation.

At the same time certain differences can also be found. The political willingness to improve the situation has increased in Colombia while only minor changes have happened in Peru. While in Colombia the legislation hasn't improved much, the actual praxis of the government has; this is contrary to the Peruvian case where legislation has improved on certain issues but the government is still rather unwilling to recognize the right to land to the extent it should. On the other hand, while Colombia recognizes the right to ownership of lands Indigenous Peoples traditionally use or have used, the Peruvian legislation only recognizes the ownership of such lands that Indigenous Peoples have got legal ownership to. This situation is controversial since it doesn't comply with the provisions of the ILO 169. One must also underline the difference between the treatment of Indigenous Peoples in Colombia and Peru: while the Colombian government more and more has embraced Indigenous Peoples, the Peruvian governments have continuously isolated their Indigenous Peoples and even blamed them for the slow development of the country.

In general both countries have still remarkable gaps in their legislation on the right to land of Indigenous Peoples. More importantly though is the fact that there are still notable political unwillingness to improve the legislation, political strategies or governmental actions. Before governments understand the value and importance of their Indigenous Peoples as well as their interests and demands, it will be difficult to improve the legislation or strategies aiming at protecting the right to land or any other rights of these peoples.

# 4 The right to prior consultation

## 4.1 Introduction

The ILO has stated that “*the spirit of participation and consultation constitutes the cornerstone*” of the ILO 169.<sup>241</sup> As such, the prior consultation is a key provision and “*basis for applying all other*” rights in the ILO 169.<sup>242</sup> Same could be concluded about the importance of the right to prior consultation in the UN Indigenous Declaration and all other instruments that deal with Indigenous Peoples’ Human Rights.

While all individuals and peoples, among them also the Indigenous Peoples, have the right to participate in elections, decision making and the influencing of decisions on all levels in their countries,<sup>243</sup> the right to prior consultation is a right that has been granted only to Indigenous Peoples. Several reasons could be listed on the reason why Indigenous peoples have this additional right compared with other peoples, but this thesis will only focus on one of these reasons – the special importance of the traditional land for Indigenous Peoples requires additional tools of protection compared to the protection of other property.

The special relationship between Indigenous Peoples and their land has been described above and it has been recognized by international, regional and national instruments and bodies.<sup>244</sup> Since the land of Indigenous Peoples has been acknowledged to be directly linked with the spiritual, cultural and physical existence of most of these peoples, its protection becomes naturally a high priority in order to preserve this existence. While the right to land of Indigenous Peoples is an extended protection of the right to property, the right to prior consultation is simultaneously an extended protection of the right to property as well as the extended protection of the right to participation on issues that affect Indigenous Peoples directly.

The CEACR has underlined the importance of the prior consultation, not only because of the value it has because of the dialogue it creates between the Indigenous Peoples and the states, but also because it is a mechanism to

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<sup>241</sup> ILO, *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, ILO Doc. GB.277/18/4, GB.282/14/2, ILOLEX 162000ECU169, submitted the 14<sup>th</sup> of November 2001, paragraph 31.

<sup>242</sup> See for example ILO, *Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala (ratification: 1996)*, report by the CEACR, 76th Session (2005), submitted 2006, ILOLEX 062006GTM169, paragraph 15.

<sup>243</sup> ICCPR, Article 25. See also UN High Commissioner for Human Rights (hereafter UNHCHR), *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, General Comment No. 25 (General Comments), CCPR/C/21/Rev.1/Add.7, adopted the 7<sup>th</sup> of December, 1996.

<sup>244</sup> See above chapter 3.1.

prevent and resolve conflicts. In one of its General Observation from 2008 the CEACR stated that:

*[g]iven the enormous challenges facing indigenous and tribal peoples today, including the regularization of land titles... and the increasing exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue... Consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict.*<sup>245</sup>

The ILO has further underlined that “consultation is [in the ILO 169] viewed as a crucial means of dialogue to reconcile conflicting interests and prevent as well as settle disputes. Through the interrelatedness of the principles of consultation and participation, consultation is not merely the right to react but indeed also a right to propose”.<sup>246</sup> As will be shown below, Indigenous Peoples don’t only have the right to be consulted prior to measures that affect their lands, but also to participate in the implementation and evaluation of domestic legislation, programs and projects that affects them directly.

## **4.2 International instruments**

### **4.2.1 General provisions on the right to consultation**

#### **4.2.1.1 Provisions in universal UN instruments**

Before presenting the provisions of the ILO Conventions and the UN Indigenous Declaration, the most quoted sources for the right to prior consultation, it should be mentioned that also the ICCPR and the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR)<sup>247</sup> and their supervisory bodies have found the right to prior consultation to be covered by each of these respective instruments. Also the Committee on Elimination of Racial Discrimination (hereafter CERD) has found the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter ICERD)<sup>248</sup> to cover the right to consultation with Indigenous Peoples.

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<sup>245</sup> ILO, *Application of International Labour Standards 2009 (I): Report by the CEACR - General Observations: Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, CEACR 98<sup>th</sup> Session (2009), submitted 2009, page 672.

<sup>246</sup> ILO, *supra* note 3, page 60.

<sup>247</sup> See *supra* note 42.

<sup>248</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted the 21<sup>st</sup> of December 1965, entered into force the 4<sup>th</sup> of January 1969, 660 UNTS 195, U.N. Doc. A/6014 (1966).

In the Human Rights Committee's (hereafter HCR) General Comment (hereafter GC) 23, the HCR established that Article 27 of the ICCPR, on the right of minorities to their cultures, gives the states the positive duty to “ensure the effective participation of members of minority communities in decisions which affect them”.<sup>249</sup> The HRC has hence interpreted the provision as also giving states the positive obligation to consult with their Indigenous Peoples, especially in cases related to Indigenous land and territory rights.<sup>250</sup>

In the Committee on Economic, Social and Cultural Rights' (CESCR) GC 21, the CESCR defined that Article 15 of the ICESCR, on the right to participate in cultural life, covered also Indigenous lands and territories, in the cases these had been expropriated or taken without the consent of the affected peoples. The CESCR has hence called to states to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights”.<sup>251</sup>

The CERD has on the other hand expressed in its GC 23 that “no decisions relating directly to indigenous peoples are to be taken without their informed consent”.<sup>252</sup> The CERD has argued that Indigenous Peoples enjoy the right to prior consultation, especially regarding their land rights, due to their participatory rights, and that the non-enjoyment of this right could amount to a discriminatory praxis.<sup>253</sup>

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<sup>249</sup> UNHCHR, *General Comment No. 23: The rights of minorities (Art. 27)*, General Comment No. 23 (General Comments), U.N. Doc. CCPR/C/21/Rev.1/Add.5, submitted the 8<sup>th</sup> of April 1994, paragraph 7.

<sup>250</sup> UNHCHR, *Concluding observations of the Human Rights Committee: Chile*, UN Doc. CCPR/C/CHL/CO/5, submitted the 12<sup>th</sup> to 30<sup>th</sup> of March 2007, paragraph 19; UNHCHR, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3, submitted the 17<sup>th</sup> of April 2008, paragraph 21; UNHCHR, *Concluding observations of the Human Rights Committee: Nicaragua*, UN Doc. CCPR/C/NIC/CO/3, submitted the 12<sup>th</sup> of December 2008, paragraph 21.

<sup>251</sup> UN Committee on Economic, Social and Cultural Rights (hereafter CESCR), *General comment No. 21 Right of everyone to take part in cultural life (Article 15(1)(a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21, submitted the 21<sup>st</sup> of December 2009, paragraph 37.

<sup>252</sup> UN Committee on the Elimination of Racial Discrimination (hereafter CERD), *Report of the Committee on the Elimination of Racial Discrimination: Annex V - General Recommendation XXIII*, UN Doc. Supplement No. 18 (A/52/18), submitted the 26<sup>th</sup> of September 1997, paragraph 4(d).

<sup>253</sup> See, CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, Consideration of Reports submitted by States Parties under Article 9 of the Convention, UN Doc. CERD/C/ECU/CO/19, submitted 22<sup>nd</sup> of September 2008, paragraph 16; CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Namibia*, Consideration of Reports submitted by States Parties under Article 9 of the Convention, UN Doc. CERD/C/NAM/CO/12, submitted the 22<sup>nd</sup> of September 2008, paragraph 18; CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: USA*, Consideration of Reports submitted by States Parties under Article 9 of the Convention, UN Doc. CERD/C/USA/CO/6, submitted the 8<sup>th</sup> of May 2008, paragraph 29. See also Wand, *supra note* 191, page 3.



The GCs or recommendations published by these UN supervisory bodies are not legally binding provisions as such and hence the states are not bound to follow them.<sup>254</sup> The provisions though illustrate how International Law is developing on the specific matters and has an interpretative value that could also become legally binding in the future through its customary status.<sup>255</sup> Even though the UN supervisory bodies have so far been quite united on their approach on the scope of the right to prior consultation, it is really hard to argue that the content of this right would have yet reached a customary status since the state practice varies significantly.

#### 4.2.1.2 Provisions in the ILO Conventions

The ILO 107 does not deal much with consultation, in fact it doesn't mention the term at all in the instrument. Art. 12(1) is the only article that has a provision mentioning that consent is required before Indigenous Peoples can be reallocated from their lands.<sup>256</sup> The provision is though weak since the right can, according to the convention, be limited on the basis of a number of different grounds that basically all put the priorities of the state first.<sup>257</sup> In general the language used in the ILO 107 and ILO 169 differ significantly when it comes to the involvement of the Indigenous Peoples in the implementation and fulfillment of their rights. While the ILO 107 almost only considers the state parties of the convention, the ILO 169 also encourages or even demands the participation of the Indigenous Peoples. The difference is explained by the different historical contexts in which the ILO Conventions were drafted.

Even though Articles 6 and 7 are the main articles to establish the right to prior consultation and participation in the ILO 169, also a number of other articles in the ILO 169 mention consultation, consent or participation. Further some scholars argue that Articles 6 and 7 “*reflect the spirit of prior informed consent and apply to each provision of ILO 169*”.<sup>258</sup> Especially the UN Indigenous Declaration could be said to confirm this argument due to its participatory approach. The UN Indigenous Declaration and its provisions will be discussed more in detail below.

The relevant paragraphs of the Articles 6 and 7 of the ILO 169, in this case related only to consultation, state that:

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<sup>254</sup> O'Flaherty, Michael, “The Concluding Observations of United Nations Human Rights Treaty Bodies”, *Human Rights Law Review*, Volume 6, Issue 1, 2006, page 33.

<sup>255</sup> Wand, *supra note* 191, pages 3 and 4.

<sup>256</sup> ILO 107, Article 12(1).

<sup>257</sup> The article mentions among other things national security, national economic development or the health of the involved peoples.

<sup>258</sup> Baluarte, David C., “Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169”, *Sustainable Development Law and Policies*, Volume IV, Issue 2, 2004, page 10.

## Article 6

### 1. ...Governments shall:

a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly...

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.<sup>259</sup>

## Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives... and the lands they occupy or otherwise use...

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.<sup>260</sup>

As can be seen from the general provisions in Article 6(1)(a), it is clearly stated that the states are only required to consult with Indigenous Peoples prior to legislative or administrative measure that may affect these peoples *directly*. In fact quite a number of governmental decisions affect Indigenous Peoples directly on some level. From the context of the ILO 169 it could though be understood as these measures, that may affect Indigenous Peoples directly and that required prior consultation in the ILO 169, are limited to only those measures that deal with rights that are covered by the ILO 169 and/or that affect the Indigenous Peoples *significantly*. The term significantly has not been defined and this thesis will not try to define the term, but argues that at least decisions that affect Indigenous Peoples land rights are significant. The lack of ownership rights to Indigenous lands, the relocation of Indigenous Peoples from their lands and the exploitation of natural resources on Indigenous lands, all amount to measures that affect Indigenous Peoples directly and that could affect significantly their existence or lives.

As can also be noted when reading Articles 6(1)(a) and 6(2) in conjunction, the consultation has to take place prior to the planned legislative or administrative measures. Article 6(2) states that the consultation “*shall be undertaken... with the objective of achieving agreement or consent to the **proposed measures***”.<sup>261</sup> The term proposed affirms that the measures have not yet been taken, but that the issues discussed are only suggested measures. Hence, as was stated in the introduction of this chapter, the consultation works as a tool to prevent conflict by allowing discussion

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<sup>259</sup> ILO 169, Article 6(1)(a) and 6(2).

<sup>260</sup> *Ibid.*, Article 7(1) and 7(4).

<sup>261</sup> Bold in the quote added by the author.

between the Indigenous Peoples and the state already prior to the adopting of measures that could lead to conflicts.

Besides confirming that the consultation has to take place prior to the planned measures, Article 6 also provides instructions on how the consultation shall take place as well as the expected results of this consultation. The first paragraph states that the peoples shall be consulted through “*appropriate procedures*”, while the second paragraph confirms that the consultation “*shall be undertaken, in good faith and in a form appropriate to the circumstances*”.<sup>262</sup> Regarding the appropriate procedures, the ILO has stated that this would mean the creation of favorable conditions for the consultation; disregarding the outcome of such consultation.<sup>263</sup> The ILO has further stated that

*“[t]he form and content of the consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.”*<sup>264</sup>

As the Article 6(1)(a) itself points out, appropriate procedures also means that the consultation is conducted through the representatives institutions of the Indigenous Peoples. These institutions are of course chosen by the Indigenous Peoples affected themselves, and in accordance with their own traditions and customs. The parties of the consultation need to give the Indigenous Peoples involved sufficient time to elect their representatives and for these representatives to prepare and consult internally, prior to the consultation with the state and other parties involved.<sup>265</sup> The information provided and the consultation itself shall naturally also be conducted in a language that the Indigenous Peoples fully understand.<sup>266</sup>

Good faith on the other hand should be understood as the creation of a climate of mutual trust that will allow the consultation to be conducted with the genuine aim of reaching an agreement or consent.<sup>267</sup> Besides the spirit of the consultation, the Indigenous Peoples also need to receive all relevant information on time and if an agreement or consent is reached, the state is

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<sup>262</sup> ILO 169, Article 6.

<sup>263</sup> See ILO, *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Academics of the National Institute of Anthropology and History (SAINAH), the Union of Workers of the Autonomous University of Mexico (STUNAM), the Independent Union of Workers of La Jornada (SITRAJOR) and the Authentic Workers' Front (FAT), Governing Body*, ILOLEX GB.289/17/3, 2004, paragraph 89.

<sup>264</sup> ILO, *supra* note 245.

<sup>265</sup> ILO, *supra* note 3, page 62.

<sup>266</sup> UN Development Group (hereafter UNDG), *Guidelines on Indigenous Peoples' Issues*, HR/P/PT/16, New York and Geneva, 2009, page 30.

<sup>267</sup> ILO, *supra* note 3, page 62.

expected to work in accordance with this agreement or consent.<sup>268</sup> Indigenous Peoples should also be given a sufficient amount of time to internally and in accordance with their own cultural traditions, discuss the issues that are being consulted, especially prior to the start of the consultation.<sup>269</sup>

Article 6(2) further states that the consultation shall be conducted “*with the objective of achieving agreement or consent*”.<sup>270</sup> This means at least two things: that the consultation has to genuinely aim at achieving an agreement with or the consent from the Indigenous Peoples, and that the Indigenous Peoples agreement or consent is not a prerequisite in order for the state to in any case be able to continue with their proposed measures. Regarding the objective being the agreement or consent, all parties involved in the consultation must hence enter the consultation with the genuine interest and aim of achieving an agreement or the consent.<sup>271</sup> On the other hand, the objective of the consultation is the agreement or consent, but this is only an obligation of means and not of results. Hence states are able to continue with their proposed measures even if the consultation didn’t lead to an agreement or consent. Indigenous Peoples though would still have the possibility to exhaust the domestic judicial system and even take the case up to the IACtHR if they wanted, but in case the consultation process had been properly committed and the government tried to as far as possible take the views of the Indigenous Peoples into consideration when applying the measures, then there doesn’t seem to be any legal hinder to proceed with the planned measures. As will be shown below when dealing with consultation regarding specifically the right to land, the ILO 169 itself also stipulates that the states have the right to take measures after consultation that didn’t resulted in an agreement or consent.

#### **4.2.1.3 Provisions in the UN Indigenous Declaration**

The UN Indigenous Declaration is far-reaching when it comes to the spirit of participation of and consultation with Indigenous Peoples. Of the two ILO Conventions and the UN Indigenous Declarations, the latter one is in fact the only instrument where Indigenous Peoples were actively taking part in the drafting process and hence the outcome of the instrument reflects better the view of Indigenous Peoples than any other earlier instrument.<sup>272</sup>

The Preamble of the UN Indigenous Declaration encourages all states to comply with their obligations, and that this has to be done in consultation

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<sup>268</sup> *Ibid.*

<sup>269</sup> ILO, *supra note 3*, page 62.

<sup>270</sup> ILO 169, Article 6(2).

<sup>271</sup> ILO, *supra note 3*, page 62.

<sup>272</sup> It should though not be forgotten that the UN Indigenous Declaration is not legally binding for any state and hence does not have the same legal authority as for example the ILO 169 even if the latter one is not in its text as far-reaching as the UN Indigenous Declaration.

with their Indigenous Peoples.<sup>273</sup> Article 19 sets the actual right by stating that states “shall 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”.<sup>274</sup>

Some of the characteristics mentioned in Article 19 are the same as were already presented above regarding the right to consultation in the ILO 169: *good faith, through the Indigenous Peoples’ own institutions and before measures are taken*. Some characteristics are though new: the consultation aims at reaching FPIC, and the Article do not refer to measures that affect Indigenous Peoples *directly*, but simply to consultation that “*may affect these peoples*”. The scope of the term *directly* was briefly discussed above and will not be discussed further here. The author is of the opinion that even if the term has been left aside from the UN Indigenous Declaration, it does not mean that other than direct measures would be covered by the UN Indigenous Declaration. The author hence argues that only measures that may affect Indigenous Peoples directly are covered by the UN Indigenous Declaration and International Law in general.

When it comes to the term FPIC, the UN Development Group<sup>275</sup> has in its Guidelines on Indigenous Issues<sup>276</sup> identified the different elements of the consultation.<sup>277</sup> The elements listed are the following:

*Free* - should imply no coercion, intimidation or manipulation;<sup>278</sup>

This provision is rather easy to understand; Indigenous Peoples shall be able to form and express their own opinion on all matters, without the involvement of external pressure, force or manipulation.

*Prior* - should imply consent has been sought sufficiently in advance of any authorization or commencement of

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<sup>273</sup> UN Indigenous Declaration, Preamble: “**Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned**”. Bold added by author; original text in italics.

<sup>274</sup> UN Indigenous Declaration, Article 19.

<sup>275</sup> The UNDG is a group consisting of a high number of agencies and programs working with development within the UN. The task of the group is to coordinate the work of all these different actors.

<sup>276</sup> UNDG *supra* note 266.

<sup>277</sup> This description was the outcome of a workshop held by the PFII (PFII, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc. E/C.19/2005/3, adopted the 17<sup>th</sup> of February 2005), later endorsed by the fourth session of the PFII (4<sup>th</sup> session of the PFII, held in New York the 16<sup>th</sup> to 27<sup>th</sup> of May, 2005) and also by the UNDG in the above mentioned guidelines.

<sup>278</sup> PFII, *Ibid.*, paragraph 46.

*activities and respect time requirements of indigenous consultation/consensus processes;*<sup>279</sup>

This requirement has at least two sides. On one hand, the consultation has to take place prior to the starting of any measures by the state or externals. On the other hand, the consultation should be given enough time to enable the Indigenous Peoples to elect internally their representatives, and to commit proper consultations within their own communities. The latter consultations should be given enough time to take place prior to the initiation of the official discussions with the government or/and other parties involved in the consultation. Reasonable time should also be given for any possible additional internal consultations during the official consultation process.

***Informed*** - *should imply that information is provided that covers (at least) the following aspects:*

- a) The nature, size, pace, reversibility and scope of any proposed project or activity*
- b) The reason/s or purpose of the project and/or activity*
- c) The duration of the above.*
- d) The locality of areas that will be affected.*
- e) A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;*
- f) Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, Government employees and others);*
- g) Procedures that the project may entail.*<sup>280</sup>

From the list it can be noted that the Indigenous Peoples need to receive all the practical information regarding the measures that have been planned. As was pointed out above this has to be done in an atmosphere of good faith and hence the information provided has to be accurate and honest. The information has to be given to the peoples that may be affected, prior to the consultation and with sufficient time for these peoples to commit internal evaluations of the material. As is noted by point f) it is assumed that Indigenous Peoples could be involved in the planned projects, also after the consultation process through participation in for example the proper implementation of the agreed issues.

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<sup>279</sup> *Ibid.*, paragraph 46.

<sup>280</sup> *Ibid.*, paragraph 46.

### **Consent**

*Consultation and participation are crucial components of a consent process... The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation... The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it...*<sup>281</sup>

As can be understood from the text, reaching consent is a process. To be able to reach consent between the parties, the atmosphere of the consultation has to be respectful and inclusive. Special emphasis is put on the participation of Indigenous women, children and youth. The text also confirms that Indigenous Peoples have the possibility to abstain from consenting to some measures, but this doesn't give them the right to veto any planned measures. As will be discussed below, even if Indigenous Peoples wouldn't consent on the measures they are being consulted about, it seems like the states still have the right to continue with their planned measures.

## **4.2.2 Provisions regarding the right to land and prior consultation**

Besides the general provisions mentioned above, also a number of the articles dealing with the right to land in the ILO 169 and the UN Indigenous Declaration require in certain cases the prior consultation with Indigenous Peoples. The provisions on consultation and land rights are mentioned explicitly in some cases, but in some other articles they must be understood from the context of the provisions.

Article 4 of the ILO 169 defines generally that states shall adopt special measures to safeguard the environment of the Indigenous Peoples.<sup>282</sup> For Indigenous Peoples "*their environment*" equals to their lands and territories. The article goes though further underlining that the measures to be taken shall not be contrary to the freely-expressed will of the affected peoples.<sup>283</sup> Even if this in itself does not constitute a hinder for states to start or continue with their planned measures, it does present the general atmosphere of the ILO 169 as trying to involve Indigenous Peoples as much as possible in the implementation of the instrument and to have control over their own lives. This general approach can also be found in Article 7(1) of the ILO 169: "*The peoples concerned shall have the right to decide their*

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<sup>281</sup> *Ibid.*, paragraph 47.

<sup>282</sup> ILO 169, Article 4(1).

<sup>283</sup> *Ibid.*, Article 4(2).

*own priorities for the process of development as it affects... the lands they occupy or otherwise use and to exercise control... over their own economic, social and cultural development”*.<sup>284</sup>

There are though also specific provisions where the ILO 169 explicitly mentions the right to prior consultation when dealing with the right to land. Article 15(2) requires prior consultation with Indigenous Peoples prior to the exploration or exploitation of sub-surface resources.<sup>285</sup> Article 16(2) stipulates that relocation of Indigenous Peoples shall only take place after their free and informed consent.<sup>286</sup> If consent has to be achieved before the relocation can take place, this means that the consultation with the affected peoples will have to take place before a FPIC can be achieved. Article 17(2) deals with the specific case where Indigenous Peoples might need to be consulted in order to assess their capacity to alienate their lands or other rights outside of their own community.<sup>287</sup> The CEACR has also expressed that Article 15 of the ILO 169, on Indigenous Peoples’ natural resources, shall be read in conjunction with Articles 6 and 7 of the convention.<sup>288</sup>

The CEACR has in its General Observation on the ILO 169 concluded that “[w]ith regard to consultation, the Committee notes two main challenges: i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and tribal peoples directly; and ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted.”<sup>289</sup> Hence the CEACR observed that there are in general both legislation gaps as well as implementation problems. On the one hand, according to the CEACR, the member states haven’t managed to adopt the provisions in the ILO 169 into their domestic legislation in a satisfying manner. On the other hand the states have problems with the practical implementation of the right, especially that the consultations should take place prior to the adoption of any measures.

In the UN Indigenous Declaration also a limited number of articles deal with both the right to consultation and the right to land. Article 32(2) mentions that “States shall consult and cooperate... with the indigenous peoples concerned... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>290</sup> This

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<sup>284</sup> *Ibid.*, Article 7(1).

<sup>285</sup> *Ibid.*, Article 15(2).

<sup>286</sup> *Ibid.*, Article 16(2).

<sup>287</sup> *Ibid.*, Article 17(2).

<sup>288</sup> ILO, *Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia (ratification: 1991)*, ILOLEX 062005BOL169, submitted 2005, paragraph 3.

<sup>289</sup> ILO, *supra note 3*, page 64.

<sup>290</sup> UN Indigenous Declaration, Article 32(2).



general provision is important due to the fact that it once again points out all the different characteristics of a successful consultation. It also underlines that the consultation shall be conducted prior to any planned project that may affect the land or territories of Indigenous Peoples. Taking into consideration the wording of the provision and its context, it seems like only projects that affect the Indigenous Peoples' lands or territories directly require prior consultation. The term *may be affected*, was on purpose left aside and hence it should be understood as indirectly affecting measures are not covered by the instrument.

Article 30(2) of the UN Indigenous Declaration further stipulates that consultation shall be undertaken “*prior to using... [the Indigenous Peoples'] lands or territories for military activities*”.<sup>291</sup> Article 38 further states that “*States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.*”<sup>292</sup>

It is interesting to note that even if both the UN Indigenous Declaration and the ILO 169 establish the general right to consultation, it is in the articles dealing with the right to land that consultation and consent is most frequently mentioned. This clearly shows the importance of the right to land and how the drafters of the two instruments aimed at securing the right through the additional obligation to consult with the affected Indigenous Peoples prior to the initiation of any measures that would or could affect their lands.

## **4.3 Inter-American instruments and the jurisprudence of the IACtHR**

### **4.3.1 Inter-American Human Rights and Indigenous Rights instruments**

The American Declaration and the ACHR don't deal explicitly with the right to prior consultation with Indigenous Peoples. As we will see in the next section, the IACtHR has though in its jurisprudence found the right to prior consultation to also be an integrated part of several rights in these instruments. As said, the instruments don't deal with the issue as such and the author will in this part instead focus on the American Draft Declaration before going analyzing the jurisprudence of the IACtHR.

The American Draft Declaration deals with the right to prior consultation in several articles, both when dealing with the Indigenous Peoples' right to land, but also when dealing with other rights.<sup>293</sup> Dealing with land rights,

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<sup>291</sup> UN Indigenous Declaration, Article 30(2).

<sup>292</sup> *Ibid.*, Article 38.

<sup>293</sup> As has been mentioned before, the American Draft Declaration has not yet been adopted and many of the provisions are still being discussed, but the instrument could still be

Article XVIII, regarding the right to protection of a healthy environment, states in its third paragraph that “*Indigenous peoples have a right to [prior information and consultation on] [their free, prior and informed consent on] measures and actions which may [significantly] affect the environment in indigenous lands [and territories].*”<sup>294</sup> The wording of the Article has not yet been adopted and all text in brackets is still being discussed. The Indigenous Caucus has also proposed an own variant to this provision: “*Indigenous peoples have the right to their free, prior and informed consent, with respect to measures and actions that may affect the environment in indigenous lands and territories.*” Both provisions mention that Indigenous Peoples have the right to FPIC. Both provisions also propose that consultation shall be conducted for measures that *may* affect Indigenous Peoples. It is though still open if the effects of the interventions shall be significant or not. The proposal is still being debated but it could be concluded that some of the same debates that were held regarding the provisions on consultation in the UN Indigenous Declaration are the same ones that are being debated when drafting the American Draft Declaration.

Paragraph 1 of Article XXV of the American Draft Declaration stipulates that “*Indigenous peoples shall not be transferred or relocated without their free, prior, and informed consent...*”<sup>295</sup> Article XXX establishes in its fourth paragraph that: “*[i]n the event of armed conflicts, the states shall take adequate measures, with the agreement of the indigenous peoples concerned, to protect the... lands, territories, and resources of the indigenous peoples, **inter alia**:... take measures of integral reparation and provide adequate resources for reconstruction, with the free, prior, and informed consent of the indigenous peoples affected, for the damages incurred.*”<sup>296</sup>

The provisions in Article XXV can also be found in the UN Indigenous Declaration with a very similar wording; hence these two provisions don't differ from each other significantly. The provisions of Article XXX, on the other hand cannot though be found in the UN Indigenous Declaration.<sup>297</sup> Especially in the case of Colombia, but also Peru, the provisions regarding armed conflicts would be crucial taking into consideration the present or past armed conflicts that these countries have experienced.

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seen, at least partially, as presenting the current status of the right to prior consultation in the Inter-American Human Rights system.

<sup>294</sup> American Draft Declaration, Article XVIII(3). Brackets as in original document.

<sup>295</sup> *Ibid.*, Article XXV(1). The paragraph establishes though certain circumstances when relocation or transfers is accepted (such as natural disasters, national emergency, etc.), but also these situations need to be discussed with the affected Indigenous Peoples.

<sup>296</sup> *Ibid.*, Article XXX(4) and Article XXX(4)(f). Bold added by author; original text in italics.

<sup>297</sup> The provisions regarding Indigenous Peoples in times of armed conflicts were actually discussed by the drafting parties of the UN Indigenous Declaration, but the article stipulating this situation this was dropped before passing the final proposed UN Indigenous Declaration document to the GA.

As can be seen, the American Draft Declaration is hence inclusive in the way that in its several articles calls or demands the participation of and/or consultation with Indigenous Peoples. The legal importance of the instrument is though not very high since it's still only a draft. As we will see next, the IACtHR has instead developed the right to prior consultation through the interpretation of the ACHR.

### 4.3.2 The jurisprudence of the IACtHR and the IACHR

The IACHR and the IACtHR have gathered a solid amount of jurisprudence regarding Indigenous Peoples' right to property, the right to prior consultation and of both these rights combined. These bodies have also dealt with cases regarding prior consultation, finding violations of this right, in conjunction with other rights; for example in conjunction with the right to non-discrimination or judicial protection. This jurisprudence has developed slowly through a number of important cases that today are considered to guide all the member countries of the OAS.

In the case of *Mary & Carrie Dann v. U.S.* the IACHR interpreted the American Declaration, coming to the conclusion that there had been a violation of the Western Shoshone Nation Indigenous Peoples' property rights due to the lack of a proper prior consultation with the affected peoples.<sup>298</sup> In the case the Western Shoshone Nation argued that they still had right to their ancestral lands while the government of the U.S. argued against, claiming that the Nation had lost its right to the lands through legal and administrative measures. The IACHR, besides finding a violation of the right to property, also found violations of the right to equality under the law and the right to fair trial.<sup>299</sup> This was due to the fact that the FPIC of the whole Western Shoshone Nation had not been sought prior to any measures that affected the lands. The AICHR concluded that the government had failed in its "*obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole*".<sup>300</sup>

Another very similar case is the one of the *Maya Communities of the Toledo District v. Belize*.<sup>301</sup> The case is typical in the sense that it dealt with the situation where the government of Belize had granted a third party the exploitation rights to natural resources on the lands of the Maya communities of the Toledo District. In the case the IACHR ruled that the government of Belize had violated Article 23 of the American Declaration. The violation was on the one hand due to the governments' failure to

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<sup>298</sup> Case of *Mary & Carrie Dann v. U.S.* (hereafter *Mary & Carrie Dann case*), Decision of the 27<sup>th</sup> of December 2002, paragraph 1.

<sup>299</sup> *Ibid.*, paragraph 172.

<sup>300</sup> *Ibid.*, paragraph 141.

<sup>301</sup> Case of *Maya Indigenous Communities of the Toledo District v. Belize* (hereafter *Toledo District case*), Decision of the 12<sup>th</sup> of October 2004.

effectively delimit, demark, and recognize the lands,<sup>302</sup> and on the other hand due to the lack of “...*effective consultations with and the informed consent of the Maya people.*”<sup>303</sup> Again the IACHR hence concluded that the lack of prior consultation on matters that affect Indigenous Peoples’ lands amounts to violations of these peoples’ property rights. The IACHR finally also concluded that “...*the duty to consult is a fundamental component of the State’s obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied.*”<sup>304</sup>

The *Saramaka* case is the only case so far where the IACtHR has dealt with FPIC.<sup>305</sup> This case is one of the most important cases in the Inter-American Human Rights system dealing with the right to prior consultation, FPIC and the right to land.<sup>306</sup> The importance arises from the judgments’ highly descriptive approach that brings clarity to a number of previously open questions. Also this case dealt with the granting of exploitation rights to third parties over natural resources, in this case logging and mining rights, on Indigenous lands. The IACtHR established that only natural resources that are *necessary* for the survival of the Indigenous Peoples, hence have traditionally been used by these peoples, are protected under Article 21 of the ACHR. This would mean resources that are associated and needed for agricultural activities, hunting or fishing. All other natural resources are hence *unnecessary* and the states could have the right to exploit them in case the domestic legislation allows it, though taking into consideration that the exploitation of these resources may also affect Indigenous Peoples.

The IACtHR found in the *Saramaka* case that the protection of the natural resources of the Indigenous Peoples required additional safeguards than those already found by the IACtHR in previous cases dealing with the right to land.<sup>307</sup> Taking into consideration these findings, the IACtHR concluded that:

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<sup>302</sup> *Ibid.*, paragraph 193.

<sup>303</sup> *Ibid.*, paragraph 194.

<sup>304</sup> *Ibid.*, paragraph 155.

<sup>305</sup> Note that the IACtHR has dealt with the right to prior consultation in a number of landmark cases prior to the *Saramaka* case, but that the *Saramaka* case is the first one where the IACtHR deals with the issue of Free, Prior and Informed Consent (hereafter FPIC). Note also that the IACtHR is since dealing with a number of cases related to FPIC, among others the *Kichwa Peoples’* case in Ecuador; the judgments of these cases are though still pending.

<sup>306</sup> Brunner, Lisl, “The Rise of Peoples’ Rights in the Americas: The *Saramaka* People Decision of the Inter-American Court of Human Rights”, *Chinese Journal of International Law*, Volume 7, Issue 3, 2008, page 706; and Tramontana, Enzamaria, “The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources”, *International Journal on Minority and Group Rights*, Volume 17, Issue 2, 2010, page 221.

<sup>307</sup> The previously found safeguards were: “a) *previously established by law*; b) *necessary*; c) *proportional*, and d) *with the aim of achieving a legitimate objective in a democratic society*”. These safeguards were found in the following cases: *Yakye Axa* case, paragraphs 144 and 145; *Ricardo Canese* case, paragraph 96; *Herrera Ulloa* case, paragraph 127; and *Ivcher Bronstein* case, paragraph 155. See also the *Sawhoyamaya* case, paragraph 137.

*...the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory that are necessary for their survival... [and] that the State may restrict said right by granting concessions for the exploration and extraction of natural resources found on and within Saramaka territory only if the State ensures the effective **participation** and benefit of the Saramaka people, performs or supervises prior environmental and social impact assessments, and implements adequate safeguards and mechanisms in order to ensure that these activities do not significantly affect the traditional Saramaka lands and natural resources...*<sup>308</sup>

The IACtHR dealt with all the obligations quoted above, but for this thesis the most relevant one is the one dealing with the right to effective participation of Indigenous Peoples in the decision-making, planning and implementation processes. Regarding the participation, the IACtHR concluded that the states have a general duty to consult with their Indigenous Peoples on measures that may affect them.<sup>309</sup> It continued by describing the effective participation by stating that the states when committing active consultation must fulfill the following criteria:

- The consultation must be done *in accordance with the customs and traditions* of the affected Indigenous Peoples;
- The State has to accept and *disseminate information* and ensure constant communication between the parties of the consultation;
- The consultation has to be committed *in good faith* and through *culturally appropriate procedures*;
- The consultation has to be committed with the *objective of reaching an agreement*;
- The consultation has to be *committed at an early stage*, not only when the need arises to obtain approval. This gives the parties proper time for internal discussions and proper feedback procedures;
- The state has to provide *information about the possible risks* of the planned measures;
- The Indigenous Peoples have to have the possibility to accept the measures, *informed of the risks* and doing so *voluntarily*;
- The consultation should take into consideration the Indigenous Peoples' *traditional methods of decision-making*.<sup>310</sup>

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<sup>308</sup> *Saramaka* case, paragraph 158. Bold added by author.

<sup>309</sup> *Ibid.*, paragraphs 129 and 133.

<sup>310</sup> *Ibid.*, paragraph 133. The IACtHR also discussed the provisions of FPIC in paragraphs 134-137; these findings will be discussed further in the following section.

Regarding the criteria that the IACtHR found, these cover the same criteria that can be found in Article 19 of the UN Indigenous Declaration. The IACtHR is though more specific and complete than the Article 19 of the UN Indigenous Declaration in its listing of the criteria. The IACtHR doesn't anyway introduce any new criteria to the interpretation of the right to prior consultation, since all the criteria listed are either mentioned in Article 19 of the UN Indigenous Declaration or already covered and applied by the CEACR. The IACtHR is though the first International Human Rights court to recognize these criteria and establish them as duties within the Inter-American Human Rights system. The IACtHR does not go into detail on the interpretation of each criterion but concludes in the *Saramaka* case that the government had refrained from committing consultation with the Saramaka peoples even if they had a duty to do so and hence had violated these peoples' rights to property and judicial protection under the ACHR.<sup>311</sup>

The background of the case of the *Kichwa People v. Ecuador* was already presented in the last chapter. The interesting facts of the case are that the IACHR in its ruling of the case didn't not only find a violation of the right to land and judicial protection, but also of the freedom of thought and expression.<sup>312</sup> The case is being dealt with by the IACtHR at the moment and the judgment is expected at some point during 2012. This is potentially the first time that an International Human Rights court could come to find a violation of the right to freedom of expression in conjunction with the right to land, due to the lack of prior consultation with the affected Indigenous Peoples. As was presented in the previous chapter, Indigenous land has been found to be linked with other rights, and especially the right to property and the right to culture and cultural expressions. While the IACtHR has previously in the cases presented above found violations of the right to property in conjunction with the right to land due to the lack of prior consultation with the affected Indigenous Peoples, the *Kichwa People* case is potentially first case to find a violation of the right to culture in conjunction with the right to land due to the lack of prior consultation with the affected Indigenous Peoples.

The identification of the scope of the right to prior consultation, as in conjunction with the right to land, has been and continues being one of the major achievements of the IACtHR in the Inter-American Human Rights system. The development of the right is still ongoing and cases like the one of the *Kichwa People* will continue broadening the understanding of the right to prior consultation and how it's interrelated with the right to land. The judgments of the IACtHR are only considered to be applicable on the states of the Americas, but the impact it has globally and for Indigenous Peoples in also other continents will be more than significant.

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<sup>311</sup> *Ibid.*, paragraphs 214(1), 214(2) and 214(3).

<sup>312</sup> *Kichwa people* case, paragraph 259.

## **4.4 Can Free, Prior and Informed Consent in certain cases be a prerequisite for the adoption of measures?**

### **4.4.1 What are the consequences of an Indigenous refusal to agree or consent?**

What happens in the case Indigenous Peoples refuse to give consent to a measure proposed by a government? Can governments anyway go ahead and proceed with their planned measures? These questions certainly divide scholars.

It is clear that the UN Indigenous Declaration and the IACtHR has established that the *objective* of the prior consultation with Indigenous Peoples shall be an agreement or the consent. Hence it's only an objective and there is a possibility that the parties won't reach that objective. As long as the consultation has been committed in accordance with the required effective procedures, as described by the UN Indigenous Declaration and the IACtHR, the government should be seen as having fulfilled its obligations under International Law, hence it seems that it is free to proceed with its plans, taking into consideration the results of the consultation, despite that it did not lead to an agreement or consent. The Indigenous Peoples could in such cases probably take their claims to the domestic judicial system and finally to the IACtHR, but as long as the consultation was committed in accordance with the requirements presented above, there doesn't seem to be a hinder for the government to continue with the planned measures. Hence an Indigenous consent or agreement doesn't seem to be a pre-requisite for governments to anyway adopt measures after a properly conducted consultation. As we will see below, the situation is though more complicated when dealing with FPIC.

### **4.4.2 Current development of the issue**

Even if consultation *per se* doesn't seem to pre-require the consent of the Indigenous Peoples involved, the emerging jurisprudence of the IACtHR and the rulings and statements by International Human Rights bodies seem to point increasingly to the fact that FPIC could become a pre-requisite in certain cases in order to continue with the government's planned measures.

There seems to be in the HRC an uncertainty regarding the meaning of the term FPIC and its scope, and hence it body hasn't had a clear position regarding it yet.<sup>313</sup> So far the HRC has never in any of its cases come to the conclusion that not only consultation but that also FPIC could be required.

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<sup>313</sup> Barelli, Mauro, "Free prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead", *The International Journal of Human Rights*, Volue 16, Issue 1, 2012, page 8.

In a number of cases the body has though suggested that FPIC could become a pre-requirement for certain measures.<sup>314</sup> The development of the HRC cases though seems to be going towards a requirement of PFIC in cases that have a major impact on the affected Indigenous Peoples lives. This is also the approach that has been promoted by the Special Rapporteur and adopted by the IACtHR.

While the HRC has dealt with the FPIC as interpreted within the provisions of the ICCPR, the IACtHR and the Special Rapporteur have interpreted the UN Indigenous Declaration which is clearer, but still controversial.<sup>315</sup> Article 32(2) of the UN Indigenous Declaration states that consultation should be committed “*in order to obtain*” the Indigenous Peoples’ FPIC.<sup>316</sup> Even if the provision seems to suggest that states would have to obtain the FPIC regarding all consultations that affect Indigenous Peoples’ lands and territories, this is not the case. Studying the negotiations leading to the adoption of the UN Indigenous Declaration and the statements done by state representatives after the adoption of the instrument it becomes clear that states did not intend to give Indigenous Peoples the right to veto on all consultations regarding their lands.<sup>317</sup> This does not mean though either that consent hadn’t to be reached in any case; it doesn’t make sense that Indigenous Peoples would have the right to self-determination and the right to freely pursue their economic, social and cultural development, if states anyway could take decisions against their will on any measures that could risk their cultures and lives.<sup>318</sup> Hence the provisions of Article 32 must be seen as flexible and in certain cases obliging the states to find the FPIC of the affected Indigenous Peoples. The provisions in the UN Indigenous Declaration don’t anyway clarify when such cases could occur. The jurisprudence of the IACtHR has though helped in the interpretation of this obligation.

In the *Saramaka* case, the IACtHR after recognizing the states’ general obligation to consult with Indigenous Peoples and the criteria for the effective consultation, the IACtHR went further and stated that it considered that when it comes to “*large-scale development or investment projects that would have a major impact... [on Indigenous Peoples], the State has a duty, not only to consult with the [affected peoples]..., but also to obtain their free, prior, and informed consent, according to their customs and*

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<sup>314</sup> Case of *Ilmarinen Länsman v. Finland*, UN Doc. CCPR/C/52/D/511/1992, Decision of 8<sup>th</sup> of November 1994; Case of *Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/CAN/CO/5, Decision of 20<sup>th</sup> of April 2006, paragraphs 8 and 9; and Case of *Angela Poma Poma v. Peru*, UN Doc. CCPR/C/95/D/1457/2006, Decision of 27<sup>th</sup> of March 2009.

<sup>315</sup> In the case of the IACtHR, the court has interpreted the ACHR but also referred to the UN Indigenous Declaration in its jurisprudence.

<sup>316</sup> UN Indigenous Declaration, Article 32(2).

<sup>317</sup> Barelli, *supra note* 313, pages 10 and 11. See also GA, *General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, says President*, GA/10612, published the 13<sup>th</sup> of September 2007, available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>, visited 8<sup>th</sup> of May, 2012.

<sup>318</sup> Barelli, *Ibid.*, page 11.



traditions.<sup>319</sup> The IACtHR hence recognized that there is a difference between small-scale and large-scale projects and that the latter might amount to projects that endanger greatly the lands and cultures of Indigenous Peoples. In these cases, the state might be required to obtain the FPIC of the affected people prior to any further measures. Quoting the Special Rapporteur the IACtHR stated that in case of large-scale projects:

*“...it is likely that... [Indigenous] communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”*<sup>320</sup>

In the same report, the Special Rapporteur concluded that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects”.<sup>321</sup> The IACtHR further pointed out that also other international Human Rights bodies have come to the same conclusions as the IACtHR and the Special Rapporteur on the obligations of states regarding large-scale projects on Indigenous lands.<sup>322</sup>

As a side note it must be noted that even if the differentiation between small- and large-scale projects has been identified and recognized by the IACtHR, some scholars argue that this doesn't solve *per se* the problematic of the evaluation of the importance or impact of a project.<sup>323</sup> The simplest

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<sup>319</sup> *Saramaka* case, paragraph 134.

<sup>320</sup> Stavenhagen, Rodolfo, *Indigenous Issues: Human rights and indigenous issues*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen submitted in accordance with Commission resolution 2001/65, UN Doc. E/CN.4/2003/90, submitted the 21<sup>st</sup> of January 2003, page 2.

<sup>321</sup> *Ibid.*, paragraph 66.

<sup>322</sup> The IACtHR mentioned that the CERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”. CERD, *Concluding Observations on of the Committee on the Elimination of Racial Discrimination: Ecuador*, Consideration of Reports submitted by States Parties under Article 9 of the Convention, UN Doc. CERD/C/62/CO/2, submitted the 2<sup>nd</sup> of June 2003, paragraph 16.

<sup>323</sup> Pasqualucci, Jo M., “International Indigenous Land Rights: A Critique of the Inter-American Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples”, *Wisconsin International Law Journal*, Volume 27, Issue 1, 2009, page 84.

example is the situation with a locality with a high number of smaller-scale projects that in the end have a larger impact on the lands of Indigenous Peoples. These situations are not covered by the IACtHR' division of smaller and larger projects since it doesn't take into consideration the overall impact of the projects. It remains to be seen if this kind of situations are raised in front of the IACtHR and what the outcome of such claims would be.

On the basis of the findings in the case, the IACtHR concluded that “*the “level of consultation that is required is obviously a function of the nature and content of the rights of the Tribe in question.” ... [I]n addition to the consultation that is always required when planning development or investment projects within [a] traditional... [Indigenous] territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the... [Indigenous] people to a large part of their territory must be understood to additionally require the free, prior, and informed consent..., in accordance with their traditions and customs.*”<sup>324</sup>

Taking into consideration these three mandatory safeguards: a) the extent of the measures to be adopted, b) the adoption of the minimum criteria for the effective consultation, and c) the evaluation of the benefits that the Indigenous Peoples would gain from the project, the IACtHR was able to balance the rights of the Saramaka People and the interests of the wider public.<sup>325</sup> The IACtHR concluded that there had indeed been a violation of the Saramaka peoples' rights under the ACHR, due to the lack proportionality considering the above mentioned aspects.<sup>326</sup> The introduction of the different aspects to be taken into consideration when balancing the interests of Indigenous Peoples and the wider public indeed facilitates the understanding and interpretation of the FPIC, even if there is still room for further development.

Even though the IACtHR introduced the difference between smaller and larger scale projects, and applied it in the case of the Saramaka People, the scope of the FPIC is still not totally clear. It must be concluded that it seems like there are situation when Indigenous Peoples' consent could be a pre-requisite prior to any measures. This does not mean that the Indigenous Peoples have a right to veto in certain situations; it means that there must be a wider flexibility under certain circumstances.

The Special Rapporteur has explained the situation very accurately in the following statement:

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<sup>324</sup> Saramaka case, paragraph 137.

<sup>325</sup> Pentassuglia, Gaetano, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, Martinus Nijhoff Publishers, Leiden, 2009, page 116.

<sup>326</sup> *Ibid.*, page 116.

*[T]he strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.<sup>327</sup>*

It is still to be seen in practice in what kind of situations this prohibition would appear and the practical consequences of an Indigenous refusal to consent with the proposed projects.

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<sup>327</sup> Anaya, S. James, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/12/34, submitted the 15<sup>th</sup> of July 2009, Paragraph 47.

# 5 The implementation of the right to prior consultation in Peru and Colombia

## 5.1 Introduction

According to the IACHR in most cases, the right to be consulted is violated because of the lack of domestic legislation that would regulate the consultation or how it shall be committed.<sup>328</sup> The IACHR further argues that also in cases where legislation do exists, but that this is limited or deficient, the end results in most cases is the violation of the obligation to conduct effective consultation with Indigenous Peoples, prior to any measures.<sup>329</sup> Noting the relationship between the total lack of or the existence of incomplete domestic legislation regulating the right to prior consultation and the repeated violation of this right, it becomes essential to emphasize the importance of the implementation of the international obligations that the states have committed into the domestic legislation, in order to avoid repeated violations in the future. The IACHR has concluded that “*the absence of clear legal guidelines for the consultation procedure implies, in practice, a serious obstacle for compliance with the State duty to consult.*”<sup>330</sup> The IACHR hence underlined that not only the mere obligation to consult should be implemented in the domestic legislation, but also that the regulations implemented have to be specific in order for the consultation procedures to be effective.

In accordance with the ACHR Article 2 and 1(1), the states have the duty to regulate in their domestic legal systems the obligations that they have committed to and that arise from the above mentioned instrument.<sup>331</sup> This is of course to guarantee that all the rights and duties mentioned in the instruments indeed are applied on the national level. The lack of implementation on the national level does not though mean that the state would be free from obligations; the obligations still exist independently of the implementation on the domestic level.<sup>332</sup>

In the ILO 169, Article 33(2)(b) articulates a similar obligation.<sup>333</sup> The states are responsible for the adoption of programs that aim at implementing the provisions of the ILO 169, among other things through the proposing of legislation and other measures. Additionally Article 4(1) of the ILO 169

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<sup>328</sup> IACHR, *supra note 99*, paragraph 298.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*, paragraph 299.

<sup>331</sup> ACHR, Articles 1 and 2(1).

<sup>332</sup> IACHR, *supra note 99*, paragraph 298.

<sup>333</sup> ILO 169, Article 33(2)(b).

state that states shall adopt special measures in order to safeguard the rights of Indigenous Peoples, their lands, culture, etc.

Also the UN Indigenous Declaration urges the states to the implementation of its provisions, through the adoption of legislation regulating the obligations. Article 38 of the UN Indigenous Declaration state that: “*States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.*”<sup>334</sup> Both the ILO 169 and the UN Indigenous Declaration underline that Indigenous Peoples have to be involved in the process of implementation and adopting of new legislation. While the ILO 169 only requires cooperation with Indigenous Peoples, the UN Indigenous Declaration requires also consultation. Due to the evolution of the rights of Indigenous Peoples, the flexible approach of the ILO 169,<sup>335</sup> and through the growing jurisprudence of the IACtHR and domestic courts, it seems like not only should cooperation be sought with Indigenous Peoples under the ILO 169 when implementing or drafting new legislation, but that also consultation would today be required in order to conduct the implementation of the program in an effective manner.

Within the Inter-American Human Rights system, the IACHR has concluded that states must create legislation “*that develops the individual rights of indigenous peoples, that guarantees the mechanisms of participation of indigenous persons in the adoption of political, economic, and social decisions that affect their rights, and that they be accorded greater political participation in the adoption of decisions at the national level*”.<sup>336</sup> Regarding the participation provision, this includes the obligation to consult with Indigenous Peoples prior to any legislative or administrative measures that may affect their lives. It is important to point out that the IACHR states clearly that the participation shall be guaranteed when the government is planning to adopt any measures that affect the Indigenous Peoples rights. Hence Indigenous Peoples must be consulted on issues that affect their rights, prior to the adoption of the planned measures.

According to the Special Rapporteur there is not one consultation solution or model that could satisfy all situations where consultation will be required, and hence several models or solutions should be elaborated.<sup>337</sup> In a report from 2009, the Special Rapporteur affirmed that “*...States should define into law consultation procedures for particular categories of activities, such as natural resource extraction activities in, or affecting, indigenous territories. Such mechanisms that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in*

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<sup>334</sup> UN Indigenous Declaration, Article 38.

<sup>335</sup> ILO 169, Article 34.

<sup>336</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., adopted the 2<sup>nd</sup> of June 2000, Chapter X, paragraph 39 – Recommendation 1. Bolded text added by author.

<sup>337</sup> Anaya, *supra note* 327, paragraphs 37 and 45.

*consultation with indigenous peoples.*<sup>338</sup> The Special Rapporteur without doing an exhaustive listing mentions the extraction of natural resources as an example of an activity that might require a particular consultation procedure. Through the mentioning of the extraction of natural resources the Special Rapporteur does not only point out that it is one of the most common activities that might need to be consulted, but also that this activity could be different from other activities that also need to be consulted, hence special consultation procedures should be developed for it.

Even if the pronouncements of the Special Rapporteur have been more complete so far regarding the need for different consultation procedures for different planned measures, it should be mentioned that also the IACHR has confirmed that no single formula is applicable to all countries and in all situations. The IACtHR concluded this despite the fact that there is at the moment more and more jurisprudence on the matter, by the Inter-American and other international and domestic courts and bodies.<sup>339</sup>

To end, it can be noted that the Special Rapporteur has stated that “[t]he specific characteristics of the consultation procedure... will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples.”<sup>340</sup> This statement goes in line with the discussion held in the last chapter on the obligation to find a FPIC. Not only does the outcome of the consultation in certain situations, especially in cases dealing with projects that have a greater impact on the life and property of Indigenous Peoples, have to consent with the proposed plans, but the Special Rapporteur also suggest that the consultation in such cases would have to be committed in other ways than when consultation is committed and the objective is the agreement of the affected peoples.<sup>341</sup>

Taking into consideration that there is no universal model for consultation and that each country or single project might have its best suitable model, we will next study the cases of Colombia and Peru: their legislation on consultation with Indigenous Peoples, the quality of the legislation, as well as the application of it on the national level.

## 5.2 Colombia

### 5.2.1 Introduction

The new Colombian constitution from 1991 and the ratification of the ILO 169, which also happened in 1991, are two factors that remarkable improved the protection of Indigenous Peoples’ rights and their recognition in

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<sup>338</sup> *Ibid.*, paragraph 67.

<sup>339</sup> IACHR, *supra note* 99, paragraph 301.

<sup>340</sup> Anaya, *supra note* 327, paragraphs 37 and 45.

<sup>341</sup> *Ibid.*

Colombia.<sup>342</sup> Through the adoption of the new Colombian Constitution shortly after the ratification of the ILO 169, several important provisions for Indigenous Peoples were added to this first mentioned instrument. Among other things, land rights are guaranteed and Indigenous Peoples have the right to elect own representatives to the congress of the country. The Colombian Constitution also defined that specific legislation on Indigenous Peoples' territories would regulate these rights on the domestic law level. This last mentioned legislation would also lead to the adoption of provisions regarding the right to prior consultation.

Unfortunately even if the Colombian Constitution called the legislators to draft and adopt specific legislation on Indigenous Peoples' rights, this never happened as planned. As we will see below, there is no specific law on prior consultation with Indigenous Peoples in Colombia and the different provisions that exist are incomplete or partially incompatible with the ILO 169 or the jurisprudence of the IACtHR and the Colombian domestic courts. Political unwillingness has unfortunately led to a situation where Indigenous Peoples haven't been able to enjoy their constitutionally granted rights. Instead, a high number of major development programs, infrastructure projects, mining activities, etc. have taken place on territories that have affected Indigenous Peoples' lands.<sup>343</sup> These peoples have in most of the cases not been consulted even though they had the right to it, and in the few cases where consultation actually was committed, the negotiations didn't lead to an agreement and the authorities imposed their plans disregarding the views of the Indigenous Peoples affected.<sup>344</sup>

As was mentioned already in the introduction, the internal armed conflict that has been going on in Colombia for the last over 40 years has also affected the possibilities to protect and guarantee the rights of Indigenous Peoples. But it is not only the FARC or paramilitaries that have violated the rights of Indigenous Peoples; also the Colombian army has intruded on Indigenous Peoples' lands and territories and caused direct or indirect deaths among the Indigenous population.<sup>345</sup> Even if the restitution of traditional Indigenous lands has been significant in the last decades, Indigenous Peoples still suffer not only from the lack of legal protection and political unwillingness, but also from the internal armed conflict and the violence they are confronted with.

Fortunately the Colombian domestic courts have ruled in favor of the rights of Indigenous Peoples in a number of landmark cases. These cases have clarified and expanded Indigenous Peoples' rights and hence done partially the work that the unwilling authorities so far have not been able or willing

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<sup>342</sup> Saravia B., Viviana N., *Estudio de Derecho Comparado para Definir como se ha Interpretado la Consulta en Cada uno de los Países Firmantes del Convenio 169*, Instituto Nacional de Desarrollo de los Pueblos Andinos, Amazónicos y Afroperuanos (hereafter INDEPA), 2011, page 37.

<sup>343</sup> *Ibid.*, pages 34 and 35.

<sup>344</sup> *Ibid.*, page 35.

<sup>345</sup> *Ibid.*

to do. These Colombian cases have not only become landmark cases within the Colombian legal system, but they have also been recognized by the Special Rapporteur<sup>346</sup> and other international bodies and domestic courts in the region.

## 5.2.2 The Colombian legislation on prior consultation

As was mentioned above, the Colombian Constitution takes well into consideration Indigenous Peoples' rights since the newest constitution was drafted and adopted shortly after the country's ratification of the ILO 169. Despite this, the constitution does not refer directly to the prior consultation with Indigenous Peoples in any of its provisions. The CCC has though included the right to prior consultation indirectly through the interpretation of the right to participation. The CCC has used Article 40, dealing with the general right to participate in the political life, and Article 330, dealing with the specific right of Indigenous Peoples to participate in the decision-making when the authorities are planning the exploitation of natural resources on these peoples' lands, in order to ensure Indigenous Peoples their right to prior consultation. These provisions are not very specific, but as we will see, the CCC has developed and specified the right in its jurisprudence.

First of all one shall remember that Colombia abstained when the UN Indigenous Declaration was voted upon by the GA, hence the country did not show its support to this important document. Colombia decided anyway recently to change view and approved the UN Indigenous Declaration. The country when approving the instrument made though three reservations, which can be seen as quite controversial. Most probably these reservations are not only against the spirit and aims of the UN Indigenous Declaration but also in violation with the provisions of the ILO 169.<sup>347</sup> The first reservation is to the fact that the governments' right to subsurface resources is not mentioned in the UN Indigenous Declaration. This shouldn't be contested by any parties since the government's right to subsoil resources is specifically mentioned and allowed in the ILO 169. The second reservation refuses the provision ruling that Indigenous lands and territories should be free from military presence. This reservation arises from the consequences of the ongoing internal armed conflict, but it restricts the Indigenous Peoples' right to live in peace without the infringement of their lands or on their lives, especially for military related activities. The situation is complicated since the government has on the one hand the obligation to protect the citizens of the country and find an end to the armed conflict, but on the other hand it shall respect the Indigenous Peoples' land rights. A test of proportionality hence is required, and the restricting of Indigenous land

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<sup>346</sup> Anaya, *supra note* 8, paragraph 7.

<sup>347</sup> Saravia, *supra note* 342, page 38.



rights could be required in order to secure the lives of the Indigenous Peoples, or the protection and interests of society in general.

The last reservation made by the Colombian government was that it opposes the provisions regarding FPIC due to that this provision in the UN Indigenous Declaration does not explicitly state that the Indigenous Peoples lack a right to veto on the issues they are being consulted about. The government expressed that it accepts the right to consultation, but that it did not accept Indigenous delays or vetoing.<sup>348</sup> It is rather clear that Indigenous Peoples do not have the right to veto, but this does not mean that the government can simply consult without taking into consideration the outcomes of the consultation. As the UN Indigenous Declaration states, the objective is the FPIC, not the mere consultation. Hence the Colombian government does not seem to accept the fundamental obligations to consult with its Indigenous Peoples and aim at reaching a FPIC. The fact that the government is of the opinion that the consultation process is only a “delay” in the process of implementation also shows of the lack of understanding and political unwillingness among the politicians in Colombia.

Law 99 from 1993 states in its Article 76 that Indigenous Peoples shall be consulted prior to the exploitation of natural resources on their lands; this is to avoid affecting the cultural, social or financial integrity of these peoples.<sup>349</sup> The law doesn't expand on how the consultation shall take place; it simply states that decisions on the implementation of the planned measures shall take place after prior consultation with the affected communities. Decree 1397 from 1996 on the other hand states that the government has to involve and consult with Indigenous Peoples when implementing any development projects or plans that will take place on their territories.<sup>350</sup> It is interesting to note that the decree doesn't refer to prior consultation, but to consultation on ongoing processes. The decree also specifies that a certain consultation working group<sup>351</sup> or their delegates are allowed to participate in all consultations with Indigenous Peoples. This working group hence received the role of supervisor and protector of the consultation procedures. Like the law 99 from 1993, the decree 1397 from 1996 does not develop on the right to prior consultation, it simply mentions it as mandatory when implementing the planned projects, and hence leaves

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<sup>348</sup> Presidencia de la República, *Propuestas del Presidente Uribe a las comunidades indígenas*, published the 4<sup>th</sup> of November 2008, available at <http://web.presidencia.gov.co/sp/2008/noviembre/04/11042008.html>, visited the 14<sup>th</sup> of May 2912.

<sup>349</sup> *Ley 99 de 1993, por la cual se crea el Ministerio del Medio Ambiente, se reordena el Sector Público encargado de la gestión y conservación del medio ambiente y los recursos naturales renovables, se organiza el Sistema Nacional Ambiental -SINA-y se dictan otras disposiciones (Ley General Ambiental de Colombia)*, Diario Oficial No. 41.146, de 22 de diciembre de 1993, Article 76.

<sup>350</sup> *Decreto 1397 de 1996, por el cual se crea la Comisión Nacional de Territorios Indígenas y la Mesa Permanente de Concertación con los pueblos y organizaciones indígenas y se dictan otras disposiciones*, Diario Oficial 42.853, del 12 de agosto de 1996, Articles 12(9) and 16.

<sup>351</sup> Author's translation from Spanish: “*Mesa Permanente de Concertación*.”

it up to the legislators or the judicial bodies to develop the content of this right.

It is hard to argue that any of these two legislation acts would aim at protecting the Indigenous Peoples lands. The priority when drafting them was the exploitation and benefiting of the natural resources. In this context, the consultation with the affected Indigenous People is just a mandatory task that the authorities have to commit. Only indirectly does these legislation acts protect the right to land, if they do at all taking into consideration their conflicting content..

On the other hand, the Colombian government tried in 1998 to seriously specify and elaborate on the right to prior consultation with Indigenous Peoples. The result of the effort was the adoption of decree 1320 from 1998.<sup>352</sup> This decree deals specifically with the prior consultation with Indigenous Peoples when aiming at exploiting natural resources in their lands and territories. The decree, even if probably having good intentions, seems to be in conflict with the provisions of the ILO 169 and the UN Indigenous Declaration.<sup>353</sup> Both nationally and internationally the decree has been criticized widely and both the CCC and the CEACR have urged the government in several occasions to revise the decree and refrain from using it with its current content.<sup>354</sup> Among other things, the decree only applies to measures that take place specifically in Indigenous lands or territories, and the objective of the consultation is to identify and agree on the consequences of the measures and the actions to minimize the harm. Hence the Indigenous Peoples are not consulted on their opinion of the actual measures, but simply on the effects of them. Further the decree only applies for environment related authorities and cultural appropriate methods of dialogue are not taken into consideration, besides the possibility to translate certain discussions. As we will see in the next section the CCC has found the decree to be unconstitutional and has requested the government to not use it in the future unless revised. Unfortunately the Colombian government hasn't so far revised the legislation, even though it's soon 15 years since the decree was declared unconstitutional.

Besides the legislation mentioned above, the Colombian government hasn't adopted many more pieces of legislation that would deal with the Indigenous Peoples' right to prior consultation, and those few additional

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<sup>352</sup> *Decreto 1320 de 1998, por el cual se reglamenta la consulta previa con las comunidades indígenas y negras para la explotación de los recursos naturales dentro de su territorio*, Diario Oficial No 43.340, del 15 de julio de 1998.

<sup>353</sup> Saravia, *supra* note 342, page 38.

<sup>354</sup> See cases *Acciones de tutela contra el Presidente de la República, los Ministros del Interior, Agricultura, Medio Ambiente, y Minas y Energía, la Alcaldía Municipal de Tierralta (Córdoba) y la Empresa Multipropósito Urrá S.A. - E. S. P., por la presunta violación de los derechos fundamentales del pueblo Embera-Katío del Alto Sinú*, Judgment T-652/98, 10th of November 1998, Colombian Constitutional Court., and *Acción de tutela instaurada por Dumar Macías y Paulo Emilio Anacona Bermeo en contra del Alcalde y la Secretaria Municipal de Mocoa*, Judgment T-737/05, 14th of July 2005, Colombian Constitutional Court.

legislation acts have all been declared unconstitutional by the CCC. Next we will see how the CCC has found a large number of legislation acts unconstitutional and how this body instead has taken over the role to develop and clarify the right to prior consultation in Colombia.

### 5.2.3 The jurisprudence of the Colombian domestic courts

The CCC deals with two kinds of issues: guardianship cases<sup>355</sup> and unconstitutionality claims.<sup>356</sup> The first mentioned are cases dealing with fundamental freedoms in need of urgent and immediate protection.<sup>357</sup> The procedure has mostly been used for individuals' claims, but the CCC has also dealt with Indigenous collective rights, hence recognizing them as also applicable within the scope of this judicial body.<sup>358</sup> Indigenous Peoples have indeed raised most part of their successful cases dealing with prior consultation through this process and the CCC has hence recognized that the Indigenous Peoples' right to prior consultation is one of the fundamental rights that the Colombian Constitution protects.<sup>359</sup>

The second type of cases deals with unconstitutionality claims. Individuals or groups of individuals that argued that a certain piece of legislation is in breach with the Colombian Constitution can raise a case at the CCC claiming that these legislation acts are unconstitutional and should be revoked. Besides Indigenous organizations, also academic groups and Human Rights organizations have used this method to claim the unconstitutionality of several legislation acts.<sup>360</sup> The CCC has indeed in several cases agreed with the claims and hence declared legislative acts that affected Indigenous Peoples directly and that hadn't been previously consulted with these peoples, to be unconstitutional. Also the Special Rapporteur has welcomed these cases and recognized them in his report after his latest visit to Colombia.<sup>361</sup>

As was mentioned already above, the CCC has found decree 1320 from 1998 to be unconstitutional because its provisions infringe with the Indigenous Peoples' right to prior consultation and participation in the planning and implementation of projects and measures that directly affect their cultures and property. In the case *T-652/98* the CCC found that the consultation procedures did not follow the requirements of the ILO 169,

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<sup>355</sup> Author's translation from Spanish: "acciones de tutela".

<sup>356</sup> Author's translation from Spanish: "acción pública de inconstitucionalidad".

<sup>357</sup> Saravia, *supra* note 342, page 39.

<sup>358</sup> *Proceso de tutela T-13636 adelantado por la Organización Indígena de Antioquia (O.I.A.), Agente Oficioso de la Comunidad Indígena Embera-Catio de Chajerado, contra la Corporación Nacional de Desarrollo del Choco (Codechoco) y la Compañía de Maderas del Darien (Madarien)*, Judgment T-380/93, 14th of October 1993, Colombian Constitutional Court, Fundamentos jurídicos, paragraph 8.

<sup>359</sup> Saravia, *supra* note 342, page 39.

<sup>360</sup> *Ibid.*, page 40.

<sup>361</sup> Anaya, S. James, *supra* note 8, paragraphs 44 and 45.

which are also protected by the Colombian Constitution through the provisions of participation and the right to cultural identity, and that the Indigenous Peoples' rights hence had been violated.<sup>362</sup> The CCC called the actors to interrupt immediately their measures until proper consultation had been committed with the affected Indigenous Peoples and urged the government to not use the decree again until revised.<sup>363</sup>

In this case the CCC also quoted its own findings in an earlier case, stating that “*the participation [of the Indigenous Peoples] is not reduced merely to an intervention in the administrative procedure aimed at ensuring the right of defense for those who have been affected... but has a larger meaning given the lofty interests it seeks to protect... the destiny and security of the subsistence of said communities.*”<sup>364</sup> As can be seen, the CCC underlined that Indigenous Peoples should not only be seen as a delaying hinder that need to be consulted when these have been affected, but that these peoples should be an active part of the measures already from the beginning, in order to secure the rights and future cultural existence of these groups.

As seen in the case above, the CCC did not only find a violation of the Indigenous Peoples' rights when applying the specific measures in the discussed case, but it found as well that the whole decree was unconstitutional. In the case *T-737/05* the CCC stated that the decree 1320 from 1998 was not only unconstitutional because of its content, but also because the decree, which affected Indigenous Peoples directly, had not been previously consulted with Indigenous Peoples prior to its adoption.<sup>365</sup>

In recent years the CCC has declared unconstitutional three important pieces of legislation, especially for Indigenous Peoples. The General Forestry law,<sup>366</sup> the National Development Plan for 2006 – 2010,<sup>367</sup> and the Mine Code<sup>368</sup> have all been declared unconstitutional due to the lack of consultation with Indigenous Peoples before the adoption of the acts.<sup>369</sup> All

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<sup>362</sup> Case *T-652/98*, paragraph Decisión – cuarto.

<sup>363</sup> *Ibid.*, paragraphs 5(b) and Decisión – cuarto.

<sup>364</sup> See case *T-652/98*, Consideraciones de la Corte – paragraph 5, quoting case *Acción de tutela radicado bajo el número T-84771 instaurada por el señor Defensor del Pueblo, doctor Jaime Córdoba Triviño, en representación de varias personas integrantes del Grupo Etnico Indígena U'WA, contra el Ministerio del Medio Ambiente y la empresa Occidental de Colombia, Inc.* (hereafter case *SU-039/97*), Judgment *SU-039/97*, 3<sup>rd</sup> of February 1997, paragraph II(3)(2).

<sup>365</sup> Case *T-737/05*, paragraph VII(a).

<sup>366</sup> Author's translation from Spanish: “*Ley General Forestal*”. *Ley 1021 de 2006*, por la cual se expide la *Ley General Forestal*, 20th of April 2006, Diario Oficial No. 46.249, de 24 de abril de 2006.

<sup>367</sup> Author's translation from Spanish: “*Ley del Plan Nacional de Desarrollo 2006-2010*”. *Ley 1151 de 2007*, por la cual se expide el *Plan Nacional de Desarrollo 2006-2010*, 24th of July 2007, Diario Oficial No. 46.700, de 25 de julio de 2007.

<sup>368</sup> Author's translation from Spanish: “*Código de minas*”. *Ley 1382 de 2010*, por la cual se modifica la *Ley 685 de 2001 Código de Minas*, 9th of February 2010, Diario Oficial No. 47.618 de 9 de febrero de 2010.

<sup>369</sup> See the cases of *Demanda de inconstitucionalidad contra la Ley 1021 de 2006 "Por la cual se expide la Ley General Forestal"*, Judgment C-030/08, 223rd of November 2008, Colombian Constitutional Court; *Demanda de inconstitucionalidad contra la Ley 1151*

of these legislation acts have been declared on hold and not to be applied until prior consultation has been committed with the affected Indigenous Peoples. The CCC has hence called the government to consult these legislation acts with the affected Indigenous Peoples and revise them, prior to their new adoption and application.

In the case *SU-039/97* the CCC underlined certain characteristics that should prevail during the consultation process; the parties should seek communication and understanding that inspires to mutual respect and consultation processes that are committed in good faith, and that leads to a) the Indigenous Peoples full knowledge about the planned measures and the consequences of these measures, 2) these peoples' active and effective participation in the decision making processes, and that 3) these peoples are represented through their authorized representatives.<sup>370</sup> These consultations should also discuss how to prevent similar conflicts and damages in the future, how to compensate the people in the specific case where these Peoples have already suffered damages due to the implemented measures or for the damages the planned measures will cause, etc.<sup>371</sup>

These characteristics follow the jurisprudence of the IACtHR and the provisions of the ILO 169, but they are very general and lack several of the aspects and characteristics described by the IACtHR. It is anyway a welcome development that hopefully will have continuation.

## 5.2.4 Conclusions

Even if the CCC in its jurisprudence has tried to identify characteristics, expand the scope of the right to prior consultation and describe its implementation, the overall implementation of the right in Colombia is so far are not satisfying. This is not due to a lack of jurisprudence; as has already been noted the jurisprudence of the CCC is extensive and important, not only nationally but also for the interpretation of the right outside of Colombia. The main reason for the lack of the clear implementation is most probably the lack of a specific law regarding the right to prior consultation with the Indigenous Peoples that would set the framework of the consultation in all situations. The government's attempts to create specific provision for all the different legislation acts that affect Indigenous Peoples have not been successful so far. Instead the CCC has several times found these different provisions to be unconstitutional or violate the rights of Indigenous Peoples.

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*de 2007, "por la cual se expide el Plan Nacional de Desarrollo 2006-2010",* Judgement C-461/08, 14th of May 2008, Colombian Constitutional Court; *Demanda de inconstitucionalidad contra la Ley 1382 de 2010, "Por la cual se modifica la Ley 685 de 2001 Código de Minas.",* Judgment C-366/11, 11th of May 2011, Colombian Constitutional Court.

<sup>370</sup> Case *SU-039/97*, paragraphs II(3)(3).

<sup>371</sup> *Ibid.*

On the other hand, the CCC has at several occasions called the national legislators to enact specific law on the right to prior consultation; such legislation has unfortunately thought not yet had been drafted or adopted. As was noted above, the decree aiming at defining the right to prior consultation when dealing with exploitation of natural resources was found to be unconstitutional, and it did not comply with the provisions of the domestic legislation, the ILO 169 or the UN Indigenous Declaration. The Special Rapporteur has further noted that also other legislative efforts have been made in Colombia, but that the legislators have not consulted the affected Indigenous Peoples during the drafting process of any of these legislation acts.<sup>372</sup> None of these draft legislation acts have either been adopted so far.<sup>373</sup> The high amount of cases claiming violations of Indigenous Peoples' right to prior consultation, to their cultural identity and integrity, and to their lands and territories is an indicator of the continuous problems that Indigenous Peoples face in Colombia. The Special Rapporteur has confirmed the Indigenous Peoples' ongoing problems and requested the Colombian authorities to improve, especially on the right to prior consultation with these peoples.<sup>374</sup>

It could be concluded that the ongoing problems in Colombia rises both from the lack of appropriate legislation on the issue, but also due to political unwillingness to implement the legislation that exists or to adopt better legislation than the one existing at the moment. Both the unwillingness and the lack of clear and correct legislation regarding the right to prior consultation needs to be improved before Indigenous Peoples in Colombia will be able to enjoy all their rights. The drafting and adopting of a general legislation that would deal specifically with the implementation of the right to prior consultation with Indigenous Peoples would probably facilitate the progress. The Indigenous Peoples who will be affected by the legislation though also need to be consulted in this process and be given an active role in the drafting process.

It is in the benefit of both the authorities and the Indigenous Peoples to find common standing points and methods to avoid conflicts in the future: this will guarantee the Indigenous Peoples' possibilities to continue expressing their traditional cultures and enjoying their rights, as well as the authorities' possibilities to continue with development plans and exploitation projects that will benefit the whole country, without the risk of having to stop them due to lack of appropriate consultation with the affected peoples. Taking into consideration the ongoing growth of the mining sector in Colombia it becomes an urgent task for the authorities to find solutions to the ongoing social conflicts and to adopt measures to avoid similar conflicts in the future.

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<sup>372</sup> Anaya, S. James, *supra note* 8, paragraph 45.

<sup>373</sup> *Ibid.*, paragraph 45. Seeing that the legislators have not consulted with the affected Indigenous Peoples, the value of these acts could be questioned. In case they were adopted they could be submitted for unconstitutional revision and taking into consideration the prior rulings, the revision of the acts would again come into play.

<sup>374</sup> *Ibid.*, paragraph 44.

## 5.3 Peru

### 5.3.1 Introduction

During the presidency of Alan García Pérez, that ended the 28<sup>th</sup> of July of 2011,<sup>375</sup> the government of Peru had to face an important increase of social conflicts.<sup>376</sup> The different struggles between the Indigenous movements and the government dealt mainly with two pieces of legislation: the *Law on the Right to Prior Consultation with Indigenous and Native Peoples, to implement Convention 169 of the International Labour Organization (ILO)*<sup>377</sup> and the *Law on Forestry and Wildlife*.<sup>378</sup> This thesis will focus on the first-mentioned law.

Under García Pérez' government Peru increasingly aimed at expanding the exploitation of its natural resources, especially oil, timber, and gas; most of them to be found in the Amazonas region where around 300,000 Amazonian Indigenous persons live. Protests by Indigenous Peoples led to a government issued state of emergency in the Amazonas region and in June 2009 hundreds of policemen were sent in to clear blocked roads and take control over the region. The result of the clashes between thousands of representatives of the Indigenous communities and the police was the death of 34 persons and over 200 injured persons (almost half with bullet wounds). Shortly after, the government repealed two of the most conflictive legislative decrees earlier proposed. It was said that the remaining decrees would be carefully revised, but in the end only minor changes were brought to the remaining decrees.

As a response to the continued pressure from Indigenous organizations and civil society, especially after the events in June 2009, the Peruvian congress started working on the PLPC. Both Indigenous Peoples and civil society were invited to contribute to the law that after several months of negotiations was accepted by the Congress in May 2010. The former government of Peru, represented by President García Pérez and the Prime Minister Javier Velasquez Quesquen, initially observed (vetoed) however the PLPC and it was hence not promulgated.<sup>379</sup> The PLPC wasn't approved until September 2011 after García Pérez' mandate had finished and the new president Ollanta Humala, who is recognized as an active supporter of Indigenous affairs, decided to enact it.

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<sup>375</sup> Alan García Pérez' second mandate, the 28<sup>th</sup> of July 2006 – 28<sup>th</sup> of July 2011.

<sup>376</sup> The social conflicts during the mandate of the former Government of García Pérez almost tripled from about 80 conflicts in 2006 to at the end of its mandate being over 220. See also Bolpress, *Aumenta la tensión social en Perú tras la muerte de un estudiante*, available at <http://www.bolpress.com/art.php?Cod=2011062202>, visited 12th of May 2012.

<sup>377</sup> Author's translation from Spanish: "*Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio No 169 de la Organización Internacional del Trabajo (OIT)*", Ley N. 29785.

<sup>378</sup> Author's translation from Spanish: "*Ley Forestal y de Fauna Silvestre, 4141/2009-PE*." The law is also popularly known as the "law on the forest" (*Ley de la Selva*).

<sup>379</sup> The observation will be discussed later in this chapter.

### 5.3.2 The jurisprudence of the Peruvian domestic courts<sup>380</sup>

The Peruvian domestic courts have not dealt with many cases regarding prior consultation with Indigenous Peoples, neither have they always been in favor of these peoples' rights.<sup>381</sup> A few important cases have though been dealt with by the Peruvian domestic courts and they will be presented here.

In an early case,<sup>382</sup> the Peruvian Constitutional Court (PCC) found a number of Supreme Decrees<sup>383</sup> to be unconstitutional and to violate the Indigenous Peoples' right to prior consultation due to the fact that the decrees, which regulated citizen participation in relation to hydrocarbon-related activities, was too general and hence did not meet the requirements of the ILO 169 on the special characteristics of the consultation with Indigenous Peoples. Besides the fact that the legislative decrees were passed in a manner incompatible with the Peruvian Constitution,<sup>384</sup> the main reason for the questioning of the legality of the legislative decrees was the fact that Indigenous Peoples living in the Amazonas region were never consulted on the provisions that affected them. In this case the PCC did not further explain or expand on the right to prior consultation with Indigenous Peoples, but simply indicated that it was the responsibility of the legislators to adopt legislation that would specify the right.

Shortly after the Government of García Pérez had observed the proposed PLPC in 2009, the Peruvian Constitutional Tribunal (hereafter PCT) dealt with another case related to the prior consultation with Indigenous Peoples.<sup>385</sup> In the case brought by the Asociación Interétnica de Desarrollo de la Selva Peruana,<sup>386</sup> the PCT did not only recognize the rights to prior

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<sup>380</sup> The most important jurisprudence of the Peruvian domestic courts dates back to before the drafting and adoption of the PLPC in 2011. This jurisprudence in fact in the end also guided partially the drafting and content of the PLPC. Hence it becomes relevant to first analyze the jurisprudence of the domestic courts, before studying the legislation this jurisprudence led to.

<sup>381</sup> Saravia, *supra note* 342, page 64.

<sup>382</sup> *Recurso de agravio constitucional interpuesto por don Jaime Hans Bustamante Johnson contra la resolución de la Primera Sala Mixta Descentralizada de la Corte Superior de Justicia de San Martín, de fojas 926, su fecha 10 de mayo de 2007, que declara infundada la demanda de autos N° 03343-2007-PA/TC* (hereafter *N° 03343-2007-PA/TC*), paragraph 32.

<sup>383</sup> See among others Supreme Decree *N° 012-2008-EMM*.

<sup>384</sup> According to the Peruvian Constitution, topics that deal with environmental issues and especially the exploitation of natural resources have to be dealt with within the frames of the Organic Law (*Ley Orgánica*). Since only the Congress can enact changes to laws, the legislation changes through legislative decrees promulgated by the government of García Pérez were found to have been done in a manner incompatible with the provisions of the Constitution.

<sup>385</sup> *Demanda de Inconstitucionalidad interpuesta por Gonzalo Tuanama Tuanama, en representación de más de 5000 ciudadanos contra el Decreto Legislativo 1089, N° 00022-2009-PI/TC* (hereafter *N° 00022-2009-PI/TC*).

<sup>386</sup> Authors' translation from Spanish: "*The Interethnic Association for the Development of the Peruvian Jungle.*"



consultation of the Indigenous Peoples, but also developed the content of this right.<sup>387</sup> It could be seen as after the Peruvian legislators, foremost the government represented by President Alan García Pérez, had failed at adopting specific legislation that would clarify a number of open questions, the PCT decided to itself study the right and make its own conclusions on its scope and content. The case is indeed a landmark for the Peruvian Indigenous Peoples and probably even beyond.

In the case the claimants, Gonzalo Tuanama Tuanama and over 5000 more applicants, argued that a certain piece of legislation that affected Indigenous Peoples directly had been adopted without previously consulting with these peoples.<sup>388</sup> In Peru International Human Rights instruments are considered to be directly applicable and on a hierarchical level above domestic legislation,<sup>389</sup> and the claimants, making reference to the ILO 169 and the UN Indigenous Declaration, argued that the government had violated their right to prior consultation.<sup>390</sup> It could here also be mentioned that the judgments of the IACtHR and other International Human Rights tribunals are in Peru also considered to be directly binding since they interpret Human Rights provisions that are protected by the Constitution.<sup>391</sup> The PCT studied mainly the method of adoption of the legislation and only to a smaller degree the actual content of it.<sup>392</sup>

The PCT starts by repeating already previously recognized issues: that Peru is a multiethnic and multicultural state,<sup>393</sup> and that the right to ethnic identity is a type of right to cultural identity and existence.<sup>394</sup> The PCT also recognized that the ILO 169 is directly applicable in Peru on a constitutional level, and discussed the applicability of the UN Indigenous Declaration. The PCT comes to the conclusion that the UN Indigenous Declaration is not legally binding, but that this doesn't mean that it wouldn't have a legal

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<sup>387</sup> Ruiz Molleda, Juan Carlos, *El desarrollo jurisprudencial por el Tribunal Constitucional del derecho a la consulta previa: La exigencia judicial de los derechos fundamentales de los pueblos indígenas*, Instituto de Defensa Legal – Justicia Viva, Documento de Trabajo No. 41, 2009, page 1, available at [http://www.justiciaviva.org.pe/webpanel/doc\\_trabajo/doc05082010-223419.pdf](http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc05082010-223419.pdf), visited the 12th of May 2012.

<sup>388</sup> N° 00022-2009-PI/TC, Demanda y Contestación, a).

<sup>389</sup> N° 03343-2007-PA-TC, paragraph 31, and *Demanda de inconstitucionalidad interpuesta por el Colegio de Abogados de Arequipa y el Colegio de Abogados del Cono Norte de Lima, contra el artículo 22, inciso c), de la Ley N.º 26397, Orgánica del Consejo Nacional de la Magistratura N° 0025-2005-PI/TC*, paragraph 33.

<sup>390</sup> N° 00022-2009-PI/TC, Demanda y Contestación, a).

<sup>391</sup> Código Procesal Constitucional, LEY N° 28237, Article V.

<sup>392</sup> Even if the court mainly studied if Indigenous Peoples were consulted, the Peruvian Constitutional Court (hereafter PCT) was also obliged to study the content of the legislation in order to establish if Indigenous Peoples were affected directly by the legislation and hence if they needed to be consulted in the first place.

<sup>393</sup> *Demanda de inconstitucionalidad interpuesta por don Luis Alejandro Lobatón Donayre y más de cinco mil ciudadanos, contra el artículo 54º del Decreto Legislativo N.º 776, Ley de Tributación Municipal, N° 0042-2004-AI/TC*, paragraph 1.

<sup>394</sup> *Demanda de inconstitucionalidad interpuesta por el Presidente de la República contra los artículos 1º y 2º de la Ordenanza Regional N° 022-2007-GRP, promulgada por el Presidente del Gobierno Regional de Puno, N° 0006-2008-PI/TC*, paragraph 21.

effect; the PCT argued that the UN Indigenous Declaration has moral force and that it represents what states have committed to aim at achieving.<sup>395</sup> The PCT recognizes further that Indigenous Peoples have been excluded from society and that the right to prior consultation and participation is fundamental in aiming at expanding the multicultural dialogue,<sup>396</sup> but that Indigenous Peoples are not considered to have a right to veto on the issues they are being consulted about.<sup>397</sup> The PCT also argued that in case Indigenous Peoples' territories are expropriated, these shall not only be compensated with similar lands in another location, but they shall also share the benefits of the measures implemented on their lands.<sup>398</sup>

The PCT, interpreting the provisions of the ILO 169, concludes that the prior consultation has to meet five elements or characteristics: a) good faith, b) flexibility, c) conducted with the objective to reach an agreement, d) transparency, and e) conducted prior to the implementation of the measures.<sup>399</sup> The elements or characteristics don't differ from the ones identified in the ILO 169 and the UN Indigenous Declaration, and that were already discussed in the last chapter, and hence the conclusions on these matters of the PCT will not be discussed here. The PCT though further identifies three phases when planning and adopting measures that may affect Indigenous Peoples: a) determination of the direct effects of the planned measures, b) the actual consultation, and c) the implementation of the measures.<sup>400</sup>

More importantly the PCT describes clearly the different steps of the consultation. This had not been done before by the ILO 169 or the domestic legislation, and hence it has a great value. The PCT explained five different steps:

- a) The authority that is developing a legislative or administrative measure that may affect Indigenous Peoples, shall identify such measures;
- b) The same authority shall identify all Indigenous Peoples that may be affected by the measures and inform them about the planned measures and the effects they will have;
- c) After informing the Indigenous Peoples that may be affected by the measures, these shall be given a reasonable amount of time to create themselves an opinion on the matter, after which the negotiation phase begin;
- d) If the Indigenous Peoples agree with the proposed measures, the negotiations are over;
- e) In case that after the first negotiations the Indigenous Peoples don't agree with the proposed measures, the first phase of the negotiations

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<sup>395</sup> *N° 00022-2009-PI/TC*, paragraphs III(7) and III(8).

<sup>396</sup> *Ibid.*, paragraph VI(18).

<sup>397</sup> *Ibid.*, paragraph VIII(25).

<sup>398</sup> *Ibid.*, paragraph XVI(52).

<sup>399</sup> *Ibid.*, paragraph IX(26).

<sup>400</sup> *Ibid.*, paragraph IX(a)(27).

shall be finished. The PCT argues that the government does not yet have the right to implement any measures if no agreement has been reached after the first phase. A second phase of negotiations shall be initiated after a reasonable amount of time. If no agreement has been reached also after the second phase, only after that does the government have the right to continue with its planned measures, though trying to take as much as possible into consideration the views of the consulted Indigenous Peoples.<sup>401</sup>

The identification of these steps is extremely important. It brings clarity to how the consultation shall be conducted and also on the responsibilities of each party. It is important to note that the initiative shall come from the authorities, and that Indigenous Peoples should not have to request consultation and information. The requirement of at least two phases of negotiations, in case no agreement was reached after the first phase, is also very important and differs from the view that governments might have had prior to this landmark case.

Even if the judgment of the PCT ruled that the law at question was not incompatible with the Peruvian Constitution and that consultation with Indigenous Peoples had not been necessary in this case since the law did not apply on them, the content of the judgment is extremely important for Indigenous Peoples. Taking into consideration that the former government of García Pérez just had observed the PLPC, the judgment of the PCT came at a very crucial moment. The PCT showed a clear support for the rights of Indigenous Peoples, not only developing the right to prior consultation and in general recognizing the importance of Indigenous Peoples' rights, but also requesting the government to adopt appropriate legislation on the matter.

### **5.3.3 The views of the former government of García Pérez**

Before going to the actual content of the PLPC, some of the objections of the government of Alan García Pérez to the originally proposed PLPC will be discussed next. The objections represent the view of not only the former government of García Pérez but also the views of several former Peruvian governments that did not protect or respect the rights of their Indigenous Peoples.<sup>402</sup>

The previous government of García Pérez pointed out eight issues when observing the proposed PLPC. The main concern of the government was that the law didn't explicitly state that the Government has the right to make

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<sup>401</sup> *Ibid.*, paragraph XI(41).

<sup>402</sup> The repeated violations of Indigenous Peoples' rights together with the lack of specific legislation that would improve the protection of Indigenous Peoples is a rather clear evidence of this past lack of will to improve the protection of these peoples.

decisions that are contrary to the opinions of Indigenous Peoples. The government explained that Indigenous Peoples don't have a veto right on issues that affect them. Besides the issue on the veto, the former Peruvian government considered that the law proposal shouldn't give Indigenous Peoples the right to be consulted on all matters, but only on those affecting them directly. The government also suggested that when deciding on alternative solutions when an agreement or consent can't be reached between the Indigenous Peoples and the government, the interest of society in general should be prioritized before the one of the Indigenous Peoples, and that, in compliance with the ILO 169, Indigenous Peoples don't needed to be consulted about national or regional development projects. Additionally the government considered that the law extended the definition of Indigenous Peoples to, besides involving Indigenous Peoples in the Amazonian region, also involving "Andean and Coast farmers"<sup>403</sup>, and also that the document was not clear enough when it comes to the procedures of election of the Indigenous representatives. The government communicated that it saw a need for the state to verify and monitor the election of the representatives for these Indigenous representative bodies.

It is rather clear that the former government misinterpreted its international obligations. Although it might be correct that Indigenous Peoples don't have a right to veto on all issues that affect them, the government did not take into consideration the evolution of cases by the IACtHR and comments by the UN and ILO bodies arguing that it might be necessary to reach an Indigenous FPIC in certain cases, especially when dealing with large-scale development or investment projects, or other significant measures that puts the existence of Indigenous Peoples into risk. To allow the government to decide on the outcome of the consultation in all cases could be seen as a violation of the ILO 169, the UN Indigenous Declaration and the jurisprudence of the IACtHR. Also the Special Rapporteur sent the Peruvian government a communication after this later one had observed the law.<sup>404</sup> In the communication the Special Rapporteur, among other things, reiterated that governments have the duty to come to an agreement with Indigenous Peoples before taking any action, when dealing with large-scale development projects such as projects aiming at extracting natural resources on Indigenous Peoples' territories.

On the other hand, the former government should be criticized due to their comments that the law on prior consultation would be expanding the definition of Indigenous Peoples. Even if the Peruvian Constitution makes a difference between "*aboriginal peoples*" and "*farmer and native communities*", it is not true that only the first mentioned would fall within

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<sup>403</sup> Author's translation from Spanish: "*Comunidades campesinas andinas y costeñas.*"

<sup>404</sup> Anaya, S. James, *Declaración pública del Relator Especial sobre los derechos humanos y libertades fundamentales de los indígenas, James Anaya, sobre la "Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo" aprobada por el Congreso de la República del Perú*, published the 7<sup>th</sup> of July 2010, available at [http://unsr.jamesanaya.org/docs/statements/2010\\_statement\\_unsr\\_peru\\_consultation\\_la\\_w\\_7\\_7\\_2010\\_sp.pdf](http://unsr.jamesanaya.org/docs/statements/2010_statement_unsr_peru_consultation_la_w_7_7_2010_sp.pdf), visited the 13<sup>th</sup> of May 2012.

the international definition of Indigenous Peoples; most Peruvian farmer and native communities also consider themselves to be Indigenous Peoples and taking into consideration the international definition of the ILO and the UN Indigenous Declaration these peoples would indeed fall within this definition.<sup>405</sup> Indigenous organizations have claimed that the former Government was trying to limit its own responsibilities when excluding Indigenous Peoples in other than the Amazonas region.

The former government further observed that a state body should verify the methods and results of the election of the representatives of the Indigenous Peoples. This does not comply with the rights of Indigenous Peoples to freely elect their own representatives, according to their own traditions and customs. This could be seen as another attempt by the former government to limit the representation of Indigenous Peoples, especially by those Indigenous bodies that are more critical to certain government policies.<sup>406</sup> Here it must be agreed that the right of Indigenous Peoples to elect their own representatives, according to their own customs and traditions, is one of the Indigenous Peoples' most fundamental rights and that the observation presented by the government would most likely amount to a violation of this right.

In general the observations of the government of García Pérez represented, more than legal obstacles, the unwillingness of this government to recognize the rights of Indigenous Peoples. As already mentioned, it wasn't until the mandate of the former government expired before the new government was able to adopt the PLPC.

### **5.3.4 The Peruvian legislation on prior consultation**

The PLPC is not the first legislation in Peru that mentions or deals with the right to prior consultation with Indigenous Peoples.<sup>407</sup> Older legislation did not however go in depth on the issue and many times it did not follow the jurisprudence of the IACtHR or the provisions of the ILO 169 or the

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<sup>405</sup> del Castillo, Laureano, *Observaciones a la Ley del Derecho a la Consulta Previa a los Pueblos Indígenas y más allá*, page 3, Observación 6, published the 15th of July 2010 on <http://laureanodelcastillo.blogspot.com/2010/07/sobre-las-observaciones-la-ley-del.html>, visited the 13th of May 2012.

<sup>406</sup> The former Government tried in fact in a number of occasions to create own Indigenous representative bodies that were meant to replace the own ones of the Indigenous peoples. It has been argued that these actions could have amounted to violations of the rights of Indigenous peoples as stipulated by the ILO 169, the UN Indigenous Declaration and the own Constitution of Peru.

<sup>407</sup> See *Ley General del Ambiente*, Ley N° 28611, or *Decreto Supremo 028-2008-EM que establece el Reglamento de Consulta y Participación Ciudadana en el Procedimiento de Aprobación de los Estudios Ambientales en el Sector Energía y Minas*, and the *Resolución Ministerial N° 596-2002-EM/DM que aprobó el reglamento de consulta y participación ciudadana en el procedimiento de aprobación de los estudios ambientales en el sector de energía y minas* (no longer in force).

comments by the CEACR.<sup>408</sup> Among others, the Peruvian Constitution can be said to include the right to prior consultation indirectly through the right to participation,<sup>409</sup> and directly through the provisions dealing with referendums and other methods of direct consultation with the population.<sup>410</sup> Also other legislation or decrees<sup>411</sup> have been adopted prior to the PLPC, but this legislation was many times general and did not specify the consultation procedures; something that the consultation system really would have needed.<sup>412</sup> The PLPC is though the first legislation act that is specifically drafted to develop and clarify on the right to prior consultation. The PLPC was finally adopted in the end of 2011 after several years of political discussions and different political views.<sup>413</sup> The law is probably one of the most complete laws on prior consultation with Indigenous Peoples in the continent today. It follows the provisions of the ILO 169 and the jurisprudence of the IACtHR and the own PCT. That said, the law is though not complete and certain issues have been left rather open or unclear.

Article 2 of the PLPC states that all Indigenous have the right to be consulted prior to any legislative or administrative measures that may directly affect their physical existence, cultural identity, quality of life or development.<sup>414</sup> Additionally they have the right to be consulted prior to any national and regional development plans, programs or projects that may affect them directly.<sup>415</sup> Measures that affect the Indigenous Peoples' lands are indeed in the center of these examples since the loss or damaging of Indigenous lands lead to the deterioration of the Indigenous Peoples' identity, existence, quality of life and their possibilities to develop. In Article 9 it is stated that Indigenous Peoples do not only have the right to be consulted on measures that may affect them directly, but that these people also have the right to request consultation on all measures they believe will have an direct effect on them.<sup>416</sup> The PLPC further recognizes that the objective of the consultation is to reach an agreement or consent.<sup>417</sup>

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<sup>408</sup> Valdez V., Carlos A., *Estudio para Definir el Derecho a la Consulta desde el Derecho Peruano*, INDEPA, 2011, page 59.

<sup>409</sup> Peruvian Constitution, Articles 2(17) and 31.

<sup>410</sup> *Ibid.*, Articles 176, 178, 181 and 182.

<sup>411</sup> See for example the *Ley General del Ambiente*, Ley N° 28611; *Resolución Ministerial N° 159-2000-PROMUDEH*, que aprueba la Directiva N° 012-2000-PROMUDEH/SETAI, para promover y asegurar el respeto de la identidad étnica y cultural de los pueblos indígenas y las comunidades campesinas y nativas; *Reglamento de la Ley de Áreas Naturales Protegidas*, Decreto Supremo No 038-2001-AG, 22 de junio de 2001; *Resolución Ministerial N° 596-2002-EM/DM*, 20 de diciembre de 2002; *Reglamento de consulta y participación ciudadana en el procedimiento de aprobación de los estudios ambientales en el sector Energía y Minas*; *Decreto Supremo No 042-2003-EM de 2003*, del Ministerio de Energía y Minas.

<sup>412</sup> Saravia, *supra note* 342, pages 58 – 60.

<sup>413</sup> The PLC was adopted by the Peruvian congress the 23<sup>rd</sup> of August, 2011, enacted by President Ollanta Humala the 7<sup>th</sup> of September, 2011 and it entered into force the 6<sup>th</sup> of December, 2011.

<sup>414</sup> *Ibid.*, Article 2.

<sup>415</sup> *Ibid.*, Article 2.

<sup>416</sup> *Ibid.*, Article 9.

<sup>417</sup> *Ibid.*, Article 3.

The PLPC lists a number of principles that need to be fulfilled in order to facilitate the reaching of the objective: opportunity (the consultation is committed prior to any measures), intercultural understanding, good faith, flexibility, reasonable amount of time, lack of coercion or conditionings, and appropriate information.<sup>418</sup> Each one of these principles is explained and they meet the same criteria or characteristics that also the IACtHR and the PCT have found in their jurisprudence. Additionally the PLPC introduces straight forward characteristics of the subjects of the law, in order to identify who Indigenous Peoples are.<sup>419</sup> The PLPC also recognizes these peoples' own representative institutions and organizations.<sup>420</sup> When listing the steps of the consultation process, the list doesn't differ significantly from the one adopted by the PCT, besides that instead of talking about negotiations, the PLPC uses the term *dialogue*. The PLPC though when defining the decision to be the last step, does not introduce the two phase minimum limit that the PCT did in case *Nº 00022-2009-PI/TC*. Instead it is stated that the involved authority has the last word when deciding if or how to implement the planned measures,<sup>421</sup> that the dialogue/negotiations should be documented and saved,<sup>422</sup> and that in case of breach of the possible agreements and decisions agreed upon between the two parties, these can be claimed in the domestic courts.<sup>423</sup>

The PLPC ends by creating an executive authority that will take care of all practicalities of the consultation and assist the authorities in the correct implementation of the right. The organ to take care of these new tasks is not totally new, but will be taken care of by the National Institute for the Development of the Andean, Amazon and Afro-Peruvian Peoples.<sup>424</sup> This national authority has since taken care of these tasks, which also includes the creation of a database of all Indigenous Peoples, their territories, relevant details about their structures, cultures, etc. In the transitional provisions of the PLPC it is also stated that the provisions don't apply on measures taken prior to the entering into force of the law in questions, and that the PLPC does not derogate nor limit the general right to civic participation.<sup>425</sup>

### 5.3.5 Conclusions

As was already mentioned above, the PLPC does not take into consideration the two phase minimum consultation procedure that the PCT introduced in the *Nº 00022-2009-PI/TC* case. The PLPC does not exclude the possibility of such procedures, but the lack of its mentioning could lead to the

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<sup>418</sup> *Ibid.*, Article 4.

<sup>419</sup> *Ibid.*, Article 7.

<sup>420</sup> *Ibid.*, Article 6.

<sup>421</sup> *Ibid.*, Article 15.

<sup>422</sup> *Ibid.*, Article 14.

<sup>423</sup> *Ibid.*, Article 15.

<sup>424</sup> Instituto Nacional de Desarrollo de los Pueblos Andinos, Amazónicos y Afroperuanos (INDEPA).

<sup>425</sup> PLPC, *supra note* 73, Disposiciones Complementarias Finales, Segunda.

ignorance of this rule. Especially taking into consideration that many times the right to prior consultation is violated due to the lack of consultation, or due to the fact that consultation is committed in the last minute without giving the Indigenous Peoples an appropriate amount of time to consider the issues, consult internally and form an opinion. It hence becomes very important to apply this two phase procedure in order to avoid the implementation of measures without appropriate consideration. Implementing measures in a hurry should be avoided, and the two phase procedure gave the possibility to extend the consideration period prior to the implementation of the planned legislative or administrative measures.

The PLPC further stipulates that it doesn't modify any legislative or other measures taken by the government prior to its entering into force. This is a common legal rule, but several Indigenous organizations have lamented the decision and argued that the former government locked the situation and hindered the peaceful settlement of the various ongoing social conflicts. Quite a number of the ongoing social conflicts actually deal with the extradition of natural resources in Indigenous Peoples' territories without their prior consultation, agreement or consent.<sup>426</sup> The presented critiques argue that the proposed law wouldn't help resolving these ongoing conflicts because of its non-retroactive character. This argument however seems quite weak and lacks a real legal foundation.

On the other hand, the mere fact that a law didn't previously exist, doesn't in itself mean that the government didn't previously had an obligation to consult with Indigenous Peoples on matters that affected them or their territories directly. The ILO 169 and its obligations have been in force in Peru since 1995; even if there hasn't been any domestic implementation, it doesn't mean that no obligations existed. This issue was recognized by the PTC in the *Nº 00022-2009-PI/TC* case. Hence it should have been possible to claim these rights in domestic and international courts since 1995, even if the domestic legislation was missing. Peruvian courts have during the past years dealt with a number of cases related to prior consultation with Indigenous Peoples which confirms the applicability of the right even without a concrete domestic legislation. Since the non-existence of a specific law didn't previously hinder domestic courts from dealing with prior consultation, the arguments about the ongoing nature of the right and the obligations that are created with it, should find legal support. Hence the current claims of the Indigenous movements on the applicability of the right to consultation in order to solve ongoing social conflicts that were initiated after the Peruvian ratification of the ILO 169 and its entering into force, could maybe be seen as accurate.

Through the active work of the Indigenous movements and the recent supporting jurisprudence of the Peruvian domestic courts, which in the end led to the drafting and adoption of the PLPC, Peru has gone from a country with weak or non-existing legal protection of the Indigenous Peoples' right

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<sup>426</sup> Saravia, *supra* note 342, page 55.



to consultation, to one of the countries with the strongest legal protection of this right in the region. Even if the legal protection now seems to be in place, this is only the first step towards the real protection and respect for the Indigenous Peoples' rights. The PCT and other domestic courts have to continue supporting the rights of Indigenous Peoples and denouncing the possible violations of these. The authorities today have the obligation to actively implement the PLPC when planning measures that may affect their Indigenous Peoples. Only if both the judiciary and the administrative bodies actually continue fulfilling their tasks will the Indigenous Peoples' right to prior consultation be fully respected and protected in practice.

# 6 Conclusions

## 6.1 General conclusions and recommendations

As this thesis has shown, the Indigenous Peoples' right to land and right to prior consultation are recognized Human Rights. International Human Rights courts and bodies, domestic courts and authorities, Indigenous movements and organizations all recognize that Indigenous Peoples have the right to be consulted on measures that affect them directly. Not only is this a safeguard to protect the right to property, their traditional lands, territories and natural resources, it's foremost a method to protect these peoples' right to express their own cultures and to live in accordance with their own priorities.

Even if certain characteristics or elements of the right to prior consultation have been identified by the CEACR and the Special Rapporteur,<sup>427</sup> a lot of questions regarding this right remain open. It can hence be hard to argue that a clear international standard regarding the content of the right to prior consultation would yet exist today. It seems like the ILO and the Special Rapporteur have abstained from trying to define the right in depth and instead handed over the responsibility for the developing of the right and the clarifying of its scope to the regional and/or domestic courts and legislators.

Within the Inter-American Human Rights system the right to prior consultation has indeed been developed, probably more than in any other region in the world. But the judgments of the IACtHR and the decisions of the IACHR can't be seen as creating a universal standard that would be applicable for countries also outside of this region. Hence one could conclude that a clear standard for the right to prior consultation does not seem to exist, but that maybe through the regional and domestic developments made so far such a standard could be developed and agreed upon in the future. When it comes to the FPIC, here the lack of a universal standard is even clearer. The issue is still controversial and not even the landmark cases in Peru or Colombia have dealt with this issue. The FPIC needs to be developed and specified more before we can talk about the existence of a universal standard regarding this part of the right to prior consultation.

Within the Inter-American Human Rights system it is though possible to talk about the emerging of a clearer regional standard regarding the right to prior consultation. The many landmark cases by the IACtHR, that are directly or indirectly applicable on the member countries to the ACHR, have lifted the standard in the Inter-American Human Rights system, especially

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<sup>427</sup> These would mostly be the characteristics and elements that can literally be read from the provisions of the ILO 169 and the UN Indigenous Declaration.

taking into consideration that there is quite a lack of standard on the universal level. The IACtHR has not only developed the right by clarifying the content and certain aspects of it, but the court has linked the right with the right to property and the right to culture, and the lately the IACHR has also linked it with the right to freedom of thought and expression. All these cases recognize the importance of the right to prior consultation as not only an independent right, but one that interacts with other rights and that is essential in order to achieve the goals and aims of the ILO 169 and the UN Indigenous Declaration.

Even though the IACtHR has gone further than the CEACR or the Special Rapporteur in the development of the right, the IACtHR has not gone into detail on the procedures when consulting with Indigenous Peoples. Again here the domestic courts and legislators have been given the role to develop this aspect of the right. As we have seen above, in the case of Colombia the CCC has not managed to specify the consultation procedure while the PCT in Peru has indeed done so. Hence in these cases where the legislators have been unwilling or for some reasons unable to draft and adopt proper legislation, the domestic courts have partially taken over the tasks of the authorities by identifying the different elements of the right as well as how the process shall be conducted in practice. It could be argued that the IACtHR could be clearer and more precise in its judgments,<sup>428</sup> especially taking into consideration that few countries in the region have well-developed legislation or domestic courts that so far would have independently developed the right.

As has been presented in this thesis, few if anybody argues that Indigenous Peoples would have a general right to veto on measures that they're being consulted about. The concept of FPIC is though developing and more voices are claiming that the consultation regarding larger development projects or programs should not only have the objective of reaching an agreement, but that in these special cases an Indigenous FPIC would have to be obtained. It is too early to say what this means in practice. The Special Rapporteur and the IACtHR have argued that in certain situations FPIC would have to be obtained, but these situations have not been defined. Neither has any case so far been raised where the IACtHR or the Special Rapporteur would have found the FPIC to be applicable. Instead it seems, like the Special Rapporteur has stated, that the consultation procedures vary according to the extent of the planned measures as well as the impacts these have on the affected Indigenous Peoples.

It seems like there is more space to develop the Special Rapporteur's argument regarding the flexibility of the consultation, that the actual part dealing with the content of a possible mandatory the FPIC and situations where this FPIC would come into play and be required. Domestic courts and authorities have so far been reserved on this matter and it could be argued

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<sup>428</sup> The IACtHR, even if developing the Indigenous Peoples' right to prior consultation, has been rather moderate, compared with the landmark cases by the CCC and especially with the landmark cases of the PCT.

that this part of the right might remain more of a theoretical one, than one that will actually be implemented in practice. Future cases at the IACtHR and the Latin-American domestic courts will show if the FPIC will indeed be implemented in practice or not.

## **6.2 Conclusions on Colombia**

Even if the Colombian Constitution is one of the most progressive ones regarding the rights of Indigenous Peoples, the implementation of the specific right to prior consultation in the domestic legislation has fallen far behind. The existing legislation dealing with the right to prior consultation is in conflict internally and with the international provisions of the ILO 169 and the UN Indigenous Declaration. There is an urgent need for new legislation that would implement the right to prior consultation in Colombia in a manner compatible with the international and regional standards or characteristics. The country lacks a general legislation act that would implement specifically the right to prior consultation, something that should urgently be drafted and adopted. This should of course be done after prior consultation with Indigenous Peoples. A general legislation act on the right to prior consultation with Indigenous Peoples would help the authorities in the interpretation of their obligations regarding specific measures. It would also set a standard that the many different legislation acts that exist today haven't managed to create.

Colombia's development policy is today much based on the exploitation of natural resources. This is not favorable for Indigenous Peoples' lands and rights and even though the authorities have the right to exploit these resources, bigger efforts have to be made to protect the interests and cultures of Indigenous Peoples. The CCC needs to continue ensuring the protection of Indigenous Peoples' rights and denouncing possible future violations; of course within the jurisdiction of the CCC. Also the Special Rapporteur has to continue following the situation of the Indigenous Peoples in Colombia; the internal conflict can't be an excuse for the lowering of the protection standards towards this part of the population who is not voluntarily part of and doesn't want to be involved in the conflict.

In order to improve the political atmosphere and the lack of will to improve Indigenous Peoples' rights and protection, there needs to be a change of general attitudes towards Indigenous Peoples and their contributions to society. Here the whole society needs to get involved, but it's especially important that the authorities show example. Revoking the reservations made to the UN Indigenous Declaration, and the drafting and adopting of the special law regarding the Indigenous Peoples' territories are essential steps to take. The Indigenous movement will have to remain active, continue demanding action from the authorities and loudly work for the improvement of the Indigenous Peoples' rights.

## 6.3 Conclusions on Peru

In Peru, the protection and respect for Indigenous Peoples and their rights turned chapter towards something better after the change of government in 2011. Previously the political unwillingness to cooperate or find agreements with the Indigenous Peoples had led to almost 300 social conflicts, out of which a big part dealt with the violations of Indigenous land and territories, the exploitation of natural resources and the lack of proper prior consultation. As in the Colombian case, also in Peru the exploitation of natural resources, most of which can be found on Indigenous lands, is essential for the current development priorities of the country.

There have though been significant improvements in Peru in the last years regarding not only Indigenous Peoples' rights in general but also specifically regarding the right to prior consultation. The case *Nº 00022-2009-PITC* has been a true landmark case in the Peruvian judicial system and it has also affected the later approved PLPC. This later legislation, even if it doesn't follow exactly the judgment of the PCT, is progressive and a huge step forward in the recognition of Indigenous Peoples rights. It wouldn't be far from the truth to claim that Peru today has one of the best legislation acts regarding the right to prior consultation with Indigenous Peoples, not only in the region but also in the world.<sup>429</sup> The legislation is though new and real practice is still missing. The upcoming years will show how well the Peruvian authorities implement the legislation and its provisions in practice when dealing with measures that affect Indigenous Peoples directly. Even if these authorities would not have a lot of experience on the issue, at least they have much better tools to do this than what for example the Colombian authorities have.

On the other hand, the PCT and other domestic courts have to continue with the approach the case *Nº 00022-2009-PITC* took. Previous to this case the Peruvian jurisprudence was mixed and conflicting; in order for the PLPC to gain real authority and usefulness, the jurisprudence of the PTC has to become consistent in the future. In many occasions the rights of Indigenous Peoples were unjustifiably violated by authorities and accepted by the domestic courts due to financial or political aspects; this can't be accepted in the future. The domestic courts should balance the rights of Indigenous Peoples and society in general, but better take into consideration the effects that these decisions have on the lives of Indigenous Peoples. Since there are still several ongoing conflicts between Indigenous Peoples and the Peruvian government, the domestic courts should also continue dealing with cases related to Indigenous Peoples' rights, and applying and interpreting the PLPC and other legislation dealing with Indigenous Peoples rights. It is especially important that the PCT follows up the Peruvian authorities' implementation of the PLPC. As was specified above, the PLPC does not

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<sup>429</sup> It should though be mentioned that even if the legislation regarding the right to prior consultation is today strong, the legislation regarding the right to land can still be improved significantly. Especially the demarcation of the Indigenous lands can be improved, as well as the actual identification of these peoples.

follow on all parts the judgment in the *Nº 00022-2009-PI/TC* case and hence the PCT has to ensure that this judgment is still respected even if the PLPC doesn't fully reflect the judgment.

The Indigenous Peoples in Peru have after years of struggling and violations finally obtained recognition and an improved legislation that protects their rights. The steps taken so far are significant, but they are only the first ones in a series of more that need to be taken. The drafting of the PLPC took a long time and the legislation wasn't adopted before governments changed; let's hope the implementation of the legislation will not be as difficult or objected.

## **6.4 Final words**

Indigenous Peoples' rights have gone a long way since these were firstly introduced by the ILO and the ILO 107 half a decade ago. There is still though a long way ahead too. The generally negative attitudes towards Indigenous Peoples have changed in the Americas, even though it could be seen as these attitude changes have been greater among the general population than among the authorities. Unfortunately Indigenous Peoples are still today in many cases seen as a hinder to national or regional development. Indigenous Peoples are said to hinder the projects or plans, or that they delay the processes making the countries lose valuable financial resources. It might be true that Indigenous Peoples, in a different way than other peoples, in many cases should be part of the decision making process regarding the exploitation of natural resources. This does not mean though that these people are on purpose hindering or delaying the progress of the region or country; it's also in the Indigenous Peoples' own interest that the region or country they live in develops. The development can't though be committed putting the cultures, natural resources and lives of these peoples at risk. Indigenous Peoples have the right to their cultures and their cultural existence, and legislation or administrative measures have to take this into consideration.

The IACtHR has so far shown the way for all other courts in the region and beyond; no other International Human Rights court has developed the rights of Indigenous Peoples in the same way as this court has. It is only desirable that the IACtHR also in the future continues developing the rights of Indigenous Peoples and especially the rights to land and prior consultation. Hopefully the IACtHR will in the future be able to deal with the questions regarding large/small scale projects as well as how these affect the consultation procedures. It would also be interesting to see the IACtHR develop on the issues the Special Rapporteur introduced, regarding the need for different consultative procedures for different types of measures, as well as the situations when FPIC would come into play. It would be interesting to see what kind of differences the IACtHR or domestic courts would introduce in such cases.

The protection of Indigenous Peoples' rights has in the last years improved significantly with the adoption of the UN Indigenous Declaration and the many landmark cases of the IACtHR. There is though still room for further development and it will be interesting to see in which direction this development goes. There are still today quite a number of unsolved issues regarding Indigenous Peoples' rights in general and specially regarding the right to prior consultation and FPIC. For sure the IACtHR and the domestic courts in Colombia and Peru will contribute to the understanding and developing of Indigenous Peoples' rights also in the future.

# **Supplement: Peruvian Law on Prior Consultation with Indigenous Peoples**

## **PERUVIAN LAW ON THE PRIOR CONSULTATION WITH INDIGENOUS PEOPLES, AS RECOGNIZED BY CONVENTION 169 OF THE INTERNATIONAL LABOUR ORGANIZATION**

### **CONGRESO DE LA REPÚBLICA**

Ha dado la Ley siguiente:

#### **LEY DEL DERECHO A LA CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS U ORIGINARIOS, RECONOCIDO EN EL CONVENIO 169 DE LA ORGANIZACIÓN INTERNACIONAL DEL TRABAJO (OIT)**

#### **TÍTULO I ASPECTOS GENERALES**

##### **Artículo 1. Objeto de la Ley**

La presente Ley desarrolla el contenido, los principios y el procedimiento del derecho a la consulta previa a los pueblos indígenas u originarios respecto a las medidas legislativas o administrativas que les afecten directamente. Se interpreta de conformidad con las obligaciones establecidas en el Convenio 169 de la Organización Internacional del Trabajo (OIT), ratificado por el Estado peruano mediante la Resolución Legislativa 26253.

##### **Artículo 2. Derecho a la consulta**

Es el derecho de los pueblos indígenas u originarios a ser consultados de forma previa sobre las medidas legislativas o administrativas que afecten directamente sus derechos colectivos, sobre su existencia física, identidad cultural, calidad de vida o desarrollo. También corresponde efectuar la consulta respecto a los planes, programas y proyectos de desarrollo nacional y regional que afecten directamente estos derechos.

La consulta a la que hace referencia la presente Ley es implementada de forma obligatoria solo por el Estado.

##### **Artículo 3. Finalidad de la consulta**

La finalidad de la consulta es alcanzar un acuerdo o consentimiento entre el Estado y los pueblos indígenas u originarios respecto a la medida legislativa o administrativa que les afecten directamente, a través de un diálogo



intercultural que garantice su inclusión en los procesos de toma de decisión del Estado y la adopción de medidas respetuosas de sus derechos colectivos.

#### **Artículo 4. Principios**

Los principios rectores del derecho a la consulta son los siguientes:

- **Oportunidad.** El proceso de consulta se realiza de forma previa a la medida legislativa o administrativa a ser adoptada por las entidades estatales.
- **Interculturalidad.** El proceso de consulta se desarrolla reconociendo, respetando y adaptándose a las diferencias existentes entre las culturas y contribuyendo al reconocimiento y valor de cada una de ellas.
- **Buena fe.** Las entidades estatales analizan y valoran la posición de los pueblos indígenas u originarios durante el proceso de consulta, en un clima de confianza, colaboración y respeto mutuo. El Estado y los representantes de las instituciones y organizaciones de los pueblos indígenas u originarios tienen el deber de actuar de buena fe, estando prohibidos de todo proselitismo partidario y conductas antidemocráticas.
- **Flexibilidad.** La consulta debe desarrollarse mediante procedimientos apropiados al tipo de medida legislativa o administrativa que se busca adoptar, así como tomando en cuenta las circunstancias y características especiales de los pueblos indígenas u originarios involucrados.
- **Plazo razonable.** El proceso de consulta se lleva a cabo considerando plazos razonables que permitan a las instituciones u organizaciones representativas de los pueblos indígenas u originarios conocer, reflexionar y realizar propuestas concretas sobre la medida legislativa o administrativa objeto de consulta.
- **Ausencia de coacción o condicionamiento.** La participación de los pueblos indígenas u originarios en el proceso de consulta debe ser realizada sin coacción o condicionamiento alguno.
- **Información oportuna.** Los pueblos indígenas u originarios tienen derecho a recibir por parte de las entidades estatales toda la información que sea necesaria para que puedan manifestar su punto de vista, debidamente informados, sobre la medida legislativa o administrativa a ser consultada. El Estado tiene la obligación de brindar esta información desde el inicio del proceso de consulta y con la debida anticipación.

## **TÍTULO II**

### **PUEBLOS INDÍGENAS U ORIGINARIOS A SER CONSULTADOS**

#### **Artículo 5. Sujetos del derecho a la consulta**

Los titulares del derecho a la consulta son los pueblos indígenas u originarios cuyos derechos colectivos pueden verse afectados de forma directa por una medida legislativa o administrativa.

### **Artículo 6. Forma de participación de los pueblos indígenas u originarios**

Los pueblos indígenas u originarios participan en los procesos de consulta a través de sus instituciones y organizaciones representativas, elegidas conforme a sus usos y costumbres tradicionales.

### **Artículo 7. Criterios de identificación de los pueblos indígenas u originarios**

Para identificar a los pueblos indígenas u originarios como sujetos colectivos, se toman en cuenta criterios objetivos y subjetivos.

Los criterios objetivos son los siguientes:

- Descendencia directa de las poblaciones originarias del territorio nacional.
- Estilos de vida y vínculos espirituales e históricos con el territorio que tradicionalmente usan u ocupan.
- Instituciones sociales y costumbres propias.
- Patrones culturales y modo de vida distintos a los de otros sectores de la población nacional.
- El criterio subjetivo se encuentra relacionado con la conciencia del grupo colectivo de poseer una identidad indígena u originaria.
- Las comunidades campesinas o andinas y las comunidades nativas o pueblos amazónicos pueden ser identificados también como pueblos indígenas u originarios, conforme a los criterios señalados en el presente artículo.
- Las denominaciones empleadas para designar a los pueblos indígenas u originarios no alteran su naturaleza ni sus derechos colectivos.

## **TÍTULO III ETAPAS DEL PROCESO DE CONSULTA**

### **Artículo 8. Etapas del proceso de consulta**

Las entidades estatales promotoras de la medida legislativa o administrativa deben cumplir las siguientes etapas mínimas del proceso de consulta:

- Identificación de la medida legislativa o administrativa que debe ser objeto de consulta.
- Identificación de los pueblos indígenas u originarios a ser consultados.
- Publicidad de la medida legislativa o administrativa.
- Información sobre la medida legislativa o administrativa.
- Evaluación interna en las instituciones y organizaciones de los pueblos indígenas u originarios sobre la medida legislativa o administrativa que les afecten directamente.
- Proceso de diálogo entre representantes del Estado y representantes de los pueblos indígenas u originarios.
- Decisión.

### **Artículo 9. Identificación de medidas objeto de consulta**

Las entidades estatales deben identificar, bajo responsabilidad, las propuestas de medidas legislativas o administrativas que tienen una relación directa con los derechos colectivos de los pueblos indígenas u originarios, de modo que, de concluirse que existiría una afectación directa a sus derechos colectivos, se proceda a una consulta previa respecto de tales medidas.

Las instituciones u organizaciones representativas de los pueblos indígenas u originarios pueden solicitar la aplicación del proceso de consulta respecto a determinada medida que consideren que les afecta directamente. En dicho caso, deben remitir el petitorio correspondiente a la entidad estatal promotora de la medida legislativa o administrativa y responsable de ejecutar la consulta, la cual debe evaluar la procedencia del petitorio.

En el caso de que la entidad estatal pertenezca al Poder Ejecutivo y desestime el pedido de las instituciones u organizaciones representativas de los pueblos indígenas u originarios, tal acto puede ser impugnado ante el órgano técnico especializado en materia indígena del Poder Ejecutivo. Agotada la vía administrativa ante este órgano, cabe acudir ante los órganos jurisdiccionales competentes.

### **Artículo 10. Identificación de los pueblos indígenas u originarios a ser consultados**

La identificación de los pueblos indígenas u originarios a ser consultados debe ser efectuada por las entidades estatales promotoras de la medida legislativa o administrativa sobre la base del contenido de la medida propuesta, el grado de relación directa con el pueblo indígena y el ámbito territorial de su alcance.

### **Artículo 11. Publicidad de la medida legislativa o administrativa**

Las entidades estatales promotoras de la medida legislativa o administrativa deben ponerla en conocimiento de las instituciones y organizaciones representativas de los pueblos indígenas u originarios que serán consultadas, mediante métodos y procedimientos culturalmente adecuados, tomando en cuenta la geografía y el ambiente en que habitan.

### **Artículo 12. Información sobre la medida legislativa o administrativa**

Corresponde a las entidades estatales brindar información a los pueblos indígenas u originarios y a sus representantes, desde el inicio del proceso de consulta y con la debida anticipación, sobre los motivos, implicancias, impactos y consecuencias de la medida legislativa o administrativa.

### **Artículo 13. Evaluación interna de las instituciones y organizaciones de los pueblos indígenas u originarios**

Las instituciones y organizaciones de los pueblos indígenas u originarios deben contar con un plazo razonable para realizar un análisis sobre los alcances e incidencias de la medida legislativa o administrativa y la relación directa entre su contenido y la afectación de sus derechos colectivos.

#### **Artículo 14. Proceso de diálogo intercultural**

El diálogo intercultural se realiza tanto sobre los fundamentos de la medida legislativa o administrativa, sus posibles consecuencias respecto al ejercicio de los derechos colectivos de los pueblos indígenas u originarios, como sobre las sugerencias y recomendaciones que estos formulan, las cuales deben ser puestas en conocimiento de los funcionarios y autoridades públicas responsables de llevar a cabo el proceso de consulta.

Las opiniones expresadas en los procesos de diálogo deben quedar contenidas en un acta de consulta, la cual contiene todos los actos y ocurrencias realizados durante su desarrollo.

#### **Artículo 15. Decisión**

La decisión final sobre la aprobación de la medida legislativa o administrativa corresponde a la entidad estatal competente. Dicha decisión debe estar debidamente motivada e implica una evaluación de los puntos de vista, sugerencias y recomendaciones planteados por los pueblos indígenas u originarios durante el proceso de diálogo, así como el análisis de las consecuencias que la adopción de una determinada medida tendría respecto a sus derechos colectivos reconocidos constitucionalmente en los tratados ratificados por el Estado peruano.

El acuerdo entre el Estado y los pueblos indígenas u originarios, como resultado del proceso de consulta, es de carácter obligatorio para ambas partes. En caso de que no se alcance un acuerdo, corresponde a las entidades estatales adoptar todas las medidas que resulten necesarias para garantizar los derechos colectivos de los pueblos indígenas u originarios y los derechos a la vida, integridad y pleno desarrollo.

Los acuerdos del resultado del proceso de consulta son exigibles en sede administrativa y judicial.

#### **Artículo 16. Idioma**

Para la realización de la consulta, se toma en cuenta la diversidad lingüística de los pueblos indígenas u originarios, particularmente en las áreas donde la lengua oficial no es hablada mayoritariamente por la población indígena. Para ello, los procesos de consulta deben contar con el apoyo de intérpretes debidamente capacitados en los temas que van a ser objeto de consulta, quienes deben estar registrados ante el órgano técnico especializado en materia indígena del Poder Ejecutivo.

### **TÍTULO IV OBLIGACIONES DE LAS ENTIDADES ESTATALES RESPECTO AL PROCESO DE CONSULTA**

#### **Artículo 17. Entidad competente**

Las entidades del Estado que van a emitir medidas legislativas o administrativas relacionadas de forma directa con los derechos de los

pueblos indígenas u originarios son las competentes para realizar el proceso de consulta previa, conforme a las etapas que contempla la presente Ley.

#### **Artículo 18. Recursos para la consulta**

Las entidades estatales deben garantizar los recursos que demande el proceso de consulta a fin de asegurar la participación efectiva de los pueblos indígenas u originarios.

#### **Artículo 19. Funciones del órgano técnico especializado en materia indígena del Poder Ejecutivo**

Respecto a los procesos de consulta, son funciones del órgano técnico especializado en materia indígena del Poder Ejecutivo las siguientes:

- Concertar, articular y coordinar la política estatal de implementación del derecho a la consulta.
- Brindar asistencia técnica y capacitación previa a las entidades estatales y los pueblos indígenas u originarios, así como atender las dudas que surjan en cada proceso en particular.
- Mantener un registro de las instituciones y organizaciones representativas de los pueblos indígenas u originarios e identificar a las que deben ser consultadas respecto a una medida administrativa o legislativa.
- Emitir opinión, de oficio o a pedido de cualquiera de las entidades facultadas para solicitar la consulta, sobre la calificación de la medida legislativa o administrativa proyectada por las entidades responsables, sobre el ámbito de la consulta y la determinación de los pueblos indígenas u originarios, a ser consultados.
- Asesorar a la entidad responsable de ejecutar la consulta y a los pueblos indígenas u originarios que son consultados en la definición del ámbito y características de la consulta.
- Elaborar, consolidar y actualizar la base de datos relativos a los pueblos indígenas u originarios y sus instituciones y organizaciones representativas.
- Registrar los resultados de las consultas realizadas.
- Mantener y actualizar el registro de facilitadores e intérpretes idóneos de las lenguas indígenas u originarias.
- Otras contempladas en la presente Ley, otras leyes o en su reglamento.

#### **Artículo 20. Creación de la base de datos oficial de pueblos indígenas u originarios**

Créase la base de datos oficial de los pueblos indígenas u originarios y sus instituciones y organizaciones representativas, la que está a cargo del órgano técnico especializado en materia indígena del Poder Ejecutivo.

La base de datos contiene la siguiente información:

- Denominación oficial y autodenominaciones con las que los pueblos indígenas u originarios se identifican.
- Referencias geográficas y de acceso.

- Información cultural y étnica relevante.
- Mapa etnolingüístico con la determinación del hábitat de las regiones que los pueblos indígenas u originarios ocupan o utilizan de alguna manera.
- Sistema, normas de organización y estatuto aprobado.
- Instituciones y organizaciones representativas, ámbito de representación, identificación de sus líderes o representantes, período y poderes de representación.

## **DISPOSICIONES COMPLEMENTARIAS FINALES**

**PRIMERA.** Para efectos de la presente Ley, se considera al Viceministerio de Interculturalidad del Ministerio de Cultura como el órgano técnico especializado en materia indígena del Poder Ejecutivo.

**SEGUNDA.** La presente Ley no deroga o modifica las normas sobre el derecho a la participación ciudadana. Tampoco modifica o deroga las medidas legislativas ni deja sin efecto las medidas administrativas dictadas con anterioridad a su vigencia.

**TERCERA.** Derógase el Decreto Supremo 023-2011-EM, que aprueba el Reglamento del Procedimiento para la Aplicación del Derecho de Consulta a los Pueblos Indígenas para las Actividades Minero Energéticas.

**CUARTA.** La presente Ley entra en vigencia a los noventa días de su publicación en el diario oficial El Peruano a fin de que las entidades estatales responsables de llevar a cabo procesos de consulta cuenten con el presupuesto y la organización requerida para ello.

Comuníquese al señor Presidente de la República para su promulgación.

En Lima, a los treinta y un días del mes de agosto de dos mil once.

DANIEL ABUGATTÁS MAJLUF  
**Presidente del Congreso de la República**

MANUEL ARTURO MERINO DE LAMA  
**Primer Vicepresidente del Congreso de la República**

**AL SEÑOR PRESIDENTE CONSTITUCIONAL DE LA REPÚBLICA**

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