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Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of the Kichwa People of Sarayaku v. Ecuador

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NOTE

FREE, PRIOR, INFORMED CONSENT: THE KEY TO SELF-DETERMINATION: AN ANALYSIS OF *THE KICHWA PEOPLE OF SARAYAKU V. ECUADOR*

Carol Y. Verbeek[*]

I. Introduction

By definition, indigenous people traditionally lived on, and claimed possession of, the land now claimed by various states throughout the world.[1] Despite their land claims, indigenous people have historically been victimized by these states, often to the point where they are forcefully evicted from the land traditionally occupied by their ancestors.[2]

Due to the history of abuse faced by native populations throughout the world, international courts have increasingly dealt with human rights violations affecting indigenous groups.[3] One such organization is the Inter-American Court of Human Rights ("Court").[4] The Court is located in San Jose, Costa Rica and was established by the Organization of American States ("OAS") in 1979 to interpret, uphold, and enforce the American Convention on Human Rights ("Convention").[5] The Convention came into force one year prior, in July 1978.[6] The Court is autonomous and has jurisdiction over cases in which specific states are accused of human rights violations.[7] In order for the Court to have jurisdiction over any specific

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1. *Fact Sheet*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES (May 15, 2006), http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

2. *See, e.g.*, COLLEEN BRYANT & MATTHEW WILLIS, AUSTL. INST. OF CRIMINOLOGY, RISK FACTORS IN INDIGENOUS VIOLENT VICTIMISATION (AIC Reports Technical & Background Paper 30, 2008), *available at* http://www.aic.gov.au/documents/B/3/D/%7BB3DA1CED-B75E-41BE-B7DB-738D9618E007%7Dtbp030.pdf.

3. *See, e.g. Index*, INTER-AM. CT. OF HUM. RTS., http://www.corteidh.or.cr/index.cfm (follow "English version" hyperlink) (last visited Oct. 25, 2012) [hereinafter IACHR-Index].

4. *Id.*

5. *Id.*

6. *History*, INTER-AM. CT. OF HUM. RTS., http://www.corteidh.or.cr/historia.cfm (follow "English version" hyperlink) (last visited Oct. 25, 2012) [hereinafter IACHR-History].

7. *See* IACHR-Index, *supra* note 3.

state, that state must have signed the Convention.[8] As of October 2011, twenty-five states have adopted or ratified the Convention.[9]

In addition to hearing cases concerning human rights violations, the Court also has jurisdiction to issue advisory opinions. These opinions concern human rights issues brought by states that are parties to the Convention or by other bodies within the OAS.[10]

Adjudicative cases can be brought before the Court by either an individual member state, or, more commonly, by the Inter-American Commission on Human Rights ("Commission").[11] Citizens of member states may not take a case directly to the Court.[12] Instead, they must first petition the Commission.[13] The Commission then decides which cases are appropriate to refer to the Court.[14]

Before referring a case to the Court, the Commission "must first declare it admissible, conduct an investigation if necessary, explore possibilities for a friendly settlement, and deliberate and prepare a report."[15] Additionally, the Commission must determine that no conflicting domestic proceedings exist and that the case involves an issue not yet decided by the Court.[16] When a case first comes before the Commission, the Commission may first issue a non-binding opinion without referring the matter to the Court.[17] Thereafter, the Commission has discretion to determine whether to refer the matter to the Court, should the State fail to comply.[18] Thus, access to the

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8. *See id.*

9. IACHR-History, *supra* note 6. The following American states are parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. However, "Trinidad and Tobago denounced the American Convention on Human Rights, by a communication addressed to the General Secretary of the OAS on May 26, 1998." *Id.* The United States has signed, but never ratified the Convention. *Id.*

10. *Petitions and Consultations*, INTER-AM. CT. OF HUM. RTS., http://www.corteidh.or.cr/denuncias_consultas.cfm (last visited Oct. 25, 2012).

11. *See id.*

12. *See id.*

13. *See id.*

14. *See* Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26A STAN. ENVTL. L.J. 3, 36-38 (2007).

15. *Id.* at 37-38.

16. *Id.* at 37.

17. *Id.* at 38.

18. *See* Francisco Forrest Martin, *The International Human Rights & Ethical Aspects of the Forum Non-Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101, 104 (2004).

Court is limited to those states failing to comply with the Commission's recommendations.

The Court's power has increased dramatically over the years due to the quality of its jurisprudence and the increased adherence to its judgments.[19] Indeed, in the past few decades "there have been dozens of cases before the Inter-American Court of Human Rights . . . in which [states have been found] in violation of their international legal obligations with respect to human rights. Of those many rulings, only a few states have refused or been slow to comply with [the Court's] orders."[20] In recent years, non-compliance has been the exception and compliance the norm, not only for states found in violation of the Inter-American Court, but for states found in violation of other regional or international human rights courts.[21]

Indeed, in at least one case, a state even complied with the Commission prior to a final judgment issued by the Court.[22] This indicates that the judgments handed down by the Court may be becoming increasingly important, not only to those parties involved, but to the development of international norms.

The Court has established precedent on a number of important issues, including that of free, prior, informed consent ("FPIC"). In a series of cases, the Court established, in some instances, indigenous people have the right to free and informed consent prior to states granting natural resources concessions on their ancestral lands.[23] The right to FPIC effectively provides the indigenous populations with a veto power, without which they would be unable to stop companies from extracting valuable resources from their lands.

This case note will illustrate why FPIC, a right that is stipulated in the Inter-American Convention, is fundamental to self-determination. This note will explain the law as interpreted by the Court prior to its decision in the case of the *Kichwa People of Sarayaku v. Ecuador.* It will show that while the Court has recognized the right to FPIC in some cases, it has failed

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19. *See* Morse Tan, *Member State Compliance with the Judgments of the Inter-American Court of Human Rights*, 33 INT'L J. LEGAL INFO. 319, 328 (2005).

20. Martin, *supra* note 18, at 102.

21. *Id.*; Tan, *supra* note 19, at 335-36.

22. *Id.* at 328.

23. These cases include: *Case of the* Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Aug. 12, 2008); *Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 (2004);* Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173(4) (Aug. 31, 2001).

to do so in others. This disparity has resulted in some indigenous populations being unable to fully exercise their rights to control lands to which they have legal title. Thus, while they may have legal title to the lands, de facto control lies with the corporations who have been granted concessions by the State.

This note will then utilize the *Sarayaku* case to illustrate why the right to FPIC should apply equally to all state concessions. Without this right, the states will continue to oppress indigenous populations within their borders. The Court must recognize the right to FPIC with regard to all concessions. If it fails to do so, it is effectively sanctioning state sponsored oppression of indigenous populations.

II. Law Prior to the Sarayaku *Case*

Prior to 2001, no international tribunal had ruled a state had to recognize and protect the communal property rights of indigenous peoples.[24] In a number of recent cases, however, the Commission held a state must first consult, and at times even gain the consent, of the indigenous peoples. The first indication of this shift in policy came when the Court issued a ruling in the case of the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua.*[25]

In the *Awas Tingni* case, the Nicaraguan government awarded a grant to a Korean logging company to cut down trees in the land occupied by the Awas Tingni.[26] The grant permitted the logging company to exploit nearly 62,000 hectares[27] of the indigenous peoples' land. The government awarded the grant without consulting the Awas Tingni and despite their strenuous objections.[28] The Nicaraguan government issued the grant even though the "Nicaraguan Constitution recognize[d] the existence, culture, and communal forms of land ownership of indigenous peoples including the right to 'the use and enjoyment of the waters and forests on their communal lands.'"[29] In 1997, the Nicaraguan Supreme Court ruled against the

24. *See* Anne Debevoise Ostby, *Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?*, 21 WIS. INT'L L.J. 223, 232 (2003).

25. *See id.*

26. Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, HUM. RTS. BRIEF, Spring 2001, at 1, 2.

27. *Id.* A hectare is approximately 2.47 acres.

28. *Id.*

29. Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the* Case ofAwas Tingi v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609, 610 (2007) (citing the CONSTITUCIÓN

government and held the lumber license should be voided pending consultation with the indigenous peoples regarding any potential negative effects on the environment.[30]

The Supreme Court further held regional officials, including members of the Awas Tingni, must first consent to the project before the government may issue a valid license to the lumber company.[31] Nicaragua, however, failed to comply with the Supreme Court's ruling and the case ultimately reached the Inter-American Court.[32] In 2001, the Court ruled in favor of the Awas Tingni, ordering the Nicaraguan government to recognize the property interests of the indigenous people and officially transfer title of the land over to the Awas Tingni.[33] The Court further ordered the government to "abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property . . . " occupied by the indigenous people.[34] The *Awas Tingni* case served as an important precedent for issues of consultation and FPIC in subsequent cases before the Court.[35]

In 2004, the Court clarified its holding in Awas Tingni when it addressed a similar issue in the case of the *Maya Indigenous Communities of the Toledo District v. Belize.*[36] The Maya Indigenous Communities claimed the State of Belize violated their rights when it permitted private logging companies to exploit resources on their land.[37] The Maya people claimed they were not meaningfully consulted prior to the State's actions and that they never agreed to such actions.[38] The Commission issued a preliminary finding:

POLÍTICA DE LA REPÚBLICA DE NICARAGUA[CN.] tit. I, ch. I, art. 5 & tit. IV, ch. VI, art. 89, LA GACETA, DIARIO OFICIAL [L.G.] 9 January 1987).

30. Grossman, *supra* note 26, at 2.

31. *Id.*

32. *See id.*

33. *See* Alvarado, *supra* note 29, at 612-13.

34. Case of the Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173(4) (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

35. *See* Alvarado, *supra* note 29, at 614.

36. *See Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 (2004), available at* http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm.

37. *Id.* ¶ 2.

38. *Id.*

> [O]ne of the "central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories," which would ensure that decisions or other actions affecting indigenous property are "based upon a process of fully informed consent on the part of the indigenous community as a whole."[39]

Ultimately, the Court found in favor of the Maya people, holding they did have a communal property right in the land.[40] The Court further ruled Belize should transfer legal title of the land to the Maya people and protect their property rights.[41] Furthermore, the Court also held Belize should "abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people."[42] Finally, the Court recommended the State receive FPIC from the indigenous people, requiring at a minimum "that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."[43]

In 2007, the Court again issued a ruling in favor of indigenous communities in *The Saramaka People v. Suriname.*[44] The Saramaka case seemed to retreat from the stringent holding in Maya Communities, which required the State to obtain FPIC prior to making any concessions on indigenous people's land. The Saramaka case involved logging and mining concessions issued bv the Government of Suriname on the lands of the Saramaka people, but without their consent.[45]

The Saramaka People alleged that the granting of these concessions interfered with their property rights, namely the use and enjoyment of their

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39. Alvarado, *supra* note 29, at 614-15 (citing Inter-Am. Comm'n H.R., Maya Indigenous Cmtys. of the Toledo Dist., ¶ 142).

40. Inter-Am. Comm'n. H.R., *Maya Indigenous Cmtys of the Toledo Dist.*, ¶ *192-93.*

41. *Id.* ¶ 197(1).

42. *Id.*

43. *Id.* ¶ 142.

44. *See* Case of the Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Aug. 12, 2008), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf [hereinafter Case of the Saramaka People].

45. *Id.* ¶ 51.

land and the natural resources of their communal property.[46] In ruling against the State, the Court found in order to avoid violating the Saramaka People's property rights when issuing concessions within indigenous territory, the State had to adhere to three safeguards.[47] First, the State was required to ensure that the indigenous people had the ability to effectively participate "in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan . . . ."[48] Second, the State was required to ensure that the Saramaka would "reasonabl[y] benefit" from the plan.[49] Third, the State was required to issue an environmental and social impact assessment before any concessions were granted.[50] As to FPIC, however, the Court noted such consent was only needed when the concessions involved "large-scale development or investment projects that would have a major impact" on the Saramaka People's territory.[51]

Thus, in order for the FPIC requirement to be triggered, two prongs must be met. First, the concessions must have a profound impact on the property rights of indigenous peoples.[52] Second, a large part of their territory must be affected.[53] Therefore, in its most recent case regarding FPIC, the Court shirked away from its stringent requirement of consent. The Court instead held that only consultation, not consent, is required. Consent would only be required if the concessions would have a major impact on the indigenous communities of the affected territory.

A. Right to Self-Determination

Self-determination is a fundamental principle underlying both the right to property as well as the right to FPIC. In fact, "'self-determination is a foundational principle of international law that bears particularly upon the status and rights of . . . Native . . . people . . . in light of their history and

46. Marcos A. Orellana, International Decision, Saramaka People v. Suriname, *Judgment (Preliminary Objections, Merits, Reparations and Costs), Series C. No. 172, Inter-American Court of Human Rights (Nov. 28, 2007)*, 102 AM. J. INT'L L. 841, 841 (2008).

47. Case of the Saramaka People, *supra* note 44, ¶ 38.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* ¶ 17.

52. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007), ¶ 138, *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

53. *Id.*

contemporary conditions.'"[54] Recognizing this, Article 1 of the International Covenant on Civil and Political Rights states all people have a right to self-determination and can "freely pursue their economic, social, and cultural development."[55] Article 1 further provides:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[56]

Similarly, Article 4 of the U.N. Declaration on the Rights of Indigenous Peoples provides, "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs. . . ."[57] A key aspect of a tribe's right to self-determination is the ability to have control over communal lands, including the resources and development of the land.

The principle of self-determination does not require statehood or an independent government.[58] Rather, it mandates that peoples have the fundamental right to maintain their own lands, resources, governmental and decision-making institutions, and cultures.[59] Self-determination "consists of nondiscrimination, cultural integrity, security of lands and natural resources, entitlements of social welfare and development, and self-government."[60] The purpose of self-determination is to prevent a return to

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54. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 61 (2008) (citing S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 330 (1994) [hereinafter Anaya, *Native Hawaiian People*]).

55. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, S. EXEC. DOC. D, 95-2, 993 U.N.T.S. 2.

56. *Id.*

57. United Nations Declaration on the Rights of Indigenous Peoples art. 4, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

58. Ostby, *supra* note 24, at 234-35.

59. Graham, *supra* note 54, at 65.

60. Ostby, *supra* note 24, at 235

colonial days,[61] where strong imperial powers exploited the people and resources of the lands they conquered.

The U.N. Declaration further puts an affirmative human rights duty on the state to protect indigenous peoples' right to self-determination.[62] Therefore, if an indigenous group has suffered a violation of this right, the state has "a duty to provide an adequate remedy."[63] States must put in place mechanisms to prevent and address the following:

> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.[64]

Self-determination, therefore, "acts as a tool for indigenous peoples to 'diminish their vulnerability in the face of powerful majority or elite interests and to enhance the responsiveness of government to the unique interests of indigenous communities and their members.'"[65] In order for states to recognize and uphold the rights of indigenous peoples, the indigenous communities must be afforded their right to property and FPIC prior to the state making any concessions involving indigenous lands.

B. Right to Property

Real property rights are of great importance to indigenous communities throughout the world.[66] Land provides food, income, and support for indigenous peoples.[67] For indigenous communities, land represents more than a means of survival. It also provides a basis for the spiritual and

61. *Id.* at 233-34 (citing S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 110 (1996)).

62. Graham, *supra* note 54, at 76.

63. Anaya, *Native Hawaiian People*, *supra* note 54, at 360-61.

64. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 57, at art. 8(2).

65. Ostby, *supra* note 24, at 235 (citing ANAYA, *supra* note 61, at 111.

66. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 57.

67. *See id.* at 44.

cultural identities of the people who occupy it.[68] Indigenous communities often occupy their land for many centuries. Thus, their "ancestral lands, which contain the sacred sites where generations of ancestors have worshiped, are essential to the transmission of their culture and beliefs to future generations. In short, their traditional lands embody their legacy to the future."[69] It is for this reason that the International Labor Organization Convention 169 mandates that states respect the spiritual and cultural importance of indigenous peoples' land.[70]

Both the United Nations and the Inter-American System, which were established by the Organization of American States, have recognized the right of indigenous people to property.[71] Article 25 of the United Nations Declaration on the Rights of Indigenous People ("U.N. Declaration") states,

> 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.[72]

Article 26 of the U.N. Declaration grants indigenous people the "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[73]

The OAS has taken similar measures to protect indigenous land rights. In 1948, the OAS General Assembly adopted Article 39 of the Inter-American Charter of Social Guarantees, which requires "states in the Inter-American system to take 'necessary measures' to protect indigenous peoples' lives and property, 'defending them from extermination, sheltering them from oppression and exploitation.'"[74] Likewise, Article 21 of the

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68. Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 56 (2009).

69. *Id.* at 56-57.

70. International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 13(1), June 27, 1989, 1650 U.N.T.S. 383.

71. Pasqualucci, *supra* note 68, at 52.

72. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 57, art. 25.

73. *Id.* at art. 26(1).

74. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001) (citing *Inter-American Charter of Social Guaranties*

American Convention of Human Rights provides, "[e]veryone has the right to the use and enjoyment of his property."[75] Article 23 of the American Declaration on the Rights and Duties of Man confirms "the right of every person 'to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.'"[76] In 2001, as part of the *Awas Tingni* case, the Court for the first time recognized the communal property rights of indigenous people and held the State had a duty to protect those rights.[77] Thus, both the U.N. and OAS have acknowledged that indigenous people have property rights that are derived either from traditional occupation or by a state grant of the land.[78]

III. Statement of the Sarayaku *Case*

On May 12, 1992, the Ecuadorian government awarded title of a single parcel of land (approximately 254,652 hectares) to a number of indigenous communities along the Bobonaza River, including the Kichwa People of Sarayaku.[79] The purpose of the grant was to "protect the ecosystems of the Ecuadorian Amazon basin, to improve the living standards of the indigenous communities, and to preserve the integrity of their culture."[80] While this land was awarded to indigenous tribes, the Ecuadorian State reserved the "subsoil natural resources" for itself and declared that it could

art. 39 (1948), *reprinted in* ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 432, 433 (Edmund Jan Osmanczyk ed., 1990)).

75. American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S. T.S. No. 3; 1144 U.N.T.S. 123, S. Treaty Doc. No. 95-21, 9 I.L.M. 99 (1969) (entered into force July 18, 1978).

76. Anaya & Williams, *supra* note 74, at 42 (citing American Declaration of the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American states (Pan-American Union), Bogota, Colombia, Mar. 30-May 2, 1948, art. XXIII, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/Ser. L/V/II.82 Rev. 1 (1992)).

77. *See* Alvarado, *supra* note 29, at 609.

78. *See* Anaya & Williams, *supra* note 74, at 41-43.

79. *Application Filed by the Inter-American Commission on Human Rights with the Inter-American Court of Human Rights Against the Republic of Ecuador*, ¶ 59 (Apr. 29, 2010), Kichwa People of Sarayaku v. Ecuador, Case 12.465, Inter-Am. Comm'n H.R.,http://www.cidh.oas.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf [hereinafter IACHR Application] (citing Property Records for Puyo, Pastaza, Land Grant for the Bobonaza River Communities, Annex 10 (May 26, 1992) (unpublished government document).

80. *Id.* ¶ 60(a).

"exploit them without interference so long as the rules of environmental protection [were] observed."[81]

Four years later, Ecuador signed a hydrocarbon and crude oil exploration contract with a private Argentinean oil company, *Compañía General de Combustibles* ("CGC").[82] The area designated in the contract was block No. 23 of the Amazonian Region and it covered approximately 200,000 hectares.[83] Block No. 23 included the land granted to the indigenous communities, including the Kichwa People.[84] In fact, 65% of block No. 23 contained ancestral lands legally belonging to the Kichwa People of Sarayaku.[85] According to the Kichwa People, CGC conducted seismic exploration without their consent in 2002 and 2003. The Kichwa claim this exploration greatly disturbed their quality of life, while at the same time disrupting the environment that the 1992 land grant sought to protect.[86]

Prior to beginning the exploration, CGC was required to prepare an Environmental Impact Assessment ("EIA") as well as perform "all efforts necessary to preserve the ecological balance" within block No. 23.[87] Additionally, CGC was required to obtain the consent of the indigenous people that resided in the region.[88] However, none of these requirements were met. According to the Application filed by the Commission, the CGC failed to complete the EIA altogether.[89] Further, after unsuccessful negotiations with the Kichwa People, the oil company ultimately forced consent. The company obtained a medical caravan and demanded that, "in order to be treated, the individual had to sign a list, which was allegedly later converted into a letter [of consent]."[90]

In late 2002 and early 2003, as part of the exploration, CGC used a total of 1,433 kilograms of explosives and left them on the portion of block No. 23 occupied by the Kichwa People.[91] During this period, CGC's activities allegedly disrupted the Kichwa People so substantially that they declared a

81. *Id.* ¶ 60(e).
82. *Id.* ¶ 62.
83. *Id.* ¶¶ 62-63.
84. *Id.* ¶63.
85. *Id.*
86. Mario Melo, *Sarayaku: An Emblematic Case of Territorial Defense*, AMAZON WATCH (Sept. 12, 2011), http://amazonwatch.org/news/2011/0623-sarayaku-an-emblematic-case-of-territorial-defense.
87. IACHR Application, *supra* note 79, paras. 65-68.
88. *Id.* at paras. 65-70.
89. *Id.* at para. 68.
90. *Id.* at para. 70.
91. *Id.* at paras. 77.

state of emergency within their territory.[92] According to the Commission's Application, the Kichwa People's daily lives were brought to a halt, resulting in, *inter alia*, the suspension of schools.[93] Also, the Kichwa People were forced to retreat into the forest because of the land mines used in seismic exploration, resulting in the People not having access to their crops and other food sources for a period of approximately three months.[94] Further, in order to facilitate CGC's activities, the State of Ecuador ordered a military presence in block No. 23.[95] This caused a series of assaults between the Kichwa and the military.[96]

In 2003, the Kichwa People requested the Commission intervene to stop CGC's state-sponsored activities.[97] Since Ecuador is a party to the American Convention, the Commission had jurisdiction to hear the case. The Kichwa People alleged Ecuador violated their right to protect their property and the relationship they have with their land, their right to prior consultation and consent, their right to life, their right to freedom of movement, their right to human treatment, and their right to due process and judicial protection.[98] Although the Commission issued precautionary measures to protect the Kichwa People from further violation of their rights, the Ecuadorean government failed to comply with the measures in any meaningful way.[99]

A year later in July of 2004, the Inter-American Court also issued provisional measures to protect the life, property, and freedom of movement of the Kichwa People.[100] The Ecuadorean state refused to comply. Again, in June 2005, the Court dictated measures favoring the Kichwa People.[101] These additional measures, which are still in force, called for the removal of explosives from the portion of block No. 23.[102] This time, the Ecuadorean government did take some steps to comply with the Court's directives; however, these efforts were minimal at best. By December 2009, only fourteen kilograms of explosives had been removed

92. *Id.* at para. 79.
93. *Id.*
94. *Id.*
95. *Id.* at para. 80.
96. *Id.* at para. 81.
97. Melo, *supra* note 86.
98. *See* IACHR Application, *supra* note 79, at para 1.
99. Melo, *supra* note 86.
100. *Id.*
101. *Id.*
102. IACHR Application, *supra* note 79, at para. 43.

from the Sarayaku territory.[103] The process has since then been suspended.[104]

On April 26, 2010, the Commission filed an application on behalf of the Kichwa People of Sarayaku against the Republic of Ecuador.[105] The Court held hearings in San José, Costa Rica, in early July 2011. On July 25, 2012, the Court finally issued a ruling ending the decade long struggle of the Kichwa People.[106] Although the Court did not go so far as to say that the right to FPIC was absolute, the Court required meaningful consultation, with the goal of acquiring the consent of all parties involved.[107] Indeed, the Court's decision "establishes in detail how consultation should be undertaken: in good faith, through culturally appropriate procedures that are aimed at reaching consent. Thus, exploration or extraction of natural resources cannot be done at the expense of an indigenous community's means of physical or cultural survival on their own land."[108]

IV. International Authorities Versus the Court

Most international authorities generally agree that indigenous communities must be consulted prior to granting concessions that might affect the use or enjoyment of the indigenous peoples' communal property.[109] According to the International Labor Organization, the consultation "must be in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement with the affected indigenous peoples."[110] Similarly, the U.N. Human Rights Committee has held the state has an affirmative duty of consultation, and

103. Melo, *supra* note 86.

104. *Id.*

105. IACHR Application, *supra* note 79.

106. *Ecuador: Inter-American Court Ruling Marks Key Victory for Indigenous Peoples*, AMNESTY INTERNATIONAL (July 27, 2012), http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26.

107. *Id.*

108. *Id.*

109. Pasqualucci, *supra* note 68, at 86.

110. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 11 (2005) (citing 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 Confederacion Ecuatoriana de Organizaciones Sindicales Libres, ILO Doc. GB.282/14/2 (Nov. 14, 2001)).

must protect the cultural interest of indigenous peoples.[111] The World Bank likewise refuses to finance projects unless the "states engage in 'free, prior, informed consultation' with the indigenous people whose interests would be affected."[112] However, the World Bank expressly specified that, while consultation is required, consent is not, and the consultation does not result in a veto power for indigenous communities.[113]

By contrast, the U.N. requires indigenous people have the right to FPIC, in addition to prior consultation.[114] According to Article 32 of the U.N. Declaration on the Rights of Indigenous Peoples,

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources . . . States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent* prior to the approval of *any* project affecting their lands or territories and other resources . . . .[115]

The U.N. therefore explicitly recognizes the right of indigenous people to FPIC with regard to any concessions that would modify or affect indigenous peoples' use, enjoyment, or ownership of land.[116] The Inter-American Court, however, has not followed the U.N.'s approach.

Instead, the Court has taken a middle ground approach between the right of prior consultation and the right of FPIC in all cases. The Court's position has been that prior consultation is always required, while prior consent is mandated *only* in projects involving large-scale development that would have a "major impact" on the indigenous peoples' property interests.[117] Further, in order to qualify as a "major impact" project, the

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111. *See id.* at 12.

112. Pasqualucci, *supra* note 68, at 87 (citing *OP 4.10 - Indigenous Peoples*, WORLD BANK OPERATIONAL MANUAL, para. 1 (July 2005), http://go.worldbank.org/TE769PDWN0).

113. *Id.*

114. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 57, at art. 32(1)-(2).

115. *Id.* (emphasis added).

116. *Id.* at art. 26.

117. *See* Pasqualucci, *supra* note 68, at 90 (citing Case of the Saramaka People v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Aug. 12, 2008), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf).

concessions must involve a large portion of the territory owned or occupied by the indigenous peoples.[118] But full protection of property rights should not depend on the amount of land involved. The underlying principle of self-determination of indigenous peoples should govern the Court's decision-making process. The Court must recognize the right to FPIC in all cases, no matter the concession size.

V. The Inter-American Court Decision in Sarayaku

The *Sarayaku* case was before the Court for consideration in July of 2011. Many were hopeful that the Court would issue a decision granting a right of FPIC to indigenous people in concession cases of all types. Although the Court did go further than its previous decisions by not only requiring free, prior informed consultation, but consultation aimed at reaching a consensus, it did not go as far as to establish an absolute right to FPIC in all cases.[119] The Court did, however, emphasize the consultation process must take place in good faith and according to international standards.[120] Thus, as stated by Fernanda Doz Costa, "Consultations cannot simply consist of sharing decisions that have already been made. Instead, Ecuador needs to make a real effort to establish an open and honest dialogue, based on mutual trust and respect and with the aim of reaching a consensus."[121]

But it was not enough to simply establish a right to free, prior informed consultation, or even to set guidelines for how that consultation process should take place. Instead, it is vital the Court confirm indigenous peoples have a right to FPIC in all cases. Until such time, indigenous people will continue to be kept from fully exercising their right to self-determination, as the Court will have to repeatedly determine whether a concession is "large" enough to warrant a right to FPIC.

By continuing to maintain an *ad hoc* standard for FPIC, indigenous people like the Sarayaku will be forced to bring their cases to court and wait for as long as a decade before their rights can be established. Thus, the

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118. *See* Pasqualucci, *supra* note 68, at 90.

119. Press Release, José Gualinga, President of Sarayaku, Sarayaku Press Statement on Inter-American Court Sentence (July 25, 2012), *available at* http://amazonwatch.org/news/2012/0725-sarayaku-press-statement-on-inter-american-court-sentence.

120. Press Release, Amnesty International, Inter-American Court Ruling in Favor of Sarayaku Is a Step Forward for Indigenous Rights (July 27, 2012), *available at* http://www.amnestyusa.org/news/press-releases/inter-american-court-ruling-in-favor-of-sarayaku-is-a-step-forward-for-indigenous-rights.

121. *Id.*

Court must be willing to recognize a right to FPIC in all concessions, no matter the size. The Court's case-by-case analysis is detrimental to indigenous people. When the crux of the right to FPIC depends on the size of land concessions, smaller concessions allow states to get away with exploitation.

Further, the right to own property means little without *both* the right of consultation and the right of FPIC. In order for property and ownership rights to be meaningful, the indigenous communities must also have the right to be informed of concessions that may affect the use or enjoyment of the land. The Court should implement a bright-line rule and require indigenous people receive informed consent prior to any concessions.

While the U.N. has recognized the right to FPIC when any project is undertaken on indigenous lands, the Court has only recognized the right in limited circumstances. Until the Court grants a blanket rule giving FPIC to indigenous people in all cases, the communal property rights of the state cannot be fully protected.

A. Right to FPIC

Although the Court has recognized the right to self-determination with respect to property rights and the right to FPIC in the *Awas Tingni* case, it has not gone far enough. In the cases of smaller concessions, consultation without consent has been deemed sufficient.[122] FPIC must be given in all cases because the fundamental right of self-determination includes the rights of people to choose how their land will be used.[123]

States within the jurisdiction of the Inter-American Court are now required to grant indigenous communities title to their traditionally occupied communal lands[124] Despite this, the rights of indigenous people remain uncertain, and states continue to run rough-shod over the rights of indigenous communities by repeatedly granting concessions to foreign companies to extract resources.[125] This exploitation often results in violence and intimidation of the land's inhabitants, and often occurs in spite of the protests by the indigenous populations.[126]

122. *See id.*

123. *See id.*

124. *See* Pasqualucci, *supra* note 68, at 61 (citing Sawhoyamaxa Indigenous Cmty. v. Paraguay 2006 Inter-Am. Ct. H.R. (ser C.) No. 146, ¶ 128).

125. *Id.* at 59; Ostby, *supra* note 24, at 247.

126. Pasqualucci, *supra* note 68, at 59.

B. Free, Prior, Informed Consultation

How are states able to get away with exploitation if the Court requires, at the very minimum, free and informed consultation prior to such concessions? As opposed to FPIC, free, prior, informed consultation includes consultation "in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement with the affected indigenous peoples."[127] Many states skirt this requirement by failing to oversee the consultation process between the foreign companies and the indigenous communities.

The Sarayaku case is a prime example: a foreign oil company, CGC, used devious methods to satisfy the consultation requirement.[128] After a period of unsuccessful negotiations with the Sarayaku, CGC ultimately obtained a medical caravan and demanded that, "in order to be treated, the individual had to sign a list, which was allegedly later converted into [evidence of consultation]."[129]

Another example of skirting the consultation requirement took place in the case of the Embera Katio people of Colombia. The Colombian government first obtained consent of the people and subsequently made modifications to the plans for concessions.[130] Fortunately, the consultation was found to be ineffective and contrary to the Convention because the Embera Katio people were never consulted about the subsequent modifications.[131]

States and private companies avoid the requirements of free, prior informed consultation through means of deceit. Even if the private companies did consult with the indigenous communities, consultation is meaningless when the indigenous communities lack a veto power. The lack of veto power goes against indigenous communities' fundamental right to self-determination.

The Court has held that while prior consultation is always required, prior consent is only mandated for projects involving large-scale development projects having a "major impact" on the property interests of indigenous

127. Anaya, *supra* note 110, at 11.

128. *See generally* IACHR Application, *supra* note 79, at para 70.

129. *Id.*

130. Anaya, *supra* note 110, at 11 (citing Report of the Committee Set Up to Examine the Representation Alleging Non-Observance of Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) and the Colombian Medical Trade Union Association, ILO Doc. GB.282/14/3 (Nov. 14, 2001)).

131. *Id.*

peoples.[132] In order for a project or concession to have a "major impact," it must involve a large portion of the territory owned or occupied by the indigenous peoples.[133]

While consent for large-scale projects is certainly a step in the right direction, it is not enough to protect the indigenous communities' right to self-determination. First, the Court has yet to define what constitutes a "large portion" of territory. The concession in the case of the Kichwa People involved an area of 200,000 hectares, 65% of which was occupied by the Kichwa People[134] while the *Awas Tingni* case involved only a concession of 62,000 hectares.

Second, the Court fails to consider the value of the land in its analysis. Smaller concessions may be of higher value due to the amount of resources on the concessions or the great spiritual value to the indigenous people. By taking only the quantity of land into account, the Court has not considered the quality of the land, both of which have a great impact.

Third, the Court ignores the impact the private companies have on the indigenous communities when they are working on or near indigenous lands. The Kichwa People were allegedly so disrupted by CGC's activities, that a state of emergency was declared on the Sarayaku territory.[135] The disruptions caused by CGC, as well as the increased military presence, brought the Kichwa People's daily lives to a halt. Schools were suspended, crops were depleted, and the Kichwa People were forced to retreat into the jungle to survive.[136] The Court has failed to uphold self-determination because it does not take the above factors into account.

VI. Conclusion

The right to FPIC is necessary to preserve both the right to property as well as the right to self-determination. The *Sarayaku* case should have been the Court's opportunity to hand down a decision departing from its prior precedent. The Court should have held that the concession involved in the *Sarayaku* case was significant enough to warrant the right to FPIC. Instead, it held indigenous people only have an absolute right to free, prior informed consultation, not consent. Although the Court went further to mandate that such consultation must comply with international standards

132. *See* Pasqualucci, *supra* note 68, at 90.
133. *See id.* at 91.
134. IACHR Application, *supra* note 79, at para. 63.
135. *Id.* at para. 79.
136. *Id.*

and be accomplished with an aim towards reaching consent, this will not result in adequate protection for indigenous populations in the Inter-American system.

Until the Court finds the right to FPIC is indeed fundamental and should be applied to all concessions, it will continue to endorse states' oppression of the rights of indigenous people. By continuing to analyze state concessions on a case-by-case basis, states in the Inter-American system will continue to override indigenous rights to property and self-determination. A bright-line rule was needed, but the Court did not supply it.