

CONSENTING TO DISPOSSESSION: THE
 PROBLEMATIC HERITAGE AND COMPLEX
 FUTURE OF CONSULTATION AND CONSENT
 OF INDIGENOUS PEOPLES

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INTRODUCTION

Consultation and consent of indigenous and tribal peoples are matters of human rights law that have given rise recently to a convoluted array of recommendations, regulations, legislation, and judgments of national and international institutions.¹ Consultation is

1. See, e.g., U.N. Human Rights Comm., General Comment No. 23 (Article 27) ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) [hereinafter U.N. HRC, General Comment No. 23] (“The enjoyment of those [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”); Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/52/18, at 122–23 (1997) [hereinafter U.N. CERD, General Comment No. 23] (“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”); U.N. INT’L COVENANT ON CIVIL AND POLITICAL RIGHTS, SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, at 150–56, U.N. Doc. CCPR/C/OP/5, U.N. Sales No. 04.XIV.9 (2005) [hereinafter Ilmari Länsman et al.] (deciding that quarrying on the mountain where the applicants carried out reindeer husbandry did not constitute a violation of article 27, among other things because the applicants were consulted in the proceedings that led to the granting of the quarrying permit); U.N. Human Rights Comm., Communication No. 547/1993, Views of the Human Rights Comm. under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights ¶ 9.8, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000) (in the case of *Apirana Mahuiki v. New Zealand*, the Committee did not establish any violations of the ICCPR taking into account that “the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the

understood as established in Articles 6 and 15 of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO Convention 169”) and Articles 19 and 32(2) of the U.N. Declaration on the Rights of Indigenous Peoples (“U.N. Declaration”).² Namely, states are obliged to carry out procedures that guarantee the participation of indigenous peoples in decision-making that “may affect them (directly),”³ in particular, regarding legislative and administrative measures or projects of exploration and exploitation of resources in indigenous lands. Consent is understood as the objective of any consultation procedure under Article 6(2) of ILO Convention 169.⁴ In certain circumstances,

sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.”); U.N. Human Rights Comm., Communication No. 1457/2006, Views of the Human Rights Comm. under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights ¶ 7.7, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009) [hereinafter *Poma Poma*] (regarding the depletion of ground water by the construction of wells by the state, affecting the traditional means of subsistence of a member of an indigenous people and finding a violation of article 27, taking into account that “neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells”); James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* ¶¶ 41, 47 U.N. Doc. A/HRC/12/34 (July 15, 2009) [hereinafter *James Anaya 2009*] (referring to the requirement of consent and the right to consultation and self-determination of indigenous peoples). In the Inter-American human rights system, see *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, (Ser. C) No. 172, ¶¶ 129–40 (Inter-Am. Ct. H.R. Nov. 28, 2007) [hereinafter *Saramaka*]; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, (Ser. C) No. 245, ¶¶ 134–265 (Inter-Am. Ct. H.R. June 27, 2012) [hereinafter *Sarayaku*]. For a discussion of *Saramaka* and *Sarayaku*, see Section A.1.a *infra*. For the European and African human rights systems, see *infra* notes 48 and 49. For domestic legislation and case-law, see *Sarayaku*, ¶ 164, and notes 190–215.

2. Int’l Labour Org. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1650 U.N.T.S. 383, 545, 548 (June 27, 1989) [hereinafter *ILO Convention 169*]; G.A. Res. 61/295, Annex at 8 and 12 (Sept. 13, 2007) [hereinafter *U.N. Declaration*].

3. Article 6 of ILO Convention 169 refers to measures that “may affect them directly,” while Article 19 of the U.N. Declaration refers to measures that “may affect them.” See *ILO Convention 169*, *supra* note 2, at 545; *U.N. Declaration*, *supra* note 2, at 8. See also discussion *infra* Part II.A and notes 152–53.

4. Article 6(2) of ILO Convention 169 provides: “The consultations carried out in application of this Convention shall be undertaken, in good faith and in a

obtaining consent is a legal requirement which means that states need to reach agreements with indigenous peoples prior to implementing a project or giving effect to a measure.⁵

Regardless of different understandings, the concepts of consultation and consent are usually understood as progressive and indicative of the crossing of an imaginary threshold between epochs. It concerns a narrative of progress, from a time when assimilation of indigenous peoples into nation states erased ancestral traits, to a time in which cultural identity is valued *per se* and indigenous voices are being heard.⁶

This Article is animated by the idea that, apart from the legal, social, and procedural complexities of design and implementation, the notions of consultation and consent are inherently problematic, thus compromising their progressive potential. This intuition is arguably present in most discussions on consent and consultation, but often remains implicit so as not to jeopardize proceedings or undermine the progressive character of the notions themselves.

Since colonial times, these concepts have been employed in different ways. This Article argues that current vocabularies of consultation and consent may reinforce and “buy into” a problematic heritage that needs to be unearthed, made explicit, and amplified. If ignored, this heritage may come back to haunt the rules and procedures so meticulously developed. Consultation and consent are not prohibitive or preventive notions that necessarily deter harmful activities of states and companies. Rather, they are enabling and permissive notions that make such activities possible and give them apparent validity. In other words, consultation and consent present the perfect justification for the dispossession of indigenous peoples, rather than allowing for their recognition and empowerment.

This Article does not offer a solution or redefinition that salvages these notions as unequivocally positive and progressive. This

form appropriate to the circumstances, *with the objective of achieving agreement or consent to the proposed measures.*” ILO Convention 169, *supra* note 2, at 545 (emphasis added).

5. See *infra* notes 138–44 and accompanying text.

6. See, e.g., César Rodríguez Garavito, *El Sistema Interamericano de Derechos Humanos – Tendencias y Complementariedades* (March 18, 2013), <https://vimeo.com/channels/503739/page:2> (discussing these different stages in the recognition of indigenous peoples’ rights). For a critique of the idea of progress, see Georges Canguilhem, *The Decline of the Idea of Progress*, 27 *ECON. & SOC’Y* 313 (1998).

is impossible since consultation and consent already implicate both a legitimization of—and a resistance to—inequality.⁷ There are, of course, positive aspects to consultation and consent. For example, they play an important role in advocacy for indigenous peoples' rights. However, anyone using the terms consultation and consent, whether to advance such rights or other interests, should be conscious of the historical, conceptual, and practical difficulties—difficulties that may be “imported” into any domain of application by their mere use.

Part I introduces the methodology of considering concepts as “preserved problems”⁸ by reference to the work of the French philosopher and historian of science, Georges Canguilhem.⁹ The Part focuses on the history and changing uses of the notions of consultation and consent, on the contexts that determine their meaning, and on the values they integrate. This is illustrated by reference to seventeenth century property theory, looking at how the “cultivation of industriousness” and the “civilization of savages” gained traction in the work of John Locke through his strategically shifting use of the notion of consent,¹⁰ and nineteenth century international law, in particular Antony Anghie's work about the use of the concept of consent to construe a theory of state sovereignty that both relied on and excluded indigenous peoples.¹¹

7. César Rodríguez Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOB. LEGAL STUD. 1, 43 (2010).

8. Marina C. Brilman, George Canguilhem: Norms and Knowledge in the Life Sciences 12, 35–37 (Mar. 2009) (unpublished Ph.D. Dissertation, London School of Economics & Political Science) (on file with the British Library of Political and Economic Science, London School of Economics & Political Science).

9. *Id.* at 20. Georges Canguilhem (1904–94) was a Professor of the History and Philosophy of Sciences at the Sorbonne in Paris. *Id.*

10. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. MacPherson ed., 1980) (1690). The focus in this Article is on the way in which the notion of consent is employed, rather than on the difference between common law conceptions of property, Latin American property law (originally based on Spanish colonial systems), and indigenous forms of “property.” See, e.g., Julieta Lemaitre Ripoll, *¡Viva nuestro derecho! Quintín Lame y el legalismo popular*, in LA QUINTIADA (1912–1925); LA REBELLION INDÍGENA LIDERADA POR MANUEL QUINTÍN LAME EN EL CAUCA 221, 236–43 (Julieta Lemaitre Ripoll ed., 2013) (discussing the difference in the property regime of indigenous reservations under Spanish colonial rule and after Colombia's independence).

11. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 63 (1999).

Part II explores the way in which these concepts and their heritage persist, return, and transform in current debates. The Part focuses first on the regional level by discussing the judgment of the Inter-American Court of Human Rights (“IACtHR”) that most extensively addresses the subject, *Kichwa Indigenous People of Sarayaku v. Ecuador*.¹² The focus here is not only on its contribution to existing norms, but—perhaps more importantly—on what is left unresolved, what is absent in this judgment, and what meaning may be attributed to such absence.

Second, at the national level, the part addresses the institutional and normative confusion surrounding consultation in Colombia by referring to debates in the Standing Committee for Coordination with Indigenous Peoples and Organizations (*Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas*) (“Mesa”),¹³ which is a space for dialogue between indigenous and state representatives. Based on observations of *Mesa* meetings in Bogota, Colombia, and interviews with representatives,¹⁴ this Article argues that a perceived threat of “state collapse” is cultivated by state representatives in a way that imbues the notions of consultation and consent with an apocalyptic character. Most resources are then geared towards controlling, managing, and—at the same time—exploiting this threat. Meanwhile, the rise of “consultation consultants” and the proliferation of spaces of dialogue arguably contribute to paralysis of discussions, rather than defusing possible conflicts and informing debate.

Third, at the community level, indigenous communities have long criticized company- and state-led consultation procedures as ineffective and illegitimate.¹⁵ Not only are such procedures culturally foreign to most, if not all communities, but after experiencing consultation “in action,” communities often believe that these procedures justify and formalize exploitation of them and of their lands. The creation of “alternative” or “autonomous” consultation processes, for example by the *Wayuu* community in *La Guajira*,

12. Sarayaku, *supra* note 1.

13. Marina C. Brilman, *La Mesa Permanente de Concertación con los Pueblos y Organizaciones Indígenas – El Diálogo Que Es Su Propio Fin*, 31 REVISTA DE DERECHO PÚBLICO 1, 1 (2013).

14. Carried out by the author, see *infra* notes 178, 193, 212, 217, 276.

15. See e.g., Inter-Am. Comm’n on Human Rights, Public Hearing, *Empresas, Derechos Humanos y Consulta Previa en America*, YOUTUBE (Mar. 17, 2015), https://www.youtube.com/watch?v=DGvASYx_j5c (discussing businesses, human rights, and prior consultation in the Americas).

Colombia, rely partly on Western notions of rights, such as the right to property and the right to self-determination, and partly on substantially different notions that do not fit comfortably within traditional legal categories, such as the living environment and community. If such alternatives point to a way forward, even a way not previously imagined, can consultations designed and carried out by indigenous communities themselves be recognized as consultations for the purposes of international law?

Moreover, another emerging pattern is identified at the community level. While the principal battleground at the international and regional level seems to be the recognition and adequate implementation of the hard-won rights to consultation and consent, the Wayuu indigenous community in Colombia is no longer, at least primarily, seeking such recognition. Rather, and perhaps counterintuitively, the insistence on these rights is regarded as potentially complicit in the violation of other rights, such as communal property and cultural rights. This is illustrated by reference to a *tutela*¹⁶ action brought by this community against a mining company and state authorities.¹⁷

Part III discusses two notions that continue the problematic heritage of consultation and consent: good faith and benefit-sharing. Many debates on consultation are predominantly technical and procedural in nature, focusing on different requirements and their

16. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] Art. 86; Corte Constitucional [C.C.] [Constitutional Court], noviembre 19, 1991, Decreto Número 2591, <http://www.corteconstitucional.gov.co/lacorte/DECRETO%202591.php>, (“Por el cual se reglamenta la acción de tutela consagrada en el artículo 86 de la Constitución Política”), amended by Corte Constitucional [C.C.] [Constitutional Court], enero 25, 1993, Sentencia C-018/93, <http://www.corteconstitucional.gov.co/RELATORIA/1993/C-018-93.htm> (establishing, *inter alia*, that the objective of the recourse of *tutela* is to protect fundamental constitutional rights. Although the formulation in the judgment is not very clear, it suggests that cases not explicitly characterized as “fundamental” in the Constitution may be selected for a *tutela* revision in certain cases if the nature of the right to be protected so permits); Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. H.R.J. 179, 185–86 (2014) (explaining the *tutela* action and its role in “constitutional transformation”).

17. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. De Casación Penal, septiembre 13, 2012, M.P. Salazar Otero, Expediente 2012-62515, *Impugnación de Tutela 62515 - Comunidades Wayuu “Nuevo Espinal” y otras*, <https://corte-suprema-justicia.vlex.com.co/vid/402083946>. This was a recourse against a judgment rendered by the Sala Penal del Tribunal Superior de Riohacha [Penal Chamber of the Superior Tribunal of Riohacha] (July 16, 2012). See discussion *infra* Part II.C.

proper interpretation or implementation. Good faith and benefit-sharing illustrate how consultation requirements, often regarded as mere formalities, implicate and continue this problematic heritage. They can be regarded as prisms that fracture aspects of this heritage, while at the same time maintaining it.

In conclusion, this Article argues that this problematic heritage, as well as the uncertainties and violence that accompany its procedures, are necessarily implied in the vocabularies, actions, and interests of all involved actors as they seek to come to terms with the complex history, present, and future of colonialism and indifference in perpetuity regarding indigenous peoples' situations.

I. TRACING THE HERITAGE OF THE CONCEPT OF CONSENT

A. Consultation and Consent as Concepts Preserving Problems

Even if the proliferation of legislation, case law, and debates regarding consultation and consent is relatively recent, these concepts themselves are not. In fact, they have a long and rather complex history and are central to modern ideas of property, contract, liberty, and government.¹⁸ The focus on consultation and consent as *concepts* in this Article follows the work of Georges Canguilhem who, outside of France, is mostly known as the mentor of Michel Foucault.¹⁹ As Canguilhem pointed out, a concept is not a rational tool of cognition or a standard of evaluation that is prior to—and divorced from—the world it seeks to make intelligible.²⁰ Rather, concepts are products of practices and of the material environment in which they are used. This means that they implicate values and cannot be understood separately from the conditions in which they arise. These characteristics of

18. See, e.g., LOCKE, *supra* note 10, at 13, 17–18 (discussing man's transition from the state of nature to the "body politic," freedom from absolute, arbitrary power, and obtaining property).

19. Gary Gutting, *Introduction Michel Foucault: A User's Manual*, in THE CAMBRIDGE COMPANION TO FOUCAULT 1, 7 (Gary Gutting ed., 2d ed. 2005); Nikolas Rose, *Life, Reason and History: Reading Georges Canguilhem Today*, 27 ECON. & SOC'Y 154, 154, 156 (1998); Brilman, *supra* note 8, at 22.

20. GEORGES CANGUILHEM, ETUDES D'HISTOIRE ET DE PHILOSOPHIE DES SCIENCES 344 (1968); GEORGES CANGUILHEM, ON THE NORMAL AND THE PATHOLOGICAL at xxxv (Carolyn R. Fawcett trans.) (1978) (arguing that a concept is not productive because it "economize[s] thought," but because it "preserve[s] a problem" that should be maintained "in the same state of freshness as its ever-changing factual data," and philosophy's task as the "science of solved problems" is, then, to "reopen rather than close problems," referring to Léon Brunschvicg).

concepts—their indeterminacy, the way in which they implicate the means of their own production, and their mobility—have since been well documented.²¹

Canguilhem also emphasized the historical and continuous transformation of concepts. That is, concepts are “theoretically polyvalent; the same concept can function in quite different theoretical contexts. This opens up the possibility of histories of concepts that are distinct from the standard histories that merely trace a succession of theoretical formulations.”²² The transformation of a concept is primarily the result of different uses and experimentation rather than logical reasoning or the progressive development of knowledge.²³ This is why Canguilhem charted such transformation through time and in different contexts far removed from the abstract theoretical worlds of most epistemologists, focusing each time on the values that a concept integrates in its form.²⁴ He demonstrated that a concept is always normative; there is no such thing as a neutral or value-free concept.²⁵

Moreover, rather than regarding a concept as a “process to economize thought,” Canguilhem addressed the inherently “problematic” nature of concepts.²⁶ He studied concepts because they “preserve a problem,”²⁷ not because they make knowledge possible.²⁸

21. See, e.g., HANS-JÖRG RHEINBERGER, TOWARD A HISTORY OF EPISTEMIC THINGS - SYNTHESIZING PROTEINS IN THE TEST TUBE 16–17 (2005); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (1979). The “mobility” of concepts here does not concern the traditional correspondence between a concept and the object to which it refers or the idea that concepts tend to hover between practice and theory. Rather, mobility means that concepts circulate freely and migrate irrespective of disciplinary boundaries. See also Brilman, *supra* note 8, at 15.

22. Gutting, *supra* note 19, at 8.

23. Henning Schmidgen, *The Life of Concepts: Georges Canguilhem and the History of Science*, 36 HIST. & PHIL. LIFE SCI. 232, 247 (2014).

24. See Brilman, *supra* note 8, at 33–34. This “vitality” of concepts—their evolution, mutation, and self-generation—is undoubtedly inspired by Canguilhem’s field of study: the life sciences.

25. Françoise Duroux, *L’Imaginaire Biologique du Politique*, in GEORGES CANGUILHEM - PHILOSOPHE, HISTORIEN DES SCIENCES 49 (Etienne Balibar, M. Cardot, F. Duroux et al. eds., 1993).

26. CANGUILHEM, ETUDES D’HISTOIRE ET DE PHILOSOPHIE DES SCIENCES, *supra* note 20, at 344.

27. CANGUILHEM, ON THE NORMAL AND THE PATHOLOGICAL, *supra* note 20, at xxv (noting that he seeks to “preserve a problem, which I consider fundamental, in the same state of freshness as its everchanging factual data”).

28. See Brilman, *supra* note 8, at 52–92. In order to recognize the polemic nature of Canguilhem’s ideas it should be noted that Enlightenment philosophers,

Even if concepts transform and are reformulated over time, he noted that “the problem itself persists at the heart of the solution presumably given to it.”²⁹

In what follows, consultation and consent are understood as concepts that are value-laden and transform in different times and contexts. However, despite such transformation, they preserve a problem or a problematic heritage. In order to unearth this problem and the values these concepts integrate, this Article will discuss their use in seventeenth century property theory and nineteenth century international law. It will refer to these theories at those particular points in time because of the way in which each of them uses the idea of indigenous peoples’ consent to sustain their main arguments. The objective is not so much to demonstrate a continuum between previous and present uses of the notions, but rather to understand how references to the “native” contributed to the constitution and meaning of consent and consultation.

B. Land Lying Waste: Cultivating Industriousness and Civilizing Savages

John Locke tells a particular story about the relation between indigenous peoples and consent in his seventeenth century theory on property. Although the earth was given by God to man in common, Locke sets out to demonstrate how appropriation from the common is possible without requiring the agreement or consent of others—“without any express compact of all the commoners”³⁰—even if

such as Kant, regarded a concept as a “unification of a manifold” or the “lawfulness of the contingent,” suggesting that concepts can “solve” the problem that the diversity of the empirical world represents for knowledge or understanding. *Id.* at 36. Concepts would gather empirical diversity within themselves, and it is this unification that makes understanding possible. *Id.* However, Canguilhem regards a concept not as a solution to a problem of understanding, but as itself enveloping a manifold of problems. *Id.* What was initially presented as a solution by Kant has now been identified as a problem by Canguilhem. *Id.* at 37. However, for the latter, the realization that a concept preserves a problem and envelops a diversity of values is not problematic. Quite the reverse, it is precisely what makes a concept productive. *Id.*

29. CANGUILHEM, ON THE NORMAL AND THE PATHOLOGICAL, *supra* note 20, at 36; *id.* at 8 (“[W]e are yielding to a demand of philosophical thought to reopen rather than close problems. Léon Brunschvicg said of philosophy that it is the science of solved problems. We are making this simple and profound definition our own.”).

30. LOCKE, *supra* note 10, at 18.

those others have, in principle, equal rights to the land held in common. Therefore, consent is immediately identified as central to his argument on property, even if this notion lacks a clearly defined meaning. In fact, he uses it in at least three different ways, all meant to substantiate different parts of his theory: individual liberty, appropriation, and accumulation.

First, Locke portrays consent as an essential aspect of man's liberty and individuality, much as it is understood today in liberal contract theory: "Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent."³¹

Second, when elaborating the idea of appropriation, Locke describes consent as an obstacle and a logical impossibility:

And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him.³²

This argument is repeated a number of times in his theory, while references to "express"³³ or "explicit"³⁴ consent imply that no such consent is required. Rather, consent should be *implicitly* assumed because to argue otherwise would go against the nature of man, the plenty of nature, and God's will. Consent is no longer explicit and

31. *Id.* at 52. This idea of consent has also been understood as the cornerstone of the right to self-determination of indigenous peoples. However, Lemaitre Ripoll pointed out that a "presumed consent to be governed" does not necessarily apply in the relation between state authorities and indigenous peoples. See Lemaitre Ripoll, *supra* note 10, at 221, 254–57 (arguing that the indigenous leader Quintín Lame at the beginning of the twentieth century did not appeal to the Colombian State for the protection of indigenous lands on the basis of a "social contract." Rather, he appealed to such protection on the basis of an implicit agreement between the victor and the vanquished; in exchange for the submission of indigenous peoples to the colonizing violence, the state needed to respect the limited self-rule in indigenous reservations).

32. LOCKE, *supra* note 10, at 19.

33. *Id.* at 19–20 (stating, for example, "[a]nd the taking of this or that part, does not depend on the *express consent* of all commoners. Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my *property*, without the assignation or consent of any body.") (first emphasis added).

34. *Id.* at 20.

central to the freedom of man, but implicit and reduced to near irrelevance. Moreover, it is not required to legitimize appropriation because appropriation is always already legitimate. Consent is a natural entitlement that exists irrespective of whether others, with whom the earth is held in common, have agreed to it.

Third, Locke uses consent when introducing the notion of *unlimited* appropriation or accumulation. Man can only appropriate enough for his use “had not the invention of money and the tacit agreement of men to put a value on it, introduced (by consent) larger possessions, and a right to them[.]”³⁵ Here, consent is relied upon to legitimize unlimited appropriation as a natural right, even if it is again represented as tacit.³⁶ However, as he explains, indigenous peoples cannot be regarded as having, either expressly or tacitly, consented to the use of money.³⁷ Therefore, their lands would supposedly be exempt from unlimited appropriation. What justifies such appropriation anyway, even in the recognized absence of consent, is the assumption that the land on which these peoples dwell lays “waste.”³⁸ Since God has given the earth to man for his use, “[t]he earth, and all that is

35. *Id.* at 23 (emphasis omitted).

36. *Id.* at 29 (“[I]t is plain, that men have agreed to a disproportionate and unequal possession of the earth, they having, by a tacit and voluntary consent, found out a way how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver, which may be hoarded up without injury to any one.”) (second emphasis added).

37. *Id.* at 28. Locke served as secretary to the Lords Proprietors of Carolina and the Council of Trade and Plantations and as commissioner of the Board of Trade. He also held investments in the Royal Africa Company (an enterprise involved in slave trade along the west coast of Africa) and the Bahama Adventurers (a group of eleven investors, including six proprietors from Carolina, that sought to develop plantations in the Bahamas). C.B. MacPherson, *Introduction* to JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* vii, x (C.B. MacPherson ed., 1980) (1690). See also WAYNE GLAUSSER, *LOCKE AND BLAKE – A CONVERSATION ACROSS THE EIGHTEENTH CENTURY* 63–66 (1998).

38. LOCKE, *supra* note 10 at 26, 28. Cf. *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.) [hereinafter *Mabo*] (establishing that the concept of *terra nullius* had erroneously been applied to land that had been inhabited at the moment of occupation by the British). See also Barbara Ann Hocking & Barbara Joyce Hocking, *Australian Aboriginal Property Rights as Issues of Indigenous Sovereignty and Citizenship*, 12 *RATIO JURIS* 196, 203 (1999) (suggesting that what contributed to the *Mabo* decision was that, contrary to other indigenous peoples, “[s]ince time immemorial, on the Murray Islands, there had been a complex system of land ownership and many property disputes” and that the Murray Islanders “are renowned gardeners”) (quoting B.J. Hocking, *Torres Strait Islanders and Australian Law*, 2 *L. & ANTHROPOLOGY* 359, 364 (1987)).

therein” should be subject to appropriation, even by the “wild Indian.”³⁹ Regardless of the “Indian’s” consent or lack thereof, he forms part of an inevitable and never-ending cycle of survival and sustenance, of appropriation and accumulation.

According to Locke, taking something out of the state of nature “begins the property[.]”⁴⁰ Lands inhabited by indigenous peoples that are used for subsistence do not meet Locke’s test of “beginning property;” only labor that “subdue[s] the earth” exercised by the “industrious and rational.”⁴¹ Indigenous people were not regarded as such and, according to Locke, they should be grateful to those who labor their land, thereby appropriating it and increasing its value.⁴² This means that uncultivated ancestral lands may be appropriated by others for the benefit of all, regardless of whether any benefits truly accrue to the indigenous peoples who live there.

C. Consenting to Dispossession: Paying the Price for Recognition

Not only did the idea of consent regarding indigenous peoples play an important role in the formulation of modern ideas of property, but it also informed the concept of sovereignty that structures international law. It regards, *inter alia*, the “consent to be bound” expressed by the ratification of a treaty that signals the sovereign equality of states. Antony Anghie argued that the modern idea of sovereignty is defined by what it excludes: non-sovereign peoples.⁴³ His argument counters the assumption that such peoples merely played an incidental or marginal role in the formation of international law as a discipline.⁴⁴ Even if the sovereignty of colonized territories was not recognized, a degree of sovereignty was granted in some measure to colonized peoples in order to establish legal title over territory and make the transfer of property possible in the absence of legal

39. LOCKE, *supra* note 10, at 18–19 (emphasis omitted). Locke suggests that a failure to claim property in more land than is made use of indicates “that the inhabitants valued it not[.]” *Id.* at 25.

40. *Id.* at 19.

41. *Id.* at 21.

42. *Id.* at 23 (“[T]he inhabitants think themselves beholden to him, who, by his industry on neglected, and consequently waste land, has increased the stock of corn, which they wanted.”).

43. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 742 (2006).

44. *Id.* at 741.

personality of such peoples.⁴⁵ Thus, while the ability to contract of indigenous peoples was limited to certain acts, it was limitless with regard to the territories and powers ceded.⁴⁶

If the objective of partial legal recognition of indigenous peoples was to gain control over their territories, such recognition cannot be regarded as the first step in a process of decolonization. Rather, it formed part of the colonizing process itself. It was a means to infringe upon, rather than promote, the rights of indigenous peoples. A citation by Anghie of the United States' representative during the Berlin conference in 1884–1885 is illustrative:

[m]odern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.⁴⁷

There are at least three aspects of this statement that merit special attention. First, it is not indigenous peoples or their culture that is recognized but the right of such peoples to dispose of themselves and their lands. Once consent has been given, or is deemed to have been given, this justifies “voluntary” dispossession. Therefore, consent represents a means to dispossess in an orderly and legally recognizable manner.

Second, the temporal element in the representative's statement seems significant. The identification of land that is to be taken possession of is *prior* to the process of obtaining the “voluntary consent” for such possession. Therefore, the granting of consent no longer seems to have any bearing on the dispossession already planned—and perhaps executed—without such consent being given. Moreover, the reference to the “aim” of “voluntary consent” signals the possibility of consent that is *not* voluntary, for example, consent given under duress, threat, or use of force.

The third aspect that stands out is that consent would *not* be required, and land could be “taken possession of” freely if there were some sort of provocation or “aggression” on the part of the natives. This is problematic because colonizers intent on taking possession of

45. *Id.* at 745.

46. Anghie, *supra* note 11, at 47.

47. *Id.* at 53.

indigenous territories are, arguably, continuously being “provoked” by indigenous peoples, irrespective of any action or inaction by such peoples. As referred to by Anghie, the provocation is their mere existence and presence on the uncultivated land that others wish to possess.⁴⁸ If indigenous provocation were continuous, then consent would *never* be required.

As was evident in Locke’s property theory, consent serves as a “variable entity”⁴⁹ that can be used for different purposes and be “created in accordance with the exigencies of the situation.”⁵⁰ However, repeated references to consent as a notion with a single meaning contributes to the suggestion of coherence.⁵¹ Even if uses of the notion differ, a few common elements may be identified. First, consent assumes an often-implicit acceptance of shared principles. Second, because consent is regarded as implicit, *not* consenting requires an explicit act that may be regarded as subversive because it upsets assumptions about how liberty, property, and government are constituted. In this way, a failure to consent implies a rejection of participation in a collective enterprise and in a shared imagination that supposedly benefits all, even if it does not in practice.

II. THREE CURRENT SPACES OF DEBATE

In seventeenth century property theory, the implicit consent of indigenous peoples was used to justify the appropriation of their uncultivated lands, while in nineteenth century international law, a limited measure of sovereignty and explicit consent was sought for the transfer of their ownership. How, then, can consent and consultation of indigenous peoples be construed and understood today? Taking seriously the idea that concepts are created and transformed by the contexts in which they are put to work, the use of these notions is assessed at the regional, national, and community level. After all, it seems unlikely that consultation and consent as defined in

48. Cf. Anghie, *supra* note 43, at 743 (“[I]t is almost inevitable that the Indians, by their very existence and their own unique identity and cultural practices, violate this [natural] law, which appears to deal equally with both the Spanish and the Indians, but which produces very different effects because of the asymmetries between the Spanish and the Indians.”) (referring to the work of FRANCISCO DE VITORIA, ON THE INDIANS LATELY DISCOVERED (1557)).

49. Anghie, *supra* note 11, at 71.

50. *Id.* at 61.

51. *Id.* at 71.

international instruments would not change in meaning or consequence when they are put into practice.

A. The Regional: the Sarayaku Judgment of the Inter-American Court of Human Rights

1. A Contribution to Existing Norms

At the regional level, the Inter-American system is the regional human rights system with the most elaborate case-law on indigenous matters.⁵² The IACtHR's *Sarayaku* judgment is the decision that most extensively addresses the right to consultation.⁵³ It was rendered in 2012, when progress had already been made regarding minority rights in Europe⁵⁴ and the issue of indigenous rights was becoming more prominent in Africa.⁵⁵ The importance of consultation and consent of minorities and indigenous peoples had to some extent been recognized

52. See e.g., case-law referred to *supra* note 1 and *infra* notes 68, 71–75.

53. Sarayaku, *supra* note 1, ¶¶ 134–232.

54. See, e.g., Council of Eur., *Framework Convention for the Protection of National Minorities and Explanatory Report*, H(95)10 (Feb. 1995), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf>; Council of Eur., *European Charter for Regional or Minority Languages*, E.T.S. 148 (Nov. 5, 1992), <http://conventions.coe.int/Treaty/EN/Treaties/Html/148.htm>; Council of Eur., *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (Nov. 4, 1950) [hereinafter ECHR] (does not contain a specific Article regarding minority rights). *But see* Eur. Court of Human Rights, *Cultural Rights in the Case-Law of the European Court of Human Rights*, at 4, http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf (noting that the provisions of the ECHR mostly invoked to seek protection of such rights are Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), and Article 2 of Protocol No. 1 (right to education)).

55. ORG. OF AFRICAN UNITY, REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 90 (2003), http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 245 (does not include an article on minority or indigenous rights). *But see* Ctr. for Minority Rights Dev. (Kenya) and Minority Rights Grp. Int'l (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/03, African Comm'n on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 290–91 (Nov. 25, 2009) [hereinafter Endorois], <http://www.achpr.org/communications/decision/276.03/> (finding that Kenya had not obtained the consent of the Endorois people "before designating their land as a Game Reserve and commencing their eviction" and declaring a violation of Article 22 of the African Charter (right to "economic, social and cultural development with due regard to . . . freedom and identity")).

by the United Nations Human Rights Committee (“U.N. HRC”).⁵⁶ Both the U.N. HRC and the United Nations Committee on the Elimination of Racial Discrimination (“U.N. CERD”) had issued General Comments on indigenous peoples’ rights in 1994 and 1997, respectively. The U.N. CERD specifically referred to ‘free and informed consent,’ stating that if indigenous peoples had been deprived of their lands without it, State Parties should “take steps to return those lands.”⁵⁷ Moreover, some States had ratified or approved the most well-known international instruments regarding indigenous rights: the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (“ILO Convention 169”) and the United Nations Declaration on the Rights of Indigenous Peoples (“U.N. Declaration”).⁵⁸ Mexico and Norway were the first states to ratify the ILO Convention 169 in 1990; the Central African Republic and Nicaragua were the last to ratify this instrument in 2010.

In the Americas, the IACtHR’s case-law on indigenous peoples is especially significant because of the, until recently, non-existent

56. See, e.g., Ilmari Länsman et al., *supra* note 1, ¶¶ 9.4–9.6. The U.N. Human Rights Committee deems a limitation of the cultural rights of minorities under Article 27 of the International Covenant on Civil and Political Rights to be permissible, as long as the impact of measures taken “on the way of life of persons belonging to a minority” does not amount to a denial of their right to enjoy their culture. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 27, S. Exec. Doc. E, 95-2, at 13 (1978), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. In order to assess this, it takes into account, *inter alia*, whether effective participation by minorities in decision-making has taken place. The U.N. Human Rights Committee first declared a violation of Article 27 ICCPR in Poma Poma, *supra* note 1, ¶¶ 7.5–7.6 (regarding the depletion of ground water affecting the traditional means of subsistence of a member of an indigenous people). It reiterated the standard of “denial” of the right but lowered this threshold by subsequently referring to a “substantive negative impact”; it also referred to the requirement of consent (without further explanation). *Id.*

57. U.N. HRC, General Comment No. 23, *supra* note 1, ¶ 7; U.N. CERD, General Comment No. 23, *supra* note 1, ¶ 5 (“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”).

58. Twenty-two countries ratified ILO Convention 169. ILO Convention 169, *supra* note 2; 143 countries voted in favour of the U.N. Declaration. *United Nations Adopts Declaration on Rights of Indigenous Peoples*, U.N., <http://www.un.org/apps/news/story.asp?NewsID=23794#.VV3oC3lFBdg> (last visited Nov. 12, 2017).

codification of indigenous peoples' rights in regional instruments.⁵⁹ The American Convention on Human Rights ("ACHR") and the American Declaration on the Rights and Duties of Man ("American Declaration") do not contain a specific Article regarding such rights.⁶⁰ In 1989, work commenced on an American Declaration on the Rights of Indigenous Peoples by a working group of the Organization of American States ("OAS"). The negotiation proved to be a lengthy process because of the procedural requirement that each provision be adopted by consensus, among other things.⁶¹ While the need for recognition and regulation of indigenous rights seems especially pressing in countries with relatively large indigenous populations, states seem wary of international obligations that may be more far-reaching than national norms, especially regarding land rights. In May 2015, indigenous representatives temporarily withdrew from the negotiations, because states sought to include provisions endorsing restrictive national laws.⁶² However, on June 15, 2016, after seventeen years, the American

59. Mario Melo, *Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights*, 4 SUR – INT'L. J.H.R. 31, 32 (2006).

60. *American Declaration of the Rights and Duties of Man*, O.A.S. Res XXX, 9th Int'l Conference of American States, art. 13, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at art. XIII (1992) [hereinafter *American Declaration*] (stating that the "right to the benefits of culture" established in Article 13 concerns a "right to take part in the cultural life of the community" and does not regard a right to cultural identity of ethnic groups); see also Grand Chief Michael Mitchell v. Canada, Case 12.435, Inter-Am. Comm'n H.R., Report No. 61/08 ¶ 74 (2008). On the difference between the right to (access to) culture of every member of society and the right of cultural identity of ethnic groups, see Asbjørn Eide, *Cultural Rights as Individual Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS – A TEXTBOOK 229 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2001); Rodolfo Stavenhagen, *Cultural Rights and Human Rights: A Social Science Perspective*, in HUMAN RIGHTS IN THE MAYA REGION 28 (Pedro Pitarch, Shannon Speed & Xochitl Leyva Solano eds., 2008).

61. *Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 7, ORG. OF AM. ST. (May 2, 2012), http://www.oas.org/DIL/GT-DADIN-doc_334-08_rev7_eng.pdf.

62. In 1997, the Inter-American Commission on Human Rights submitted a Proposed American Declaration on the Rights of Indigenous Peoples to the OAS General Assembly, which instructed the OAS Permanent Council to work on the draft. Subsequently, a Working Group was established. See *Draft American Declaration on the Rights of Indigenous Peoples*, ORG. OF AM. ST., <http://www.oas.org/en/iachr/indigenous/activities/declaration.asp> (last visited Nov. 10, 2017); *Indigenous People*, ORG. OF AM. ST. DEPT. OF INT'L. LAW,

Declaration on the Rights of Indigenous Peoples was finally adopted by the General Assembly of the OAS.⁶³ Similarly, the U.N. Declaration took approximately fifteen years to be approved by the U.N. General Assembly from the submission of the first draft⁶⁴ and the United States, Canada, New Zealand, and Australia voted against approval. Colombia and Kenya abstained from voting.⁶⁵ This is significant, since all these countries have large indigenous populations.

At the national level, various states in Latin America included in their relatively recently reformed constitutions references to pluriculturalism,⁶⁶ although lack of enforcement and political will to address some of the “structural causes” of indigenous peoples’ marginalisation may make such references seem gratuitous.⁶⁷ Many states have also adopted specific legislation regarding indigenous lands.⁶⁸

http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm (last visited Nov. 10, 2017); *Negotiation Texts*, ORG. OF AM. ST. DEPT. OF INT’L. LAW, http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm (last visited Nov. 10, 2017); Press Release, Amnesty Int’l, Prospective American Declaration on the Rights of Indigenous Peoples Risks Undermining a Decade of Progress (May 21, 2015), <https://www.amnestyusa.org/press-releases/prospective-american-declaration-on-the-rights-of-indigenous-peoples-risks-undermining-a-decade-of-progress/>.

63. *A 17-year Wait Pays off for Indigenous Peoples*, ORG. OF AM. ST. (Jun. 15, 2016), http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16.

64. Victoria Tauli-Corpuz, *El Reto de Ejecutar la Declaración de la ONU sobre los Derechos de los Pueblos Indígenas*, in *LA DECLARACIÓN SOBRE LOS DERECHOS DE LOS PUEBLOS INDÍGENAS – PUNTO Y SEGUIDO* 9, 10 (Mikel Berraondo ed., 2008), <https://elecochasqui.files.wordpress.com/2009/06/declaracion-sobre-derechos-indigenas.pdf>. The United Nations Working Group on Indigenous Peoples finished the first draft in 1992. Subsequently, the Human Rights Commission established an inter-governmental Working Group to negotiate the draft. The final version was approved by the U.N. General Assembly in 2007.

65. U.N., *Bibliographic Information System – Voting Record Search*, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>.

66. See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] July 4, 1991, art. 7; NUEVA CONSTITUCIÓN POLÍTICA DEL ESTADO, Sept. 28, 2008, art. 1 (Bolivia); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, Oct. 20, 2008, art. 1.

67. Rodríguez Garavito, *supra* note 7, at 24; Rodrigo Villagra Carrón, *Los territorios indígenas amerindios y el Sistema Interamericano de Derechos Humanos*, 1 REVISTA CEJIL 59, 63 (2006).

68. See, e.g., Sarayaku, *supra* note 1, at 44–47 nn.190–93, 195–99 & 201–12 (referring to national legislation); see also Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama, Series C No. 284, IACtHR (October 14, 2014) [hereinafter *Kuna*], at nn.203–06, n.221.

In cases brought before the IACtHR, some states continue to present arguments relating to the non-recognition of indigenous peoples' legal personality. They not only argue a lack of standing, but also call into question the indigenous character of communities as a means to deny rights to cultural identity and collective property. For example, states have argued the lack of ethnic distinctiveness or partial disintegration of indigenous culture through the acceptance of modern developments,⁶⁹ through a move away from ancestral territory,⁷⁰ through the impossibility to clearly distinguish between different indigenous cultures that have become intertwined,⁷¹ and even the formal non-existence of indigenous persons due to administrative failures in the emission of birth certificates by the state itself.⁷²

69. See *Sarayaku*, *supra* note 1, ¶ 139. Ecuador rejected the alleged violation of the right to culture, arguing that the representatives of the victims defined culture "based on a fixed ethnic notion" and therefore "d[id] not grasp the integration and polysemy of the cultural dimension of the indigenous peoples." It suggested that the indigenous community's acceptance of certain technological developments (such as a landing strip for an airplane, needed for transport and medical supplies) was inconsistent with the alleged violation of the right to culture and communal property. See *Multimedia Gallery*, INTER-AM. COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/index.php/en/court-today/galeria-multimedia?start=20>; see also *Saramaka*, *supra* note 1, ¶ 164 (as summarized by the IACtHR, the state argued that the "voluntary inclusion of some of the members of the Saramaka people in 'modern society' ha[d] affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality"). However, the U.N. Human Rights Committee established in *Ilmari Länsman et al.*, *supra* note 1, ¶ 9.3, "that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant."

70. *Saramaka*, *supra* note 1, ¶ 164.

71. *Xákmok Kásek Indigenous Community v. Paraguay*, (Ser. C) No. 214 (Inter-Am. Ct. H.R. Aug. 24, 2010) [hereinafter *Xákmok Kásek*]. The state requested the suspension of proceedings, arguing—as summarized by the IACtHR—that "the contradictions found in the name and ethnic roots of the Community would prevent titling land in its favor" and that "ethnic roots or membership in a people is an 'essential element for the transfer of property.'" *Id.*

72. *Sawhoyamaxa Indigenous Community v. Paraguay*, (Ser. C) No. 146, ¶ 192, (Inter-Am. Ct. H.R. Mar. 29, 2006) [hereinafter *Sawhoyamaxa*]. The state argued: "If neither the existence of these persons nor even their death has even been proved, it is not possible to claim liability from anyone, lest the State, where are their birth and death certificates?" The Court found a violation of Article 3 ACHR (right to legal personality), considering that it was "the duty of Paraguay to implement mechanisms enabling all persons to register their births and get any other identification documents." *Id.* ¶¶ 193–94.

The IACtHR developed its case-law on indigenous peoples' rights mostly in cases concerning alleged violations of the right to property established in Article 21 of the ACHR.⁷³ Although the issue of consultation had been brought up tentatively by parties in their arguments and through evidence submitted,⁷⁴ the IACtHR first explicitly referred to consultation with regard to the selection of alternative lands and payment of compensation in *Case of the Yakye Axa Indigenous Community v. Paraguay* and *Case of the Sawhoyamaya Indigenous Community v. Paraguay*—both regarding claims to ancestral lands.⁷⁵

After the rather sparse references to consultation in these Paraguayan cases, the IACtHR in the *Case of the Saramaka People v. Surinam*, regarding, *inter alia*, concessions given to third parties for logging and mining in communal territories, used a similar standard as the U.N. HRC had previously adopted with regard to Article 27 of the International Covenant on Civil and Political Rights ("ICCPR"). Namely, the IACtHR did not consider the right to property established in Article 21 of the ACHR to be absolute, so that this right could be restricted when general limitation requirements of necessity, proportionality, and the objective of a legitimate aim in a democratic society are met. In addition, when it concerns restrictions of property rights regarding indigenous lands, the restriction must not "amount to a denial of their traditions and customs in a way that endangers the

73. There are exceptions of cases regarding indigenous victims in which a violation of Article 21 ACHR was neither alleged nor established by the IACtHR *iure novit curiae*. See, e.g., *YATAMA v. Nicaragua*, (Ser. C) No. 127 (Inter-Am. Ct. H.R. Jun. 23, 2005) (regarding a violation of the rights to judicial guarantees and protection, political rights and equality before the law); *Norin Catrimán et al. (leaders, members and activist of the Mapuche indigenous people) v. Chile*, (Ser. C) No. 279 (Inter-Am. Ct. H.R. May 29, 2014) (regarding, *inter alia*, violations of the principle of legality, principle of equality and non-discrimination, right of the defense to examine witnesses, and right to appeal the judgment before a higher court).

74. See, e.g., *Mayagna (Suma) Awas Tingni Community v. Nicaragua*, (Ser. C) No. 79, ¶¶ 26–160 (Inter-Am. Ct. H.R. Aug. 31, 2001) [hereinafter *Mayagna*] (in which consultation regarding legislation on providing title to ancestral lands was referred to in testimonies, an expert opinion, and the state's arguments, but no consideration was made by the IACtHR).

75. *Yakye Axa Indigenous Community v. Paraguay*, (Ser. C) No. 125, ¶ 151 (Inter-Am. Ct. H.R. Jun. 17, 2005) [hereinafter *Yakye Axa*]; *Sawhoyamaya*, *supra* note 72, ¶¶ 135, 212.

very survival of the group and of its members.”⁷⁶ It subsequently identified three “safeguards” against impermissible restrictions of property rights of indigenous peoples: effective participation, reasonable benefit, and prior environmental and social impact assessment.⁷⁷

The IACtHR identified some additional consultation requirements,⁷⁸ later elaborated upon in the *Sarayaku* judgment, and established that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”⁷⁹ Some room for interpretation was left regarding the intensity of the impact and the object of impact that would require obtaining consent.⁸⁰

In April 2010, almost five years after *Saramaka*, the *Sarayaku* case reached the IACtHR.⁸¹ *Sarayaku* regarded an indigenous people living in the Amazonian region of Ecuador. In 1996, the state had signed a contract for the exploration and exploitation of petroleum through the wholly state-owned company PETROECUADOR with a consortium constituted by *Compañía General de Combustibles S.A.* (“CGC”) and *Petrolera Argentina San Jorge S.A.* The exploration and exploitation was to take place in the ancestral lands of the Sarayaku people and the lands of other indigenous communities.⁸² At the time of signing the exploration agreement with the consortium, Ecuador had not yet ratified ILO Convention 169. It did so two years later, in 1998, and the Convention entered into effect in 1999.⁸³

76. *Saramaka*, *supra* note 1, ¶¶ 126–27 (referring to Ilmari Länsman et al., *supra* note 1); *see also supra* note 56. However, the IACtHR refers to a denial of the survival of the indigenous people, whereas the U.N. Human Rights Committee referred to a denial of the right to enjoy their culture.

77. *Id.* ¶ 129; *Xákmok Kásek*, *supra* note 71, ¶ 157 (repeating the requirement of effective participation).

78. *Saramaka*, *supra* note 1, ¶ 133.

79. *Id.*

80. *Id.* ¶¶ 136–37. *See discussion infra* Part II.A.

81. *Saramaka*, *supra* note 1, ¶¶ 136–37. Previously, in 2004, upon request of the IACHR, the IACtHR had ordered provisional measures in favour of the Sarayaku people. *Sarayaku*, *supra* note 1.

82. The facts of the case described in this paragraph are based upon Chapter VII of the *Sarayaku* judgment. *Supra* note 1, ¶¶ 52, 64–65.

83. *Id.* ¶ 70.

The IACtHR established that CGC had tried to enter Sarayaku territory on numerous occasions, offering medical services, personal gifts, and money to members of the community.⁸⁴ However, the general assembly of the Sarayaku people refused to accept the money offered, even if other indigenous communities in the area signed agreements with CGC.⁸⁵ Before 1999, prospecting activities had commenced but were subsequently suspended between April 1999 and September 2002, because of opposition by the Sarayaku people.⁸⁶ When the works resumed, paths were cleared and explosives inserted into the ground for seismic exploration.⁸⁷ As a result, a sacred site, water resources, and vegetation were destroyed and cultural ceremonies were suspended.⁸⁸ Members of the Sarayaku people organized to defend the borders of their territory, leaving their villages to live in the forest where there was a shortage of food.⁸⁹

The Inter-American Commission on Human Rights (“IACHR”) and the representatives of the victims alleged that the state violated a number of rights contained in the ACHR, most importantly the right to property established in Article 21.⁹⁰ The representatives of the victims additionally alleged a violation of the right to culture, referring to Article 26 of the ACHR.⁹¹ The IACtHR found that the state had not carried out “any type of consultation” with the Sarayaku “at any stage of the implementation of oil exploration activities”⁹² and that it had violated, *inter alia*, “the rights to consultation, to indigenous communal property, and to cultural identity, in the terms of Article 21 of the American Convention.”⁹³ However, it did not enter into an analysis of the alleged violation of Article 26.⁹⁴

Arguably, one of the most notable contributions of the *Sarayaku* judgment is that, for the first time in its history, the IACtHR regarded an indigenous people, collectively, as a holder of rights.⁹⁵ The

84. *Id.* ¶ 73.

85. *Id.* ¶ 74.

86. *Id.* ¶ 72.

87. Sarayaku, *supra* note 1, ¶¶ 92, 101.

88. *Id.* ¶ 105.

89. *Id.* ¶ 100.

90. *Id.* ¶¶ 3, 6.

91. *Id.* at 5 n.3.

92. Sarayaku, *supra* note 1, ¶ 184.

93. *Id.* ¶ 341(2).

94. *Id.* at 95; see discussion *infra* Section II.A.

95. Sarayaku, *supra* note 1, ¶¶ 231, 284. The violation of Article 21 ACHR, as well as violations of the rights to judicial guarantees and protection, were

IACtHR previously recognized that Article 21 of the ACHR also applies to collective property, but only established violations regarding *members* of an indigenous community and not the community itself.⁹⁶ While the U.N. HRC established in its General Comment No. 23 that indigenous rights are individual rights,⁹⁷ the position taken by the IACtHR seems to correspond with the culture and communal sense of ownership of many indigenous peoples.⁹⁸ In subsequent cases regarding indigenous peoples, *Indigenous Peoples Kuna of Madungandí and Emberá of Bayano and its members v. Panama*, *Community Garifuna Triunfo de la Cruz and its members v. Honduras*, and *Garifuna Punta Piedra Community and its members v. Honduras*, the IACtHR established a violation of Article 21 of the ACHR with regard to the indigenous communities, as well as their members.⁹⁹

Other notable contributions of the *Sarayaku* judgment are that it (i) establishes consultation as a “general principle of international law,”¹⁰⁰ (ii) elaborates consultation requirements,¹⁰¹ and (iii) consolidates the right to cultural identity.¹⁰² First, the IACtHR refers to a “right to consultation.”¹⁰³ This right is not contained in the ACHR. It concerns an “unnamed” or implicit right, such as the “right to identity” or the “right to truth,” that is derived from a right that is

regarded as violations of the indigenous community’s rights as a collective. However, the violations of the right to life and physical integrity regarded *members* of the indigenous community. The reason for this difference is not immediately obvious, since the violation of the latter rights was apparently found with regard to all members of the Sarayaku people (because the state had allowed explosives to be placed in their territory). *Id.* ¶¶ 248–49.

96. See, e.g., Mayagna, *supra* note 74, ¶¶ 148, 155.

97. U.N. HRC, General Comment No. 23, *supra* note 1, ¶ 3.1.

98. See, e.g., Villagra Carrón, *supra* note 67, at 60 (describing how Amerindian indigenous peoples view themselves as inextricably linked to the land).

99. *Kuna*, *supra* note 68, ¶ 209; Right to Property (Art. 21 American Convention on Human Rights) and Rights to a Fair Trial and Judicial Protection (Arts. 8 and 25 American Convention on Human Rights); *Garifuna Triunfo de la Cruz Community and its Members v. Honduras*, (Ser. C) No. 305 ¶ 257 (Inter-Am. Ct. H.R. Oct. 8, 2015); Right to Property (Art. 21 American Convention on Human Rights) and Right to Judicial Protection (Art. 25 American Convention on Human Rights), *Garifuna De Punta Piedra Community and its Members v. Honduras*, (Ser. C) No. 304, ¶ 317 (Inter-Am. Ct. H.R. Oct. 8, 2015).

100. *Sarayaku*, *supra* note 1, ¶ 164.

101. *Id.* ¶¶ 178–210.

102. *Id.* ¶¶ 212–20.

103. See, e.g., *id.* ¶¶ 159–60, 168, 172 (referring explicitly to the “right to consultation”).

contained in the ACHR—in this case, the right to property. It also establishes that “the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law” with extensive references to norms and case law of various countries in the region.¹⁰⁴ The IACtHR does not refer to the right to consultation as customary international law, even if the extensive references could be interpreted as an effort to establish an *opinio iuris* or state practice.

Ecuador argued that it had not been obliged to consult with the Sarayaku people when it signed the exploration agreement because it had not yet ratified ILO Convention 169 and, at the time, its constitution contained no such obligation.¹⁰⁵ If the right to consultation constituted a norm of customary international law, then it would have been irrelevant if Ecuador had, or had not, ratified ILO Convention 169. The state would have had to consult with the indigenous people regardless, unless it had been a “persistent objector,”¹⁰⁶ which Ecuador never argued. However, the existence of customary international law is notoriously difficult to establish with regard to human rights norms because continuous violation makes it almost impossible to establish the element of state practice.¹⁰⁷

The IACtHR apparently resolved this difficulty by recognizing the right to consultation as a “general principle of international law” and found that Ecuador was bound by the obligations contained in ILO Convention 169 “at least” since its entry into force for that country.¹⁰⁸ No violation of a right to consultation was, therefore, established with regard to actions or omissions of the state before that time, even though the IACtHR habitually interprets the scope of Article 21 of the ACHR by reference to ILO Convention No. 169¹⁰⁹ and Ecuador *had* ratified the ACHR at the time it signed the exploration agreement.

104. *Id.* ¶ 164.

105. Sarayaku, *supra* note 1, ¶ 128.

106. Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 95, 106–08 (Malcolm D. Evans ed., 3d ed., 2010).

107. *Id.* at 105.

108. Sarayaku, *supra* note 1, ¶ 176.

109. At least since *Yakye Axa*, *supra* note 75. However, this means of interpretation has been criticized for “importing” norms into the ACHR that states may not have consented to (or had not at the time that the facts of the case took place). See e.g. the State’s arguments in *Sarayaku v. Ecuador*, (Ser. C) No. 245, ¶ 128 (Inter-Am Ct. H.R.) (arguing that Article 28 of the Vienna Convention on the Law of Treaties meant that Ecuador’s obligations under a treaty were “non-existent” with respect to contracts signed before the treaty was ratified); see also Lisl Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System*:

Second, the IACtHR's extensive references to national legislation and case law in the *Sarayaku* case, apart from demonstrating that consultation is a general principle of international law, seem to knit together a web of rules indicative of a "globalization of human rights standards,"¹¹⁰ or at least a harmonization of norms at the regional level with regard to consultation requirements. Namely, it codifies the idea that (i) consultation be prior, (ii) consultation be in good faith and with the objective to reach an agreement, (iii) consultation be adequate and accessible, (iv) a study of environmental impact be carried out, and (v) consultation be informed.¹¹¹

Third, the IACtHR consolidated the right to cultural identity in the *Sarayaku* judgment and established it as a "fundamental right," thereby aligning itself with the case law of, for example, the Colombian Constitutional Court.¹¹² However, it did not declare a violation of the right to culture under Article 26 of the ACHR. Rather, the right to cultural identity was linked to the right to consultation, as well as the right to property.¹¹³ In this sense, the IACtHR's argumentation is more or less in line with the U.N. HRC, which also relates consultation to the right to cultural identity,¹¹⁴ although this is perhaps because the ICCPR does not contain a right to property like the ACHR.

The IACtHR, furthermore, referred to the right to cultural identity as a "synthesizer right" (*derecho transversal*), a right whose

Legal Standards after Sarayaku, 16 AM. SOC. INT'L L. INSIGHTS 35 (2012), <http://www.asil.org/insights/volume/16/issue/35/duty-consult-inter-american-system-legal-standards-after-sarayaku> (discussing the difference in approach of the IACtHR between *Saramaka* and *Sarayaku*).

110. Víctor Abramovich, *De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema interamericano de derechos humanos*, 6 SUR INT'L. J.H.R. 7, 12 (2009).

111. *Sarayaku*, *supra* note 1, ¶¶ 180–210.

112. *Id.* ¶ 217. In the Colombian legal system a "fundamental right" has a specific meaning, whereas in the Inter-American system it does not. See Corte Constitucional [C.C.] [Constitutional Court], marzo 21, 2007, Sentencia C-208/07, ¶ 4, <http://www.corteconstitucional.gov.co/relatoria/2007/C-208-07.htm> (last visited Oct. 29, 2017); Corte Constitucional [C.C.] [Constitutional Court], enero 23, 2008, Sentencia C-030/08, ¶ 4.2.2, <http://www.corteconstitucional.gov.co/relatoria/2008/c-030-08.htm> (last visited Oct. 28, 2017); *supra* note 16.

113. *Sarayaku*, *supra* note 1, ¶ 159.

114. See, e.g., Ilmari Länsman et al., *supra* note 1; Poma Poma, *supra* note 1.

recognition is a precondition for the enjoyment of other rights.¹¹⁵ However, it could be argued that this reference weakens, rather than strengthens, the character of the right to cultural identity. The flip-side of a “*derecho transversal*” seems to be that it can be adequately protected through the protection of other rights. For example, rather than protecting the right to cultural identity as such, various other rights established in the ACHR, such as the right to property, would protect the right to cultural identity, depending on the circumstances of the case and subject to the same limitations as the right to property.¹¹⁶ The question whether such non-recognition of the justiciability of a right to cultural identity *per se* is harmful or less effective will be explored in the following paragraphs.

2. A Justiciable Right to Cultural Identity (Article 26 ACHR); The Silence on Consent

The aforementioned contribution of the *Sarayaku* judgment to existing norms is noteworthy. However, it may be instructive to identify a few questions left unanswered. After all, an unaddressed issue may indicate the existence of unresolved complexities that persist and eventually turn into future battlegrounds. The following absences are discussed: (i) considerations regarding Article 26 of the ACHR, (ii) references to consent, and (iii) certain consultation requirements.

Perhaps the most conspicuous absence in the *Sarayaku* judgment is the lack of analysis regarding Article 26 of the ACHR in relation to the violation of the right to culture alleged by the representatives of the victims. Article 26 does not mention any social, economic, or cultural rights in particular, referring only to “progressive development” of “rights implicit in the economic, social, educational, scientific, and cultural standards” set out in the OAS Charter. The IACHR has previously used the American Declaration¹¹⁷ and the

115. Oswaldo Ruiz Chiriboga, *The Right to Cultural Identity of Indigenous Peoples and National Minorities: A Look from the Inter-American System*, 5 SUR INT'L J.H.R. 43, 46 (2006).

116. See, e.g., Partially Dissenting Opinion of Judge Alirio Abreu Burelli to *Yakye Axa*, *supra* note 75, ¶¶ 24–36 (referring specifically to Articles 1(1), 5, 11, 12, 13, 15, 16, 17, 18, 21, 23 and 24 of the ACHR as rights through which the right to cultural identity could be protected).

117. Nat'l Ass'n of Ex-Employees of the Peruvian Soc. Security Inst. et al. v. Peru, Case 12.670, Inter-Am. Comm'n H.R., Report No. 38/09, ¶¶ 130–33 (2009) (discussing pension and social security rights) (citing Advisory Opinion of the IACtHR, Interpretation of the American Declaration of the Rights and Duties of

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”)¹¹⁸ as instruments to interpret the OAS Charter in order to identify rights that would be protected by Article 26. The Protocol San Salvador is the only binding regional instrument addressing economic, social, and cultural rights, but suggests in Article 19(6) that only trade union rights and the right to education are justiciable. This has been used to argue that states did not intend to extend such justiciability to other rights, including the right to culture.¹¹⁹ Moreover, Article 26 of the ACHR could be read as referring to norms that are “programmatic” in nature, supposedly forcing the IACtHR to enter into political decisions regarding resource allocation by states.¹²⁰

The IACHR has found violations of Article 26 of the ACHR in the past, though not with regard to the right to culture.¹²¹ The IACtHR,

Man within the Framework of Article 64 of the American Convention on Human Rights, OC-10/89, Series A No. 10 (July 14, 1989), ¶ 43); *see also* Christian Courtis, *La Protección De Los Derechos Económicos, Sociales y Culturales a Través Del Artículo 26 de la Convención Americana Sobre Derechos Humanos*, LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL, 361, 367–68 (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., 2008) (noting that the American Declaration has been used to interpret the rights protected by Article 26).

118. ORG. OF AM. STATES, DEPT OF INT’L LAW, <http://www.oas.org/juridico/english/treaties/a-52.html> (last visited Oct. 28, 2017). *See, e.g.*, Jorge Odir Miranda Cortez et al. v. El Salvador, Inter-Am. Comm’n H.R. Report No. 27/09, ¶ 77 (2009) (regarding the right to health).

119. For a critique of the use of Article 19(6) Protocol of San Salvador to restrict the justiciability of rights protected by Article 26 ACHR, *see* Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 232 (2006).

120. On the problematic approach of applying the “progressivity/regressivity” doctrine to an individual contentious case, *see* Tara J. Melish, *A Pyrrhic Victory for Peru’s Pensioners: Pensions, Property, and the Perversion of Progressivity*, 1 REVISTA CEJIL 51, 60–63 (2005); Acevedo Buendía et al. v. Peru, (Ser. C) No. 198, ¶ 105 (Inter-Am. Ct. H.R. July 1, 2009) (“[T]he commitment requested from the State by Article 26 of the Convention consist in the adoption of measures, specially [sic] those of an economic and technical nature-insofar as there are available resources- by legislation or other appropriate means-with a view to achieving progressively the full realization of certain economic, social and cultural rights.”). The IACtHR established that this case regarded the non-compliance by the state with an order of payment issued by domestic courts, so that it did not concern an analysis of a “measure adopted by the State that hindered the progressive realization of the right to pension” and no violation of Article 26 of the ACHR had to be declared. *Id.*

121. *See* Milton García Fajardo et al. v Nicaragua, Case 11.381, Inter-Am. Comm’n H.R., Report No. 100/01, OEA/Ser.L/V/II.114, doc. 5 rev. § D (2001). After

until recently, had not found such violations.¹²² In the highly criticised *Case of Five Pensioners* judgment, the IACtHR did not rule on the alleged violation of Article 26 because the case regarded a certain group of persons rather than the population in general.¹²³ However, more than five years later the IACtHR confirmed the justiciability of Article 26 in *Acevedo Buendía*, a case regarding Peru's noncompliance with payment orders for pensions and the adoption of national decrees regarding pension rights.¹²⁴ Nevertheless, the Court did not find it necessary to declare a violation since the case concerned the state's noncompliance with payment orders rather than measures taken to prevent the progressive development of the right to pension in Peru.¹²⁵

142 customs officers were attacked, arrested, and dismissed for participating in an illegal strike, the IACHR established that Nicaragua had sought to restrict workers' rights instead of adopting measures for progressive development, causing significant harm to the workers' economic and social rights. *Id.*

122. In some cases, victims' representatives alleged a violation of Article 26 of the ACHR, often in conjunction with other rights, but the IACtHR either did not find a violation or, more often, did not consider an analysis to be necessary because it had already established the violation of another right based on the facts, allegations, and evidence. *See, e.g.,* Girls Yean and Bosico v. Dominican Republic, (Ser. C) No. 130, ¶ 185 (Inter-Am. Ct. H.R. Sept. 8, 2005); Juvenile Reeducation Inst. v. Paraguay, (Ser. C) No. 112, ¶ 255 (Inter-Am. Ct. H.R. Sept. 2, 2004); Dismissed Congressional Employees (Aguado-Alfaro *et al.*) v. Peru, (Ser. C) No. 158, ¶ 136 (Inter-Am. Ct. H.R. Nov. 24, 2006); *Yakye Axa*, *supra* note 75, ¶¶ 163, 204.

123. This case concerned a modification of the pension system that affected the victims and the state's noncompliance with domestic judgments ordering payment. "Five Pensioners" v. Peru, (Ser. C) No. 98, ¶¶ 147–48 (Inter-Am. Ct. H.R. Feb. 28, 2003).

124. *Acevedo Buendía et al.* ("Discharged and Retired Employees of the Comptroller") v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, (Ser. C) No. 198 ¶¶ 99–103 (Inter-Am. Ct. H.R. July 1, 2009). This shift in reasoning was foreshadowed by the Reasoned Concurring Opinion of Judge García Ramírez and the Reasoned Opinion of Judge de Roux Rengifo in *Five Pensioners*, *supra* note 123. *Five Pensioners*, *supra* note 123 (García Ramírez, J., concurring) (stating that "[t]he existence of an individual dimension to the rights supports the so-called 'justiciable nature' of the latter"); *Five Pensioners*, *supra* note 123 (de Roux Rengifo, J., concurring) ("[T]he reasoning according to which only State actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political, or economic, social and cultural. The Court can only act when the human rights of specific persons are violated.").

125. *Acevedo Buendía*, *supra* note 124, ¶ 106.

The IACtHR recently established in an advisory opinion that the right to a healthy environment should be considered as a right protected by article 26 ACHR with an individual, as well as collective, dimension, which would mean that it regards a justiciable right.¹²⁶ Moreover, in the case of *Lagos del Campo v. Peru*, the IACtHR established a violation of article 26 ACHR for the first time, in conjunction with article 16.1 ACHR, the right to freedom of association. The case regarded the dismissal of a representative of a professional body, allegedly as a reprisal for certain statements he made in the media regarding the company for which he worked.¹²⁷ The advisory opinion and latter case will not be explored further in this Article, since the following paragraphs specifically address the right to culture as a justiciable right.

The IACtHR had previously referred to a right to culture in the *Saramaka case*,¹²⁸ but no violation of Article 26 of the ACHR was alleged or declared. In the *Sarayaku* case, the IACtHR established that it was not necessary to analyze the alleged violation of Article 26, but found a violation of the right to cultural identity with reference to Article 21 of the ACHR.¹²⁹ Contrary to most indigenous cases that come before the IACtHR, the *Sarayaku* case was not about a lack of title to ancestral lands because the Sarayaku people already held such title.¹³⁰ Therefore, it may seem counterintuitive that in this case centering on a threat to indigenous culture, the right to cultural identity was regarded as a mere aspect of the right to property. The most probable

126. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, (Ser. A) No. 23 (Inter-Am. Ct. H.R. Nov. 15, 2017) (establishing states' obligations regarding environmental protection, arising from the rights to life and personal integrity since Colombia consulted the IACtHR specifically regarding those rights, but noting the interrelated nature of the right to a healthy environment with other human rights).

127. Case of *Lagos del Campo v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (Ser. C) No. 340 (Inter-Am. Ct. H.R. Aug. 31, 2017) (establishing that “the State is responsible for the violation of the right to stability of work [*estabilidad laboral*], recognized in article 26 of the American Convention, in conjunction with articles 1.1, 13, 8 and 16 of the same”) (translation by author).

128. *Saramaka*, *supra* note 1, ¶ 130 (referring to *Apirana Mahuiki*, *supra* note 1).

129. *Sarayaku*, *supra* note 1, ¶¶ 341(2), 341(5).

130. *Id.* ¶ 61.

justification for this focus on property rights is that indigenous cultures are generally understood as being intimately related to ancestral lands.¹³¹

However, this raises the question of whether there is any reason or litigious advantage to allege a violation of the right to culture separately from the right to property. On the one hand, taking into account its previous case-law, until recently it seemed unlikely that the IACtHR would find a violation of a right to culture *per se* under Article 26 of the ACHR¹³² and, even if it would, it is not a given that, for example, the compensation ordered for material or immaterial damages would increase. The recognition of a justiciable right to culture would then merely be a question of theoretical purity. On the other hand, guaranteeing a property right may not provide sufficient protection for the preservation of indigenous culture. A right to cultural identity that is merely regarded as an aspect of the right to property implies a focus on ownership that is central to Western property theory, rather than a recognition of indigenous identity and culture *per se*.

A second notable issue unaddressed in the *Sarayaku* judgment, especially after the pronouncements of the IACtHR in the *Saramaka* case, regards the requirement to obtain consent of indigenous peoples in certain circumstances. Since the latter judgment, the Constitutional Court of Colombia¹³³ and the U.N. Special Rapporteur on the Rights of

131. Melo, *supra* note 59, at 46 (arguing that the recognition of the special relationship between indigenous peoples and their territory makes economic, social and cultural rights “susceptible to protection by international justice,” referring to *Yakye Axa*, *supra* note 75, and *Mayagna*, *supra* note 74). Another example of the protection of economic, social and cultural rights by reference to a civil and political right, is the interpretation of Article 4 ACHR (right to life) as including “dignified life” (*vida digna*). See Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT’L & COMP. L. REV. 1, 32 (2008).

132. See *Gonzales Lluy et al. v. Ecuador*, Judgment, (Ser. C) No. 298 (Inter-Am. Ct. H.R. Sept. 1, 2015) (Sierra Porto, J., concurring); *Gonzales Lluy*, no. 298 (Pérez Pérez, J., concurring). But see *Gonzales Lluy*, no. 298 (Ferrer Mac-Gregor Poisot, J., concurring). In this judgment, the IACtHR did not declare the alleged violation of the right to health under Article 26 of the ACHR, but violations of the right to life and the right to humane treatment, relating to failures in the provision of health services.

133. Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2011, Sentencia T-129/11, at 72, 75–76, <http://www.corteconstitucional.gov.co/relatoria/2011/t-129-11.htm>. The Constitutional Court of Colombia identified three

Indigenous Peoples (“U.N. Special Rapporteur”),¹³⁴ for example, have referred to such a requirement, thereby solidifying standards regarding consent. Even if the victims’ representatives referred, at least to some extent, to consent in their arguments,¹³⁵ the IACtHR focused only on consultation. It did not enter into an analysis of consent nor, for that matter, did it repeat the standard established in *Saramaka*. Rather, it made no mention of the concept at all. How might such a rather obvious absence be explained? It has been argued that there was simply no need for any reference to consent in this particular case, since consultation requirements had not even been met by the state.¹³⁶ However, the failure to address the notion of consent perpetuates the existing uncertainty about its relation to consultation and the circumstances in which it is required. As established in Article 6(2) of ILO Convention 169, any consultation process must be carried out “with the *objective* of achieving agreement or consent to the proposed measures.”¹³⁷ The Article’s text, therefore, suggests that the effort to obtain consent should guide any consultation process. However, this does not mean that consent needs to be *obtained*. It merely repeats the requirement that a consultation process be carried out in good faith.

The absence of consent in the *Sarayaku* judgment solidifies the distinction made between consultation and consent in *Saramaka*; consent is to be understood as something *additional* to consultation that is only required in certain circumstances.¹³⁸ Those circumstances

situations in which consent would be required: (i) displacement, (ii) storage of toxic materials in ancestral territories, and (iii) activities with a high social, cultural and environmental impact that put the existence of the indigenous community at risk. In what seems to be a purposefully ambiguous formulation, the Constitutional Court implies that this list is not exhaustive, while at the same time referring to consent merely as the objective of consultation procedures and not as an obligation to *obtain* consent.

134. James Anaya 2009, *supra* note 1, at 17. In a classic example of norm generation through mutual referencing, the IACtHR established the state’s obligation to obtain consent in certain circumstances with reference to a report by the U.N. Special Rapporteur (albeit his predecessor, Rodolfo Stavenhagen) and concluding observations by U.N. CERD on a report submitted by Ecuador in 2003. *Saramaka*, *supra* note 1, ¶¶ 135–36.

135. CorteIDH, *Documento Ilustrativo Sobre la Diligencia In Situ de una Delegación de la Corte al Territorio del Pueblo Sarayaku*, VIMEO (Sept. 24, 2012), <https://vimeo.com/50106601> (for arguments of victims’ representatives).

136. Brunner & Quintana, *supra* note 109.

137. ILO Convention 169, *supra* note 2 (emphasis added).

138. See *Saramaka*, *supra* note 1, ¶ 134.

would include (i) displacement or resettlement of indigenous peoples,¹³⁹ (ii) storage or elimination of dangerous materials in indigenous peoples' territories,¹⁴⁰ (iii) realization of military activities in ancestral territories,¹⁴¹ (iv) implementation of projects on a grand scale,¹⁴² (v) promotion of the application of traditional knowledge, innovations, and practices,¹⁴³ and (vi) access to genetic resources.¹⁴⁴ Divorcing consultation from consent means that, in cases where only the former is required, consultation does not necessarily have any consequences. States and companies are merely required to take into account proposals made by indigenous communities and justify any decisions that deviate from such proposals.

Moreover, for example with regard to the implementation of projects on a grand scale (see iii above), the lack of analysis regarding consent leaves unanswered the intensity and object of impact of such a project in order to require consent.¹⁴⁵ Since small-scale projects can

139. ILO Convention 169, *supra* note 2, art. 16; U.N. Declaration, *supra* note 2, art. 10.

140. U.N. Declaration, *supra* note 2, art. 29(2); Draft American Declaration, *supra* note 61, art. XVIII(6) (this provision is in brackets and subject to ongoing negotiations).

141. U.N. Declaration, *supra* note 2, art. 30(1). However, according to the formulation of this article, such consent would not be required if those activities are "justified by a relevant public interest." See Mónica Franco Baquero & Marina C. Brilman, *Actividades Militares en Territorios Indígenas en Colombia: la Seguridad Nacional y la Autonomía Indefensa*, 33 REVISTA DE DERECHO PÚBLICO 13 (2014).

142. Saramaka, *supra* note 1, ¶ 13.

143. Convention on Biological Diversity, *opened for signature* June 5, 1992, art. 8(j), 1760 U.N.T.S. 79.

144. *Id.* art. 15(5).

145. Different interpretations exist. See, e.g., Saramaka, *supra* note 1, ¶ 137 (describing projects that require consent as those that have "a profound impact on the property rights of the members of the Saramaka people to a large part of their territory"); Constitutional Court of Colombia, *supra* note 133, at 44 (stating that consent is required when an action will cause "a high social, cultural and environmental impact on an ethnic community, that leads to putting at risk its existence") (translation by author); Endorois, *supra* note 55, at 291 (describing projects that require consent as those that have a "major impact within the [indigenous or tribal] territory"); Ilmari Länsman et al., *supra* note 1, ¶ 9.4 (stating that measures that impact "the way of life of persons belonging to a minority," which amount to the denial of the right to enjoy their culture, are not compatible with a state's obligations under article 27, although measures that have a "certain limited impact . . . [do] not necessarily amount to a denial of the right [protected] under article 27"); Poma Poma, *supra* note 1, ¶¶ 7.5–7.6 (referring to the requirement of consent in case of a "substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she

have a significant impact, the test should focus on the expected impact of a project, rather than its size. Also, the object of impact, for example indigenous peoples' land or culture, should be defined so that the required impact assessment study can take it into account. Even if Article 7 of ILO Convention 169 establishes that the state should ensure that such a study is carried out, neither it nor the Knwe Guidelines determines who should realize it.¹⁴⁶ Arguably, it is not the company involved in the project, due to that company's obvious lack of independence.¹⁴⁷ However, if the state—or contractors retained by it—carry out the impact assessment study, this is no guarantee of independence either. This is because the state will often be involved in a significant infrastructure or exploration project, either through (partly) state-owned companies or because it receives a certain percentage of the proceeds under bilateral investment or project agreements. If the scale and impact of a project is determined by an interested party, then this could prevent consent from ever being necessary; the impact would simply be characterized as minimal.¹⁴⁸

Another question is whether consent should be regarded as a veto right. The International Labour Organization ("ILO") has established, as well as the U.N. Special Rapporteur, that indigenous peoples do not have a veto right in consultation processes.¹⁴⁹ However, if consent must be *obtained* for a project to be implemented, then it implicates a veto right. If no such consent is given this answer must be

belongs" or "measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community").

146. SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, AKWÉ: KON VOLUNTARY GUIDELINES FOR THE CONDUCT OF CULTURAL, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT REGARDING DEVELOPMENTS PROPOSED TO TAKE PLACE ON, OR WHICH ARE LIKELY TO IMPACT ON, SACRED SITES AND ON LANDS AND WATERS TRADITIONALLY OCCUPIED OR USED BY INDIGENOUS AND LOCAL COMMUNITIES (2004).

147. James Anaya 2009, *supra* note 1, ¶ 55.

148. See Sarayaku, *supra* note 1, ¶ 205 ("The State must guarantee that no concession will be granted within the territory of an indigenous community *unless and until independent and technically competent bodies, under the supervision of the State*, carry out a prior environmental and social impact study." (emphasis added)); *id.* ¶ 207 ("The environmental impact study . . . was carried out by a private entity subcontracted by the oil company, without being subject to strict control by State monitoring bodies. . . . Therefore, the Court concludes that the environmental impact assessment was not carried out in accordance with its case law or with international standards on the matter.").

149. *Id.* ¶¶ 185–87; INT'L LABOUR ORG., ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES 1989 (NO. 169): A MANUAL 16 (2003).

final with regard to that particular project proposal, otherwise the consent requirement would be meaningless. Supposedly, an alternative project proposal would have to be submitted and each such proposal would, again, be subject to a process of consultation or consent, depending on new impact assessment studies. This means that proposals could theoretically be presented *ad infinitum*,¹⁵⁰ only to be limited by the progressively considerable costs of these processes.

The third issue left unaddressed in the *Sarayaku* judgment regards consultation requirements. The IACtHR could have specified aspects of existing requirements that are themselves not regulated in ILO Convention 169, but could be regarded as necessary or desirable for the adequate functioning of consultation procedures. For example, an indication of the time such procedures may take, as well as a requirement that they may not be realized exclusively in writing. In addition, the IACtHR could have distinguished between the consultation of indigenous peoples and the public participation of the general population through administrative or other procedures. It could have clarified, moreover, that the consultation requirements for legislative or administrative measures and exploration projects are the same.¹⁵¹

Another important matter left unaddressed is an interpretation of Article 6(1.a) of ILO Convention 169, establishing that consultation is required regarding measures that “may affect

150. Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2011, Sentencia T-129/11, at 76, (Colom.). The Constitutional Court of Colombia established that if the “least harmful alternative” has been explored with the participation of the communities and all alternatives prove to be harmful *and* the intervention would lead to the “annihilation” or “disappearance” of the community, the protection of its rights prevails following the *pro homine* principle. However, this means that in any circumstance less threatening to the survival of the community, when an agreement is not possible, the state could proceed with the implementation of a project as long as its decision is not “arbitrary” or “authoritarian,” but “objective, reasonable and proportional [to the Constitutional objective that requires the state to protect the social, cultural, and economic identity of the indigenous community],” and it offers mechanisms to mitigate the effects of the decision (translation by author). Corte Constitucional [C.C.] [Constitutional Court], febrero 3, 1997, Sentencia SU-039/97, ¶ 3.3, <http://www.corteconstitucional.gov.co/relatoria/1997/SU039-97.htm> (Colom.).

151. Even if Article 6 of ILO Convention 169 refers to legislative or administrative measures and Article 15 to exploration or exploitation of resources, the Convention itself includes no justification for a difference in requirements depending on the nature of the measure or activity to be consulted. ILO Convention 169, *supra* note 2, arts. 6, 15.

[indigenous peoples] directly.”¹⁵² The IACtHR did not shed any light on the meaning of the term “directly” in the *Sarayaku* judgment, probably because exploration took place in their territory and “direct affectation” was therefore assumed.¹⁵³ Even so, “directly” affected does not necessarily mean that an activity needs to take place in indigenous territory. It is entirely possible to think of scenarios in which an activity realized outside ancestral lands can affect an indigenous community. However, such an interpretation of “direct” affectation may widen the circumstances in which consultations are required to an unacceptable degree. Direct affectation could, for example, be determined by the zone of impact or influence identified in an environmental impact assessment, but this may not be desirable. Apart from the potential conflicts of interest in the elaboration of such studies, they do not necessarily include social or cultural impact.¹⁵⁴

152. ILO Convention 169, *supra* note 2, art. 6(1)(a). The agreement provides: “In applying the provisions of this Convention, 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.” *Id.*

153. The Colombian Constitutional Court analyzed the meaning of direct affectation with regard to legislative measures and established that indigenous communities would need to be specifically affected (not just as any Colombian citizen) and the proposed legislation alters the status of a person or community by imposing restrictions or conferring benefits. Corte Constitucional [C.C.] [Constitutional Court], marzo 16, 2011, Sentencia C-187/11, ¶ 3.1, <http://www.corteconstitucional.gov.co/relatoria/2011/C-187-11.htm> (Colom.). In a subsequent decision, Corte Constitucional [C.C.] [Constitutional Court], mayo 3, 2012, Sentencia C-317/12, ¶¶ 4.1–4.2, <http://www.corteconstitucional.gov.co/RELATORIA/2012/C-317-12.htm> (Colom.), the Constitutional Court concluded that “direct affectation” would be assumed if the proposed measure: (i) affected specific constitutional rights of indigenous peoples, (ii) related to ancestral territories, (iii) regards a matter regulated by ILO Convention 169. However, it restricted the mandatory nature of consultation by distinguishing between legislative measures with direct application and those that merely establish a general normative framework. *See also* Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2012, Sentencia T-376/12, <http://www.corteconstitucional.gov.co/relatoria/2012/t-376-12.htm> (Colom.).

154. *See, e.g., Sarayaku supra* note 1, ¶ 207. In that case, the IACtHR held that the environmental impact plan “did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People;” thus, it had not been “implemented in accordance with its case law or the relevant international standards.” *Id.* The IACtHR also referred to Article 7(3) of ILO Convention 169, which provides that: “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the

Lastly, the IACtHR could have indicated whether consultation at the domestic level should be regulated by statute or if an administrative or executive decree is sufficient. Of course, any national regulation regarding consultation should itself be subject to a consultation procedure. In Latin America, Peru is the only country that has a law in force on consultation with indigenous peoples, while draft bills are pending in Colombia, Bolivia, and Ecuador.¹⁵⁵ Legislation might seem preferable due to the myriad existing executive decrees in many countries, which promote legal uncertainty.¹⁵⁶ However, in Colombia, indigenous peoples have expressed their preference for regulation of consultation through administrative protocols, rather than by law. Their position is that ILO Convention 169, as well as the case law of the IACtHR and the Colombian Constitutional Court, establish progressive norms, while a law that needs to be approved by

peoples concerned, to assess the *social, spiritual, cultural and* environmental impact on them of planned development activities.” *Id.* ¶ 204 (emphasis added).

155. *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)*, *El Peruano* (Separata), Sept. 7, 2011, at 449529–449532, <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/88881/101786/F114786124/PER88881.pdf>. See Almut Shilling-Vacaflor & Riccarda Flemmer, *Conflict Transformation Through Prior Consultation? Lessons From Peru*, 47 J. LAT. AMER. STUD. 811 (2015) (referring to deficiencies in the law and its application). In Colombia, informal draft laws have been circulating since 2012, but no formal draft has been made available. The national newspaper *El Espectador* published information on a leaked version. See *Si no hay concertación, decide el Estado*, EL ESPECTADOR (Aug. 2, 2014), <http://www.elespectador.com/noticias/politica/si-no-hay-concertacion-decide-el-estado-articulo-508262>. In Bolivia in May 2014, a draft law on consultation was presented by civil society organizations to the President, which was subsequently passed on to Congress but has not been approved. See *Organizaciones sociales entregan a ejecutivo Proyecto de ley de consulta previa, libre e informada*, VICEPRESIDENCIA DEL ESTADO PLURINACIONAL DE BOLIVIA (May 12, 2014), <http://www.vicepresidencia.gob.bo/Organizaciones-sociales-entregan-a>. In Ecuador a draft law on consultation is being discussed in Congress; the most recent version is of 27 October 2014. See Memorandum from Republic of Ecuador General Assembly President Gabriela Rivadeneira to Sec’y-Gen. Libia Rivas Ordóñez (Oct. 27, 2014), <http://ppless.asambleanacional.gob.ec/alfresco/d/d/workspace/SpacesStore/348c5878-1b6f-4d58-9649-e875fc302ac1/Proyecto%20de%20Ley%20Org%20Elnica%20de%20Consulta%20Previa,%20a%20las%20Comunas,%20Comunidades,%20Pueblos%20y%20Nacionalidades%20Tr.%20193281.pdf>.

156. See Sarayaku, *supra* note 1, at 44–47 nn.190–93, nn.195–99 & nn.201–12 for examples of domestic decrees and regulations.

Congress would probably be more restrictive and diminish recognized rights.¹⁵⁷

B. The National: Consultation and Consent in Colombia

1. Normative and Institutional Challenges

The *Sarayaku* judgment, at the regional level, consolidated the importance of consultation requirements and established that the failure of compliance with such requirements can lead to a violation of the right to property. However, it left some room for interpretation at the national level. How, then, are consultation and consent understood and employed in the domestic arena? Here, Colombia is taken as an example for several reasons: it has a large and diverse indigenous population whose ancestral lands cover a considerable percentage of the national territory;¹⁵⁸ the indigenous movement is comparatively well-organized and active on the political stage;¹⁵⁹ the country has a lively public sphere in which the dynamics between economic development and minority rights are a matter of continuous debate; it has seen a boom in recent years of activity regarding consultation;¹⁶⁰ a

157. Remarks of an indigenous representative in a *Mesa* meeting, Bogota, Colombia (Oct. 25, 2012) (on file with the author).

158. DEPARTAMENTO ADMINISTRATIVO NACIONAL DE ESTADÍSTICA, COLOMBIA UNA NACIÓN MULTICULTURAL—SU DIVERSIDAD ÉTNICA 20–21, 23 (2007) https://www.dane.gov.co/files/censo2005/etnia/sys/colombia_nacion.pdf (noting that, according to the most recent census on indigenous peoples, there are 87 indigenous peoples in Colombia living on 710 reservations in twenty-seven provinces and 228 municipalities, together occupying 34 million hectares or 29.8% of the national territory).

159. Brilman, *supra* note 13, at 8.

160. For example, the Department of Prior Consultation within the Ministry of the Interior started informing publicly on its activities in October 2012. See Press Release, Ministry of the Interior, Minister Carrillo: The Government Is Committed to Respecting the Fundamental Right of Prior Consultation (Oct. 10, 2012), <http://www.mininterior.gov.co/sala-de-prensa/noticias/compromiso-del-gobierno-respetar-derecho-fundamental-de-consulta-previa-ministro-carrillo>. This coincided with the commencement of the Government's drafting of a bill on consultation in 2012, see EL ESPECTADOR, *supra* note 155, and the organization of different seminars in Bogota, Colombia, especially in November 2012 (for example, Universidad de Los Andes on Nov. 1, 2012, "Industrias extractivas y comunidades indígenas y afrocolombianas," organized by the author; GIZ on Nov. 8, 2012, "Empresas, Diligencia Debida y Derecho a la Consulta;" and Office of the European Union in Colombia on Nov. 20, 2012, "Grupos étnicos y minorías"). This activity at the national level coincided with a seminar and side events at the U.N. Permanent Forum on Indigenous Issues in May 2012 and a report on extractive industries and

bill on consultation is being drafted by the Ministry of the Interior; and the Constitutional Court of Colombia has developed ample case-law regarding consultation.¹⁶¹

In Colombia, the consultation of indigenous communities is set out in a patchwork of different norms, ranging from articles in the Constitution to laws, decrees, and presidential directives.¹⁶² Of these, Decree 1320 of 1998 has especially been criticised. The Colombian Constitutional Court, in one case concerning indigenous peoples, ordered the Ministries of the Interior and Environment not to apply it.¹⁶³ Additionally, the Committee set up to evaluate a representation

consultation presented to the U.N. Human Rights Council by the Expert Mechanism on the Rights of Indigenous Peoples in July 2012. *See* Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Follow-up Rep. on Indigenous Peoples and the Right to Participate in Decision-making, With a Focus on Extractive Industries, U.N. Doc. A/HRC/EMRIP/2012/2 (2012).

161. *See* Corte Constitucional [C.C.] [Constitutional Court], Sentencia SU-039/97, *supra* note 150; Corte Constitucional [C.C.] [Constitutional Court], mayo 13, 2003, Sentencia SU-383/03, <http://www.corteconstitucional.gov.co/relatoria/2003/su383-03.htm> (last visited Nov. 2, 2017); Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-030/08, *supra* note 112; Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-129/11, *supra* note 133; Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-317/12, *supra* note 153.

162. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330; L. 99/93, diciembre 22, 1993, Diario Oficial [D.O.] art. 76 (Colom.) <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=297> (last visited Nov. 2, 2017) (“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.”); Decreto 1320/98, julio 13, 1998, Diario Oficial [D.O.] (Colom.), http://www.mininterior.gov.co/sites/default/files/7_decreto_1320_de_1998.pdf (last visited Nov. 2, 2017) (“Por la cual se reglamenta la consulta previa con las comunidades indígenas y negras para la explotación de recursos naturales dentro de su territorio.”); Directiva Presidencial sobre el asunto de una Guía para la realización de Consulta Previa 2013, No. 10 (Nov. 7, 2013), <http://wsp.presidencia.gov.co/Normativa/Directivas/Documents/DIRECTIVA%20PRESIDENCIAL%20N%C2%B0%2010%20DEL%2007%20DE%20NOVIEMBRE%202013.pdf> (last visited Nov. 2, 2017); Decreto 2613/13, octubre 31, 2014, http://www.minambiente.gov.co/images/normativa/decretos/2013/dec_2613_2013.pdf (last visited Nov. 3, 2017) (“por el cual se adopta el Protocolo de Coordinación Interinstitucional para la Consulta Previa”); Directiva Presidencial sobre el asunto de Garantía del derecho fundamental a la consulta previa de los grupos étnicos nacionales, 2010, No. 1 (Mar. 26, 2010) http://www.parquesnacionales.gov.co/portal/wp-content/uploads/2014/05/directiva_presidencial_01_de_2010.pdf.

163. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 1998, Sentencia T-652/98, ¶ 5.b, <http://www.corteconstitucional.gov.co/relatoria/1998/T-652-98.htm> (last visited Nov. 3, 2017).

made under Article 24 of the ILO Constitution found the Decree to be in violation of ILO Convention 169 for lack of conformity with certain articles of that Convention. The Committee also found the Decree to be procedurally deficient, because it had not been consulted with indigenous communities before being adopted.¹⁶⁴

In May 2012, the Constitutional Court established that the state had an obligation to adopt a clear legislative framework regarding consultation of indigenous peoples and that absence thereof posed a “serious obstacle” in practice for the state’s compliance with its obligation to consult.¹⁶⁵ It therefore urged Congress to emit a “specific and integral regulation on the process of prior consultation.”¹⁶⁶ Since then, the Ministry of the Interior has been drafting a bill that seeks to collate and codify consultation requirements established by international instruments.¹⁶⁷ However, according to a leaked version of the bill commented on by the national newspaper *El Espectador*, not only would the draft bill lack the progressiveness often associated with the Constitutional Court’s case-law, but some of its provisions would violate international consultation requirements by setting out a decision-making process wherein indigenous communities have no actual say.¹⁶⁸

The case-law of the Colombian Constitutional Court draws heavily on international norms, especially ILO Convention 169 and the case-law of the IACtHR, incorporated into national law through what is known as the “constitutional block” (*bloque de constitucionalidad*).¹⁶⁹

164. Report of the Committee set up to examine the representation alleging non-observance by 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) (Nov. 14, 2001), ¶¶ 74, 79 [hereinafter ILO Committee Report], http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0:NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,en:NO (last visited Nov. 3, 2017).

165. Corte Constitucional [C.C.] [Constitutional Court], mayo 3, 2012, Sentencia C-317/12, *supra* note 153, ¶ 4.2.2.

166. *Id.*

167. *See Si no hay concertación, decide el Estado*, EL ESPECTADOR, *supra* note 155.

168. *Id.* (Article 26 of the draft bill provides: “[i]f . . . the community freely decides not to participate in the process or no agreement on interests has been reached, nor consent [has been given], then the public entity of national order will decide whether it presents or implements the measure”).

169. Rodrigo Uprimny, *El Bloque de Constitucionalidad en Colombia – un análisis jurisprudencial y un ensayo de sistematización doctrinal*, DEJUSTICIA

It has recognized the right to consultation as a “fundamental right,” but has remained ambiguous on consent. While recognizing the obligation to obtain consent in certain circumstances, the Constitutional Court generally refers to the necessity to adequately motivate decisions taken and adopt the “least harmful alternative.”¹⁷⁰ Such careful wording seems intended to prevent the requirement of consent from being applicable in each case and thus to maintain a margin for the Constitutional Court to evaluate the circumstances of each case.

More recently, the Constitutional Court seems to be taking a more conservative position regarding consultation. It has established that “general” legislative measures do not require such procedures.¹⁷¹ This begs the question of how much indigenous peoples need to be “differentially affected” to trigger the consultation requirement. This change in position may at least partially be explained through (i) the potential fall-out from progressive or “activist” decisions of the Constitutional Court that rendered various laws unconstitutional because of a lack of prior consultation with indigenous peoples,¹⁷² (ii) the election of new judges—changing the balance from a liberal majority to a conservative one,¹⁷³ and (iii) a certain reticence on the part of judges because of ongoing conflicts between the Colombian armed forces and indigenous peoples in the province of Cauca.¹⁷⁴

(December 12, 2005), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf.

170. See Corte Constitucional, *supra* note 133, ¶ 7.1(i); *supra* note 150.

171. Corte Constitucional [C.C.] [Constitutional Court], mayo 3, 2012, Sentencia C-317/12, *supra* note 153; Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2012, Sentencia T-376/12, *supra* note 153.

172. Corte Constitucional, Sentencia C-030/08, *supra* note 112; Corte Constitucional [C.C.] [Constitutional Court], marzo 18, 2009, Sentencia C-175/09, <http://www.corteconstitucional.gov.co/relatoria/2009/c-175-09.htm> (Colom.).

173. Corte Constitucional [C.C.] [Constitutional Court], *Magistrados que precedieron a los actuales*, <http://www.corteconstitucional.gov.co/lacorte/magistradosanteriores.php> (last visited Nov. 3, 2017). See Ana María Montoya, “Si no vas al Senado, no te eligen magistrado”. *Instituciones informales y criterios de selección de los magistrados de la Corte Constitucional colombiana en el Senado (1992-2009)*, 79 *Revista Colombia Internacional* 155 (2013), <http://revistas.uniandes.edu.co/doi/pdf/10.7440/colombiaint79.2013.06> (last visited Nov. 3, 2017) (discussing the various factors that influence the election of Judges to the Constitutional Court by the Senate (from shortlists of three candidates drawn up by the President of the Republic, the Supreme Court, and the Council of State (*Consejo de Estado*)).

174. Franco Baquero & Brilman, *supra* note 141.

Apart from the normative confusion caused by the dispersed legal framework at the national and international levels and the lack of correspondence between an overall progressive case-law and a seemingly restrictive draft bill, the institutional aspects of consultation procedures in Colombia are also far from clear. Although the realization of consultation procedures is ultimately the responsibility of the state to the exclusion of other actors, such as companies, these actors are often involved in design and implementation.¹⁷⁵

In Colombia, consultation procedures are formally the responsibility of the Ministry of the Interior, which includes two Vice-Ministries: one on “political relations” and another on “participation and equality of rights.”¹⁷⁶ Under the latter fall the “Department of Prior Consultation” (*Dirección de Consulta Previa*) and the “Department of Indigenous, Roma, and Minority Affairs” (*Dirección de Asuntos Indígenas, Rom y Minorías*).¹⁷⁷ The former is in charge of consultations with indigenous peoples, while the latter provides support to the former and also realizes consultations on the adoption of legal and administrative measures.¹⁷⁸

However, as is often the case, the formal attribution of responsibility does not necessarily correspond with actual practice. The responsibility of the Ministry of the Interior is generally delegated to

175. GAIL WHITEMAN & KATY MAMEN, NORTH-SOUTH INST., MEANINGFUL CONSULTATION AND PARTICIPATION IN THE MINING SECTOR? A REVIEW OF THE CONSULTATION AND PARTICIPATION OF INDIGENOUS PEOPLES WITHIN THE INTERNATIONAL MINING SECTOR 65–72 (2002), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.199.2901&rep=rep1&type=pdf>. Even if consultations are often represented as dialogues between two principal actors, the state and indigenous communities, the chaotic character of consultations is reinforced by different—and sometimes converging—“paths of dialogue” that take place either simultaneously or sequentially between a variety of actors. For example, there are “external dialogues,” such as company/community, government/community/company, NGO/community, NGO/company/government, and community/community. Also, there are many “internal dialogues,” such as dialogues within communities (including spiritual consultations), within companies, and between state institutions. Moreover, different departments within companies will engage in dialogue with members of indigenous communities, depending on whether such members are regarded as a potential “employee pool,” “political centre,” or “poor neighbouring communities.” *Id.*

176. See MINISTRY OF THE INTERIOR, <http://www.mininterior.gov.co/areas-misionales> (last visited Nov. 4, 2017) (displaying the areas of jurisdiction).

177. *Id.*

178. Dirección de Asuntos Indígenas, Rom y Minorías, MINISTERIO DEL INTERIOR, <http://siic.mininterior.gov.co/content/nuestra-direccion> (last visited Nov. 4, 2017).

other ministries whose area of expertise is relevant to the project or measure consulted. In order to maintain the appearance of a clear division between institutional competencies, representatives from the Ministry of the Interior are “accompanied” by someone from the relevant ministry.¹⁷⁹ For example, a consultation regarding a project with environmental repercussions will be “accompanied” by representatives from the Ministry of Environment.¹⁸⁰ While this description suggests that such representatives are merely present, in practice, they carry out the consultation procedure without being formally responsible for it.¹⁸¹ It is often only in the final phase of a consultation that the Ministry of the Interior intervenes to formalize the results.¹⁸² This process leads to a situation in which impact assessment studies contracted by the Ministry of Environment are provided to the Ministry of the Interior for review, despite the latter’s lack of prior involvement or specific knowledge of the process.¹⁸³

Because of such delegation, many ministries have a designated person—sometimes a few—whose main responsibility is to coordinate consultation procedures.¹⁸⁴ The Ministry of Environment, for example, employed one staff employee and two external consultants, one with knowledge of international standards and the other with experience in how to negotiate with indigenous communities.¹⁸⁵ The latter are often anthropologists who, not only in Colombia, have sometimes been criticized for their role in dividing communities and contributing to inter-ethnic violence.¹⁸⁶

Not only do some ministries seem to lack expertise, but the ministries seem to lack the ability to transfer knowledge and harmonize standards with one another.¹⁸⁷ The Committee set up to

179. Interview with Anonymous Representative, Ministry of Environment, Bogotá, Colombia (Oct. 2012) (on file with author).

180. *Id.*

181. *Id.*

182. *Id.*

183. Remarks by a company representative at the seminar “*Empresas, Diligencia Debida y Derecho a la Consulta*,” *supra* note 160 (on file with author).

184. Interview, *supra* note 179.

185. *Id.*

186. See, e.g., Sarayaku, *supra* note 1, ¶ 75 (discussing undisputed allegations by the victims’ representatives that CGC had hired a firm of sociologists and anthropologists who were experts in “build[ing] community relations”).

187. Decreto 2613/2013, *supra* note 162, is a “Protocol of Interinstitutional Coordination,” but does not address the coordination between intergovernmental agencies; it merely indicates that the Department on Prior Consultation leads

evaluate a representation made under Article 24 of the ILO Constitution found that Colombia had not only failed to consult indigenous peoples prior to the adoption of a legislative measure, but had also failed to inform and engage its *own* expert institutions on consultation—the *Mesa* and the Department of Indigenous, Roma, and Minority Affairs.¹⁸⁸ The civil servants involved in consultation procedures seem acutely aware that any deficiencies in such procedures may affect the constitutionality of any administrative or legislative measure consulted.¹⁸⁹

Informal delegation occurs between Ministries, but state institutions also seem to delegate certain tasks to private companies. A representative from an international petroleum company, during a seminar on consultation held in Bogotá, expressed frustration about the state's lack of expertise, funds, and political will to carry out consultation processes, leaving this to the companies involved in the project to be consulted.¹⁹⁰ He argued that, since many projects are developed in regions where there is almost complete “state absence,” members of indigenous communities look to “daddy company” (*papa empresa*) to comply with the state's social and economic responsibilities; for example, to build a school or a health care centre.¹⁹¹ However, it should also be noted that companies themselves promise to construct schools and other public works in order to persuade indigenous representatives to vote in favour of projects.¹⁹²

Moreover, the continuous renaming of existing government agencies, the creation of new institutions, and the redistribution of competencies creates institutional confusion.¹⁹³ Previously, it was suggested that the National Authority of Environmental Licensing or *Autoridad Nacional de Licencias Ambientales* (ANLA) could, in the future, be responsible for the design and implementation of

consultation processes and relies, with regard to the identification of indigenous peoples, on the Colombian Institute of Rural Development (*Instituto Colombiano de Desarrollo Rural*) (“INCODER”).

188. ILO Committee Report, *supra* note 164, ¶ 71.

189. Interview, *supra* note 179.

190. Remarks at the seminar “*Empresas, Diligencia Debida y Derecho a la Consulta*,” *supra* note 160.

191. *Id.*

192. See, e.g., Sarayaku, *supra* note 1, ¶¶ 73, 82.

193. See, e.g., Decreto 2893, agosto 11, 2011, DIARIO OFICIAL [D.O.] (Colom.) (through this Decree, the “Group on Prior Consultation” was renamed the “Department of Prior Consultation”).

consultation processes.¹⁹⁴ Apart from the evaluation and granting of licenses, one of the ANLA's functions is to ensure that participatory mechanisms regarding licenses are implemented.¹⁹⁵ However, this administrative agency would be highly unsuitable for carrying out such a task, because of the considerable pressure that it would face to decide favourably on licensing applications. Another suggestion is that the new consultation draft bill set up a Special Administrative Unit on Prior Consultation (*Unidad Administrativa Especial de Consulta Previa*) as part of the Ministry of Justice, rather than the Ministry of the Interior.¹⁹⁶

The delegation of tasks between state entities leads to a failure to assume full responsibility for deficiencies in consultation processes. At the same time, the aforementioned normative challenges, coupled with a lack of transparency, information, and expertise, promote delay in the implementation of consultation processes and contribute to the inability to comply with national and international norms.¹⁹⁷

2. The "Mesa de Concertación" in Colombia

The normative and institutional confusion referred to in the preceding paragraphs is especially noticeable in the meetings of the *Mesa*, created in 1996 by Presidential Decree 1397¹⁹⁸ and meant to serve as a permanent forum for discussion between state and indigenous representatives.¹⁹⁹ Such meetings usually take place bi-

194. Interview with Anonymous Employee, Dep't. on Prior Consultation, Bogota, Colombia (Oct. 2012).

195. Decreto 3573, septiembre 27, 2011, DIARIO OFICIAL [D.O.] (Colom.), http://www.anla.gov.co/documentos/dec_3573_270911.pdf ("Por el cual se crea la Autoridad Nacional de Licencias Ambientales – ANLA – y se dictan otras disposiciones.").

196. EL ESPECTADOR, *supra* note 155 (this administrative unit would take over some, or all, of the competencies currently exercised by the Department on Prior Consultation).

197. Brilman, *supra* note 13, at 15–16.

198. Decreto 1397, agosto 12, 1996, Diario Oficial [D.O.] (Colom.), <http://www.iadb.org/.../CO-Decreto-1397-96-Comis-NalTerritoriosInd> ("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.").

199. *Id.* art. 11 (setting out the tasks of the Mesa, including negotiation of all administrative and legislative decisions that may affect indigenous peoples, evaluation of state policies regarding indigenous peoples, and follow up on compliance of agreements reached in the forum).

monthly in different hotels in Bogotá.²⁰⁰ Its permanent members are identified in the Presidential Decree.²⁰¹ There are representatives from eight Ministries, as well as government agencies, and indigenous representatives from different regions of the country, as well as the “National Indigenous Organization of Colombia” (*Organización Nacional Indígena de Colombia*) (“ONIC”).²⁰² The sessions are jointly led by the director of the Department of Indigenous, Roma, and Minority Affairs or another representative of the Ministry of the Interior and an indigenous spokesperson.²⁰³ Government representatives sit at one side of a U-shaped table and indigenous representatives at the other, next to the Public Defenders’ Office (*Defensoría del Pueblo*).²⁰⁴ The meetings of the *Mesa* are open to the public, except for strategy discussions among representatives before and after the meetings.²⁰⁵

The *Mesa* is not a forum where all consultations are carried out, although their planning and methodology, known in Colombia as “pre-consultation” or “road map” (*ruta metodológica*) can be agreed upon in the meetings.²⁰⁶ This “consultation of the consultation process” is currently not a requirement under international law and can, in practice, lead to protraction of negotiations and a focus on formalities rather than on carrying out consultations in accordance with requirements. Also, pre-consultation should be distinguished from a

200. Interview, *supra* note 179.

201. Decreto 1397, *supra* note 198, art. 10.

202. *Id.* It concerns Ministries of the Interior, Agriculture and Rural Development, Environment, Finance, Economic Development, Mining and Energy, Health, and Education. Indigenous representatives, apart from ONIC, are indigenous members of Congress currently in office (as well as those who formed part of the Constitutive Assembly of 1991), the Organization of Indigenous Peoples of the Colombian Amazon Region (*Organización de Pueblos Indígenas de la Amazonía Colombiana*) (“OPIAC”), the Tairona Indigenous Confederation (*Confederación Indígena Tairona*) (representing part of the Caribbean region), and a delegate for each of the five “macro-regions” (selected by indigenous organizations of each region). For challenges regarding adequate representation of the regions in Bogotá, as well as the formulation of a shared or “national indigenous interest,” see Brilman, *supra* note 13, at 16–18.

203. Observation by the author of *Mesa* meetings, Bogota, Colombia (Aug. 3, 2012; Oct. 25, 2012) (on file with author).

204. *Id.*

205. *Id.*

206. See Decreto 2613/2013, *supra* note 162, Cap. III; Directiva Presidencial 1 de 2010, *supra* note 162, ¶ 4.a. This pre-consultation cannot be equated with pre-consultations carried out at the local level.

phenomenon known as “pre-agreements,” regarded as measures to convince or bribe indigenous representatives to get a project approved at the consultation stage.²⁰⁷

The agenda of the meetings is determined by the Secretariat of the Ministry of the Interior and largely depends on the availability of government officials;²⁰⁸ topics to be addressed in the next meeting are usually agreed upon at the end of each meeting.²⁰⁹ Also, matters not on the agenda are brought up during meetings, mostly by indigenous representatives.²¹⁰ For example, during one meeting, the ONIC’s representative mentioned that the day before an indigenous representative had been killed and another, who normally participates in the *Mesa*, had been unlawfully detained.²¹¹ The representative of the Ministry of the Interior called the Office of the Public Prosecutor (*Fiscalía*) to schedule a meeting the next day to address the issue.²¹²

The functioning of the *Mesa* has been informally criticized by both state and indigenous representatives. The latter argue that many indigenous communities do not feel that they are adequately represented in Bogotá and that terms agreed upon in the *Mesa* will be rejected when presented to local indigenous communities.²¹³ Also, there is a perception among indigenous representatives that the *Mesa* is used as a forum for consultation, against its objectives set out in the Presidential Decree, to rush through certain legislation that would be disadvantageous to indigenous peoples.²¹⁴

For example, in one of the meetings the representative of the Ministry of Mining and Energy explained, with regard to the draft mining bill, that in this particular meeting the *Mesa* had to agree on the pre-consultation process regarding the bill.²¹⁵ He argued that, if no agreement could be reached, a previous mining law would enter into

207. See discussion *infra* Part II.C.

208. Interview, *supra* note 194.

209. *Id.*

210. Observation by the author of *Mesa* meetings, Bogota, Colombia (Aug. 3, 2012; Oct. 25, 2012) (on file with author).

211. Observation by the author of a *Mesa* meeting, Bogota, Colombia (Oct. 25, 2012) (on file with author).

212. *Id.*

213. *Id.*; interview with Anonymous Indigenous Representative, regional indigenous organization (not a permanent member of the *Mesa*) (Oct. 25, 2012) (on file with author).

214. *Id.*

215. Remarks of the Ministry of Mining and Energy in a *Mesa* meeting, Bogota, Colombia (Oct. 25, 2012) (on file with author).

effect that would be more detrimental—or “much less favorable,” as the representative put it—for indigenous communities.²¹⁶ The indigenous representatives responded that it was unacceptable that the state had two years to consult with indigenous communities following a judgment of the Constitutional Court ordering such consultation, but only belatedly tried to pressure indigenous communities in agreeing with the proposed, and still not consulted, bill.²¹⁷ One indigenous leader, who did not participate in the *Mesa*, said that many considered leaving the entire mechanism if this approach of the state did not change.²¹⁸

The criticisms informally uttered by government representatives centered on the perception that some indigenous representatives were at times purposefully stalling proceedings and not truly representing their communities, but were only there to “take advantage.”²¹⁹ This suggestion refers to the state’s payment of food and lodging in Bogotá during the *Mesa* meetings.²²⁰ All participants, as well as the public, receive juice, coffee, lunch, and a snack. These moments provoke joking comments with an ironic undertone by indigenous representatives. For example, in one of the meetings, the latter commented that sweets of white caramel (*manjar blanco*) had been promised at a previous meeting and that the state could not even fulfill that promise, after a discussion on the alleged state incomppliance with provisions contained in the “National Development Plan” (*Plan de Desarrollo*).²²¹ Since many attendees are present at all *Mesa* meetings, especially the indigenous representatives and moderators, the atmosphere is generally informal and could even be described as jovial, especially the attitude of state representatives towards their indigenous counterparts, which could be confused with condescension.²²²

216. *Id.*

217. Remarks of an indigenous representative in a *Mesa* meeting, Bogotá, Colombia (Oct. 25, 2012) (on file with author).

218. Interview with Anonymous Indigenous Representative, regional organization, during the seminar “Grupos étnicos y minorías,” *supra* note 160.

219. Interview, *supra* note 179.

220. Decreto 1397, *supra* note 198, Article 17(6).

221. Observation by the author of a *Mesa* meeting, Bogotá, Colombia (Oct. 25, 2012) (on file with author); DEPARTAMENTO NACIONAL DE PLANEACIÓN, PLAN NACIONAL DE 2010–2014, <https://www.dnp.gov.co/Plan-Nacional-de-Desarrollo/PND-2010-2014/Paginas/Plan-Nacional-De-2010-2014.aspx>.

222. Observation by the author of *Mesa* meetings, Bogotá, Colombia (Aug. 3, 2012; Oct. 25, 2012) (on file with author).

The civil servants present seem generally willing to discuss indigenous proposals. However, this attitude is accompanied by a more insistent, and less appealing, tone as the morning progresses; often with only barely disguised expressions of frustration with the lack of progress made.²²³ Among indigenous participants, the proposals made by state officials are met with cynical amusement or quiet resignation, with some outbursts of accusations regarding incomppliance with state obligations.²²⁴ At times, the tone becomes slightly more personal. For example, an indigenous representative pointed out that the director of the Department of Prior Consultation, who was present at the meeting, had been quoted in the press as saying that he “felt among friends” amidst representatives of “big business.”²²⁵ He then asked the director how he felt now that he was among “Indians” (*Indios*),²²⁶ a pejorative term for indigenous peoples used by persons who do not identify themselves as such.

Indigenous participants also pointed out the unfulfilled promises of President Santos who, briefly after having been elected, met with indigenous communities in *La Guajira* province.²²⁷ During that meeting, he promised an improvement in their conditions and more government investment in healthcare and education.²²⁸ They then alleged that ninety of the ninety-two points included in the National Development Plan had not been complied with and no budget had even been allocated to each point, raising doubts about the seriousness and political will of the government to implement the plan.²²⁹ In response to this criticism, the then Minister of the Interior

223. *Id.*

224. *Id.*

225. Observation by the author of a *Mesa* meeting, Bogota, Colombia (Oct. 25, 2012) (on file with author).

226. *Id.*

227. *Juan Manuel Santos comenzará su posesión con rito en la Sierra Nevada de Santa Marta*, TIEMPO (Aug. 5, 2010), <http://www.eltiempo.com/archivo/documento/CMS-7845644>.

228. *Id.*

229. Observation by the author of a *Mesa* meeting, Bogota, Colombia (Aug. 3, 2012) (on file with author). On the alleged lack of compliance, see ORGANIZACIÓN NACIONAL INDÍGENA DE COLOMBIA (ONIC), INCUMPLIMIENTO A LOS PUEBLOS INDÍGENAS, www.onic.org.co/imagenes/pdf/incumplimientos-con-los-pueblos-indigenas.pdf. On the alleged achievements, see PRESIDENCIA DE LA REPÚBLICA, INFORME AL CONGRESO: JUAN MANUEL SANTOS 2014 (July 2014), https://colaboracion.dnp.gov.co/CDT/Sinergia/Documentos/Informe_Presidente_al_Congreso_de_la_Rep%C3%BAblica_2014.pdf; *¿Cumplió Santos el Plan de Desarrollo 2010-2014?*, ESPECTADOR (Oct. 1, 2014), <http://www.elspectador.com/>

suggested that separate meetings be held on each item.²³⁰ However, indigenous participants pointed out that such meetings had already taken place and that they did not want more meetings, but state compliance.²³¹

In another *Mesa* meeting, a civil servant from the Ministry of Finance explained in elaborate fashion that allocating a budget for compliance to each of the points was complex, since each relevant government institution had to comment on the budget to the extent that it pertained to its area of competence.²³² Such references to competence, or lack thereof, are frequent and seemingly serve to counter arguments of inefficiency and incompletion by the state. Rather than assuming responsibility for an effective coordination among different state entities, it is often said that “information is not available, because it belongs to another agency’s competence.”²³³ This leads to paralysis in discussions and belies the idea that stalling is exclusively a strategy used by indigenous representatives.

3. The “Spanner in the Works of Progress” and “Threat of State Collapse” Arguments

In the *Mesa* meetings and other spaces where consultation is discussed, two recurring and very similar arguments tend to be formulated, usually by state representatives, aimed at questioning the necessity and feasibility to carry out consultations. These will be referred to as the “spanner in the works of progress” and “threat of state collapse” arguments. Although each comes in different guises, the main premise of both is that consultation puts a disproportionate burden on the state. The former argument suggests that the potential consequence of consultation procedures is to make exploitation of certain parts of the national territory less profitable or impossible, thereby thwarting progress and the Government’s policy of attracting foreign investment.

For example, state authorities argue that 70% of Colombia’s resources remain unexplored and the country is lagging behind other

noticias/politica/cumplio-santos-el-plan-de-desarrollo-2010-2014-articulo-519879 (summarizing a debate between the Government and a political party in opposition about the level of compliance).

230. *Mesa* meeting, *supra* note 225.

231. *Id.*

232. *Id.*

233. Observation by the author of *Mesa* meetings, Bogota, Colombia (Aug. 3, 2012; Oct. 25, 2012).

Latin American countries regarding the exploitation of natural resources.²³⁴ This is believed to hinder international competitiveness, as well as the nation's economic and social development²³⁵ and, therefore, the prosperity of the entire population. This assumes that some of the benefits obtained would in fact be invested in social programs, including in the affected areas, which is often not the case. It is implied that indigenous peoples, by not cooperating with consultation procedures or withholding consent, are primarily to blame for the lack of development of the country. Their claims to land and resources can be regarded as an impediment to the well-being of their fellow citizens, an argument hardly conducive to countering discrimination against these peoples and achieving an inclusive and multi-ethnic society.²³⁶

The "threat of state collapse" argument refers to an imagined "apocalyptic" potential of consultation procedures. The state would supposedly collapse under divisive negotiations and the costs associated with them. It regards a cultivation of fear that the state would become paralyzed by the prospect of having to consult every decision with all ethnically-differentiated communities within its territory,²³⁷ and society at large, in one hellish continuous referendum, stifling any aspiration of development and progress of the nation. Such threats aim to demonstrate the apparent absurdity and practical impossibility of carrying out an infinite number of consultation

234. Jairo Chacón González, *Hay 27 empresas detrás del petróleo colombiano*, ESPECTADOR (Nov. 22, 2012), <http://www.elespectador.com/noticias/economia/hay-27-empresas-detras-del-petroleo-colombiano-articulo-388455>.

235. JULIETA LEMAITRE RIPOLL, *EL DERECHO COMO CONJURO – FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES* 290 (2009) (arguing that such references to the 'Nation' are themselves highly charged and invoke the "internal split of the *mestiza* nation between the *conquistador* and the 'defender of Indians'" (translation by the author)).

236. See also Ariel E. Dulitzky, *A Region in Denial: Racial Discrimination and Racism in Latin America* (David Sperling trans.), in *NEITHER ENEMIES NOR FRIENDS – LATINOS, BLACKS, AFRO-LATINOS* 39, 40, 44 (Anani Dzidzienyo & Suzanne Oboler eds., 2005) (referring to the denial of racial discrimination of indigenous peoples by reference to matters like the right to development and economic and social marginalization, with reference to Mexico).

237. The Constitutional Court recognized Afro-Colombians as tribal peoples in the sense of ILO Convention 169, Corte Constitucional [C.C.] [Constitutional Court], 14 de febrero de 2001, Sentencia C-169/01, ¶ 3.2.2, <http://www.corteconstitucional.gov.co/relatoria/2001/C-169-01.htm>. Other minorities recognized are Roma, Raizales and Palenqueros. See MINISTERIO DEL INTERIOR, <https://www.mininterior.gov.co/areas-misionales>.

procedures, each with its own specificities, especially taking into account the limited resources of state institutions.

Both of these arguments contribute to the justification for suspending or denying the right to consultation of indigenous peoples. They are also used to pressure such peoples into agreement by referring to the detrimental consequences of state collapse for them; they would be significantly “worse off” with a less-efficient state without resources to invest, for example, in bilingual education.²³⁸ Nevertheless, the threat of state collapse could simultaneously be exploited by indigenous peoples through veiled threats of holding the state to ransom through protracted negotiations, thereby making the state face significant financial losses because of project delays.²³⁹

Both means of exploiting the threat of state collapse by state and indigenous representatives are necessarily disingenuous. All representatives are acutely aware that the latter find themselves in the impossible situation of appealing to rights that are apparently devised to recognize difference, while their potential effect is nullified *ab initio*. The question becomes which party is able to exploit these threats most effectively. This depends on the bargaining and decision-making powers of each party. Since consultation dialogues play out in a situation of utter inequality, indigenous representatives’ effective exploitation of the threat of state collapse could be a way to counter such inequality. Unfortunately, the fruitlessness of any attempt that would be made by indigenous peoples to exploit this threat only brings home their disadvantaged position.

The “spanner in the works of progress” and “threat of state collapse” arguments rely to a considerable extent on uncertainty and inequality. Not only does uncertainty proliferate through normative and institutional confusion, but also through the unstoppable flow of documents produced and spaces of dialogue organized.²⁴⁰ Uncertainty

238. Remarks of Anonymous Representatives, Ministry of Mining and Energy in a *Mesa* meeting, Bogota, Colombia (Oct. 25, 2012) (observation by the author).

239. Although not explicitly stated, this was implied by the comments of an indigenous representative regarding the reform of the mining bill during the meeting of the *Mesa* in Bogota, Colombia (Oct. 25, 2012) (observation by the author).

240. The confusing contrast between Article 16 of the Indigenous and Tribal Peoples Convention of 1989 and Article 10 of the U.N. Declaration on the Rights of Indigenous Peoples, on whether indigenous people must give their consent before being moved off their lands, provides a good example of how an increase in documents addressing indigenous rights can actually make it more difficult for

exists regarding the effects of consultation on the Nation's progress, but also on the lives of the communities that are supposed to benefit from consultation procedures. Such uncertainty turns into a protagonist of consultation dialogues; it becomes an object of debate and criticism itself. Also contributing to uncertainty is the lack of agreement about whether agreement has in fact been reached,²⁴¹ let alone what the content of such agreement may be.

Meanwhile, the inequality between state authorities and indigenous representatives is exacerbated by the often highly technical nature of consultation discussions. Experts or 'consultation consultants' are enlisted to repeat or rearticulate the requirements of an appropriate consultation process and to opine, among other things, about the requirement of consent.²⁴² However, this technical and legalistic nature of discussions has an intensely "alienating" effect because it contrasts starkly with the often-violent contexts in which consultation procedures in Colombia are carried out. Such contexts are places where "order and chaos [coexist];" it concerns a combination of the "utmost legal formalism and the most extreme violence."²⁴³ Such formalism is enforced and maintained by the use of notions like "participation," "empowerment," and "stakeholders,"²⁴⁴ which presuppose a certain measure of equality and understanding between participants, but "leave power relations untouched."²⁴⁵

However, formalism does not only "bracket" power relations; it also reinforces and legitimizes existing inequalities. Moreover, when one speaks of "power relations," power remains an uncomplicated notion. It is something—presumably economic, social, and political—that some actors have and exercise in varying degrees and others do not. Such a notion obscures the power that is represented, created, and perpetuated by the dialogue itself and that is not, as such, attributable to one or the other actor taking part in dialogue. Moreover, inequality is often accompanied by considerable distrust,

indigenous people to secure those rights. ILO Convention 169, *supra* note 2; U.N. Declaration, *supra* note 2.

241. Rodríguez Garavito, *supra* note 7, at 33.

242. David Kennedy, *The Mystery of Global Governance*, 34 OHIO NORTHERN UNIV. L. REV. 827, 846–47 (2008) (*inter alia*, on the blind spots of experts as people with projects of "affiliation" and "aversion").

243. Rodríguez Garavito, *supra* note 7, at 4; LEMAITRE RIPOLL, *supra* note 235, at 290–91 (referring to the law as a means to ritually expulse violence, thereby seeking to avoid a confrontation with the violence that it *itself* is based on).

244. Rodríguez Garavito, *supra* note 7, at 10.

245. *Id.* at 16.

misunderstanding, and misinterpretation. Although the latter can partly be attributed to differences in culture and language, they can also be employed strategically by both sides²⁴⁶—for example, if state authorities argue that they interpreted a positive response to a consultation procedure given in the *Mesa* to imply that consent had been given by the local indigenous people affected by a particular project.

As the Committee of Experts on the Application of Conventions and Recommendations of the ILO (“CEACR”) stated: “consultation is the instrument envisaged by the Convention to institutionalize dialogue with indigenous peoples, ensure processes of inclusive development and prevent and resolve disputes.”²⁴⁷ The progressive connotation of such an “institutionalization of dialogue” is that it ensures a continuous communication between state and indigenous representatives that would prevent the latter’s exclusion from decisions that affect them. However, such institutionalization can also lead to the solidification of certain elements present in, and perpetuated by, such dialogue that are not necessarily positive (such as the unequal balance of power between participants).²⁴⁸ Moreover, that communication is continuous or “permanent” does not mean that it is always productive.²⁴⁹ Even if consultation procedures should, in the words of the U.N. Special Rapporteur, be “more or less formalized, systematic, replicable, and transparent,”²⁵⁰ in practice, even consultation dialogues that comply with international standards are quickly taken over by a spontaneous chaos that cannot easily be crammed back into formalism.²⁵¹ In fact, one could argue that it is

246. *Id.* at 33–35.

247. *Observation Comm. of Experts on the Application of Conventions and Recommendations (CEACR)*, ILO ¶ 3 (adopted 2006, published 96th ILC session 2007), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2262661.

248. Rodríguez Garavito, *supra* note 7, at 16.

249. Brilman, *supra* note 13, at 21; *Direct Request CEACR*, ILO ¶ 4 (adopted 2005, published 95th ILC session 2006), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2247763 (expressing concern over the irregular functioning of participation and consultation mechanisms in Bolivia and determining that the ILO Convention 169 requires a “permanent dialogue at all levels”).

250. Report of the Special Rapporteur on the human rights of indigenous peoples, ¶ 34, U.N. Doc. A/HRC/12/34/Add.6 (Apr. 24, 2009).

251. Rodríguez-Garavito, *supra* note 7, at 4.

precisely the presumably neutral proceduralism of consultation dialogues that perpetuates some of its most problematic aspects.²⁵²

When one takes into account the aforementioned difficulties and deficiencies of consultation in general and in Colombia specifically, the question arises: why have indigenous representatives and NGOs embraced these mechanisms to advance indigenous rights? Maybe they provide a limited possibility of participation for indigenous peoples, or maybe they are the only available option. As Lemaitre pointed out, indigenous peoples face the almost impossible choice of having to opt into the rights-based discourse, while knowing that it is often used for their dispossession.²⁵³ The use of consultation by indigenous peoples as a means to advance their rights, therefore, requires a careful navigation between the Scylla of whole-sale acceptance—including its problematic heritage—and the Charybdis of ultimately exhausting cynicism caused by a mere strategic use of the notion without hope or expectation.

C. The Community: “Autonomous Consultation” in La Guajira

How do indigenous peoples participate in consultation procedures, while at the same time recognizing their flawed nature? This Section will look at consultation at the community level, using the province of *La Guajira* in Colombia as an example. Here, the indigenous Wayuu community proposed the idea of “autonomous consultation” in an effort to find a way out of this quandary. Autonomous consultation would allow the community to participate in consultation procedures, but on its own terms.

La Guajira is a province on the northern Caribbean coast of Colombia, bordering Venezuela to the east. President Santos, days after assuming office, paid a visit to the indigenous communities in this region to publicize the message that his government would attend to the needs of the country’s indigenous and tribal communities.²⁵⁴ At least a year before, the mining company *El Cerrejon* started to draw up plans for the mining of carbon from the riverbed of *Ranchería*, the river

252. See discussion *infra* Part III.

253. LEMAITRE RIPOLL, *supra* note 235, at 346–47; Lemaitre Ripoll, *supra* note 10, at 221, 235 (discussing the same ambivalence shown by Quintín Lame, an indigenous leader from Cauca province, who at the beginning of the twentieth century appealed to the law in order to get indigenous peoples’ rights recognized).

254. TIEMPO, *supra* note 227.

that runs through the province of *La Guajira*.²⁵⁵ The river is the only waterway that irrigates the arid lands of the mid and lower parts of the province where many inhabitants live in Wayuu reservations.²⁵⁶ The project envisaged the deviation of the river from its natural course, thereby allowing for the mining of approximately 530 million tons of carbon.²⁵⁷ During 2012, the managing director of *El Cerrejon* stated that the mining project and the deviation of the river were still in an early phase of evaluation and viability studies.²⁵⁸

However, on November 2, 2012, the Colombian newspaper *El Espectador* published an article with the subtitle “In the Style of the Spanish *Conquista*” (*Al estilo de la conquista española*).²⁵⁹ The article revealed that *El Cerrejon* had been carrying out meetings with local indigenous communities since 2011 in order to reach “pre-agreements” about the deviation of the river, even if relevant government institutions had not yet approved any plans regarding the project.²⁶⁰

The article included pictures of a document dated May 1, 2012 on the letterhead of the Ministry of the Interior, signed by indigenous leaders, representatives of *El Cerrejon*, and the Ministry of the Interior, and entitled “Deed of Pre-Agreements: Process of Prior Consultation in the Framework of the Expansion Project ‘P500 IIWO’UYAA” (*Acta de pre-acuerdos proceso de consulta previa en el marco del proyecto de expansion “P500 IIWO’UYAA”*).²⁶¹ The document describes how an indigenous community requested, *inter alia*, a livestock breeding program with thirty cows, one bull, a tractor, an arts and crafts project, an enclosure for livestock, and 150 rolls of barbed

255. Angelica M. Cuevas G., *Los reparos de la Contraloría a Cerrejón*, – “*Al estilo de la conquista española*,” ESPECTADOR (Nov. 2, 2012), <http://www.elespectador.com/noticias/actualidad/vivir/los-reparos-de-contraloria-cerrejon-articulo-384775> (last visited Nov. 18, 2017).

256. *Cerrejón pospone estudios sobre la posible desviación del río Ranchería*, ESPECTADOR (Nov. 8, 2012, 4:23 PM), <http://www.elespectador.com/noticias/economia/cerrejon-pospone-estudios-sobre-posible-desviacion-del-articulo-385969>.

257. Cuevas G., *supra* note 255.

258. *Id.*

259. *Id.* (the subtitle only appeared in the printed version of the newspaper, on file with the author).

260. *Id.* Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], *Impugnación de Tutela 62515*, *supra* note 17, at 22 (in this *tutela* action started by Wayuu indigenous communities and others, the Ministry of the Interior recognized that with some communities it was in the phase of “pre-agreements” and with others in the phase of “pre-consultations”).

261. Cuevas G., *supra* note 255.

wire. The community was asked why it needed the barbed wire.²⁶² It responded that it was needed to fence off their lands for agricultural purposes.²⁶³ The request was granted by the company “since it regards tools allowing for the development of the community and its food security.”²⁶⁴

A senator discovered this and other related documents and presented them to the Colombian Congress prior to its publication in the newspaper, telling the members of Congress that *El Cerrejon*, together with state officials, “ha[d] gone to buy indigenous peoples.”²⁶⁵ One state representative responded that “these commitments seek to alienate the collective right [of indigenous peoples to their land] by providing benefits befitting of the Spanish *conquista*,”²⁶⁶ The Vice-Minister of the Interior’s explanation was that it regarded a preliminary phase of the project, during which a proposal had been shared with indigenous communities, to allow for an impact assessment to be carried out by the company and a finalized proposal to be presented to the ANLA.²⁶⁷

On November 8, 2012, *El Espectador* reported that the Minister of the Interior had ordered a revision of the consultation process with the Wayuu as a consequence of the pre-agreements that had come to light and the denouncements made by Congress and the media.²⁶⁸ He also announced that if any responsibility could be attributed to a civil servant of his Ministry, appropriate disciplinary measures would be taken.²⁶⁹ Around the same time, *El Cerrejon* publicly announced that it had postponed studies on the deviation of the river *Ranchería*, because of the fall in the international price of carbon.²⁷⁰ However, it announced that it would continue to study possible alternatives.²⁷¹

On March 7, 2015, *El Espectador* published information that *El Cerrejon* proposed the deviation of part of the *Arroyo Bruno*, a

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Cuevas G., *supra* note 255.

267. *Id.*

268. *Cerrejón pospone estudios sobre la posible desviación del río Ranchería*, *supra* note 256.

269. *Id.*

270. *Id.*

271. *Id.*

smaller waterway that ends in the river *Ranchería*, in order to mine 35 million tons of carbon from its riverbed.²⁷² Again, the proposal was met by opposition of local indigenous communities, also in light of the fact that *La Guajira* is the province with the least rainfall in Colombia and there had been a very serious drought in the region since the end of 2014.²⁷³

Did the local indigenous Wayuu community employ consultation in order to voice its opposition to this kind of development project and, if so, how? The community's response consisted of two strategies, a non-judicial strategy of seeking to reframe the consultation procedure and a judicial strategy that bypassed the consultation procedure altogether. Regarding the former, in March 2012, indigenous representatives of the Wayuu reservation "*Provincial*" sent a joint letter to the President of Colombia and the Minister of the Interior.²⁷⁴ They stated that they had been called to a consultation meeting and workshop on impact mitigation measures that was to take place in their reservation. However, indigenous authorities had not been contacted in advance regarding the meeting and therefore informed the President and the Minister that they would not attend.²⁷⁵ Instead, the letter stated that the community had entered into a phase of "internal reflection" or "autonomous consultation" in accordance with its customs and that state authorities—and the company—would be informed of the outcome of that autonomous consultation.²⁷⁶

The alternative consultation was carried out by the community rather than the state. Moreover, the process itself rested on entirely different assumptions. For example, it included non-indigenous peoples and other communities living in the area where the project was to be carried out.²⁷⁷ The reason for this inclusive approach was that "all

272. Sergio S. Numa, *El arroyo que se le atravesó al Cerrejón*, ESPECTADOR (Mar. 7, 2015, 9:00 PM), <http://www.elespectador.com/noticias/medio-ambiente/el-arroyo-se-le-atraveso-al-cerrejon-articulo-548145>.

273. *Id.*

274. Letter from Resguardo Indígena Wayuu de Provincial to Dr. Juan Manuel Santos, President of the Republic of Colombia (Mar. 20, 2012) (on file with author). Indigenous representatives stated that they would not organize a meeting in one of the Government officials' houses either, without having asked them for permission. *Id.*

275. *Id.*

276. *Id.*

277. Interview with Anonymous Legal Representative, Wayuu Community of *Provincial*, Bogotá, Colombia (Sept. 2012).

life depends on the river”²⁷⁸ and that its deviation would change the life of all living beings in the region. It would increase the problem of access to water of the Wayuu community, but also of the Afro-Colombian communities, small-scale farmers, and other inhabitants.²⁷⁹

Also, the autonomous consultation took into account the environment as a living whole and was not designed around individualistic and utilitarian notions of damage, costs, and benefits.²⁸⁰ This is also why, in formulating the joint letter to state authorities, the indigenous communities and their non-indigenous legal representatives were assisted by indigenous lawyers. The non-indigenous representatives, like government officials, found it difficult to step outside of rigid legal categories that seem unable to capture some of the notions associated with “autonomous consultation.”²⁸¹

The alternative procedure proposed by the Wayuu can be regarded as a response to consultations designed and carried out by the state or a company, which can lead to “feelings of frustration and exclusion” of indigenous peoples due to “differences in values, ideas, times, reference systems, and even in ways of conceiving consultation between the interlocutors.”²⁸² Such consultations may achieve the opposite of their supposed objective: the exclusion of indigenous peoples rather than their effective participation.

This may leave indigenous participants disillusioned, recognizing, as a consultation procedure progresses or fails to progress, that such procedures preclude any real participation in decision-making processes that affect them and their livelihoods. Moreover, rather than representing a progressive form of participation in stark contrast with colonial times, some of these consultations seem to continue a colonialist project in which indigenous peoples are only allowed to participate in order to permit the exploitation of their lands.²⁸³ When they are not prepared to do so, a consultation procedure

278. *Id.*

279. Letter, *supra* note 274.

280. Interview, *supra* note 277.

281. *Id.*

282. INT’L LABOUR ORG., 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) ¶ 105, (2004) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCE DURE_ID,P50012_LANG_CODE:2507235,en.

283. See Anghie, *supra* note 43, at 745.

may simply be concluded. Although comments of indigenous peoples may be taken into account and project implementation suspended or slightly altered, ultimately a project can be carried out regardless of the outcome of the consultation, since such an outcome is not legally binding on a company or state.²⁸⁴

However, can “autonomous consultation” be regarded as consultation for the purposes of international human rights law? Perhaps the main argument in its favor is that, whereas consultation procedures designed by states often do not correspond with indigenous culture and fail to meet one or more consultation requirements, autonomous consultation *ipso facto* would not. The latter is necessarily culturally adequate, realized through institutions that are representative of the community, in good faith, and free, precisely because its process is devised and carried out by the community itself. In that sense, autonomous consultation could be the only form of consultation that complies with the objective of the right to consultation: the realization of the right to self-determination and effective participation of indigenous communities in their own economic, social, and cultural development.²⁸⁵

If the indigenous community determines that the consultation procedure is not culturally appropriate,²⁸⁶ the state has not only failed to comply with one of the requisites of a legally valid consultation procedure, but has also made the effective participation of the indigenous community impossible and, therefore, the objective of the consultation itself. Moreover, in order for the election of legitimate representatives to follow community traditions and count with the largest possible participation of its members,²⁸⁷ it is important that a consultation process be carried out by the community in its territories. Since the community itself realizes the consultation, it is more likely that it can come to a decision without outside intervention or coercion. However, it remains the state’s obligation to ensure that information

284. See *supra* Part II.A (providing, in Article 6(2) of ILO Convention 169, that any consultation process must be carried out “with the *objective* of achieving agreement or consent to the proposed measures”) (emphasis added).

285. ILO Convention 169, *supra* note 2, Article 7(1); U.N. Declaration, *supra* note 2, art. 3; James Anaya 2009, *supra* note 1, ¶ 41.

286. Saramaka, *supra* note 1, ¶ 129; Sarayaku, *supra* note 1, ¶¶ 201–02.

287. James Anaya (Special Rapporteur on the rights of indigenous people), Principios Internacionales aplicables a la consulta en relación con la reforma constitucional en materia de derechos de los pueblos indígenas en Chile, ¶ 32, U.N. Doc. A/HRC/12/34/Add.6 (April 24, 2009).

regarding a measure or project is provided,²⁸⁸ since such information will generally be in the state's possession.

Another argument in its favor is that, if autonomous consultation is recognized as the procedure to be followed from the outset, a subsequent invalidation by judicial authorities of the whole consultation procedure due to formal deficiencies can possibly be prevented. This would reduce unnecessary delays, the costs of judicial procedures, and the loss of income on projects to be implemented. Autonomous consultations should be realized in the time necessary for the indigenous community to conclude its internal process of reflection.²⁸⁹ Although this may take time, it is probably quicker than having to confront delays or project suspensions because of the state's failure to comply with certain consultation requirements.

A final argument in its favor is that a failure to recognize autonomous consultation as valid arguably goes against international norms on treaty interpretation. If a state, like Colombia, has recognized the right to self-determination of indigenous peoples by ratifying ILO Covenant 169, but subsequently interprets that right in a manner that takes away its effect in practice, such an interpretation goes against the principles of *effet utile*, good faith, object, and purpose,²⁹⁰ as well as the requirement in human rights law to interpret norms *pro homine*, meaning in a way that is "most favourable" to the rights-holder.²⁹¹ Moreover, ILO Convention 169 establishes that the recognition of the right to self-determination includes a state obligation to provide indigenous peoples with the space to develop their own procedures and to financially, and otherwise, support their initiatives.²⁹² However, autonomous consultation should not be regarded as an obligation for indigenous communities that are not able or willing to realize such a process.

On the other hand, perhaps the most convincing argument *against* recognizing autonomous consultation as a valid consultation under international law is that it seems to be a *contradictio in terminis*.

288. Sarayaku, *supra* note 1, ¶ 208.

289. Special Rapporteur, *supra* note 250, ¶ 33.

290. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980); Case of Ivcher-Bronstein v. Peru, ¶ 37 (Inter-Am. Ct. H.R. Sept. 24, 1999).

291. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, ¶ 52 (Inter-Am. Ct. H.R. Nov. 13, 1985).

292. ILO Convention 169, *supra* note 2, arts. 6(c) and 23(2).

The character of a consultation procedure is precisely one of “genuine dialogue between both parties.”²⁹³ However, autonomous consultation does not necessarily mean that such a dialogue is absent. In fact, consultation procedures are currently regarded as valid even though they are designed and carried out by one of the parties—the state—but this does not seem to affect their character as a dialogue. The *contradictio in terminis* argument would, therefore, imply that current understandings of what constitutes a valid consultation are inherently faulty.

Another argument against autonomous consultation would be that it does not correspond with the state’s legal responsibility to realize such procedures. Even if the consultation is designed and carried out by indigenous peoples, the legal responsibility remains with the state. This would be problematic in practice only if the consultation procedures carried out by such peoples failed to comply with international standards, since it is only such non-compliance that triggers the international responsibility of the state. However, since consultation requirements have as their objective the protection of indigenous peoples’ rights, autonomous consultation is more likely to meet such requirements. Therefore, it diminishes the risk of a state’s international responsibility. Moreover, the burden of proof to demonstrate a state’s compliance with consultation requirements lies with the state, as determined by the IACtHR.²⁹⁴ Such proof is supposedly easily rendered when a state can demonstrate that the consultation was designed and realized by the indigenous peoples themselves. It would, after all, be unlikely that an indigenous people would design or realize a consultation procedure that negatively affects itself.

A final argument against autonomous consultation is that, even if it would be recognized as consultation under international law, its outcome is still not legally binding on the state, just as the outcomes of state-designed consultations are not. Perhaps recognition would, therefore, merely represent another instance of a “juridification of

293. INT’L LABOUR ORG., REPORT OF THE COMMITTEE SET UP TO EXAMINE THE REPRESENTATION ALLEGING NON-OBSERVANCE BY ECUADOR OF ILO CONVENTION 169, MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION BY THE CONFEDERACIÓN ECUATORIANA DE ORGANIZACIONES SINDICALES LIBRES (CEOSL), ¶ 38, (2001), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507223,en.

294. Sarayaku, *supra* note 1, ¶ 179.

ethnic claims”²⁹⁵ and a mechanism through which indigenous peoples would once again be complicit in their own dispossession. After all, it concerns a procedural adjustment that does not necessarily change the problematic heritage preserved within the concept of consultation itself.

Perhaps for the latter reason alone, the second—judicial—strategy of the Wayuu community to oppose the plans of *El Cerrejon* may be more effective. The community brought a *tutela* action before the courts, together with an Afro-Colombian organization, displaced persons, and other inhabitants of the region.²⁹⁶ The legal representatives of the community first assumed that the objective of the *tutela* would be the recognition of its right to consultation.²⁹⁷ However, the community decided on a different litigation strategy. It argued that the community had already entered into a phase of “autonomous consultation”²⁹⁸ and requested the court to annul any environmental license granted to carry out the mining project.

The court decided that, since no such license had been applied for or granted, there was no administrative decision to appeal and ordered the Ministry of the Interior and the company to carry out a consultation procedure with communities likely to be affected. The community appealed this judgment to the Supreme Court, arguing the following:

[the] petition is aimed at protecting [the community’s] ethnic-territorial rights, rights to life, environment, and culture. [These] can only be guaranteed when the project regarding deviation of the river *Ranchería* and the mining expansion is shelved. The right to consultation is not claimed, because this project cannot be the object of consultation, given that it goes against the physical and cultural survival of ethnic groups in the region who need to be protected in an autonomous manner.²⁹⁹

In other words, even though the right to consultation can be protected by a *tutela* action, and the court had in fact ordered such protection, the indigenous community appealed the judgment because it was not claiming recognition of the right to consultation, but the

295. Rodríguez Garavito, *supra* note 7, at 10.

296. *Impugnación de Tutela 62515*, *supra* note 17, at 2.

297. Interview, *supra* note 277.

298. *Impugnación de Tutela 62515*, *supra* note 17, at 3, 18, 21.

299. *Id.* at 23, ¶¶ 3.1–3.2 (translation by the author).

recognition of other fundamental rights, such as territorial and cultural rights.³⁰⁰ This did not mean that the community rejected its right to consultation. Rather, it recognized that if the emphasis was put on the right to consultation in isolation, not in conjunction with the right to property or cultural identity, then once such consultation had been carried out the project could be implemented regardless of its outcome.³⁰¹

Nonetheless, on appeal, the Supreme Court ruled that it did not have jurisdiction to decide on the shelving of the project, only on the protection of fundamental rights of the claimants. It ruled that the fundamental right to be protected in this case was the right to consultation. It ordered the Ministry of the Interior to continue the consultation process and to include all parties likely to be affected. It also ordered the Ministry that “if no agreement [in pre-consultation] is possible, define the question unilaterally, acknowledging the concerns and expectations of the authorities consulted, with the objective to mitigate, correct or restore the effects on the cultural and natural treasures of the Nation, of measures that may be taken without their participation.”³⁰²

Even if the Supreme Court insisted on the implementation of the consultation procedure, without focusing on the protection of the property and cultural rights of the indigenous community, the explicit objection of the community to claim its right to consultation may be indicative of the shortcomings of the consultation process and point to a need to protect substantive indigenous rights, rather than focus on consultation and the compliance with procedural requirements.

III. CONSULTATION REQUIREMENTS AS PRISMS OF A PROBLEMATIC HERITAGE

A. Good Faith Between Unequals

At the regional level, a consultation procedure that does not meet requirements may lead to a violation of a property right. At the national level, in Colombia, the focus has come to lie to a large extent

300. See also Rodríguez Garavito, *supra* note 7, at 34–35 (describing the U’wa people’s rejection of a Colombian Constitutional Court ruling ordering the state to consult with the U’wa people, who wanted to cancel an oil project rather than being consulted on it).

301. Interview, *supra* note 179.

302. *Impugnación de Tutela* 62515, *supra* note 17, at 67.

on proceduralism through the figure of “pre-consultation,” discussions regarding “road maps,” and delegation between state agencies. At the community level, in *La Guajira*, the Wayuu recognized the potential dangers of such proceduralism. If consultation requirements are met, then a project can apparently be implemented even if it violates fundamental rights. Therefore, they did not only seek to bring procedure in line with cultural requirements, but also directly claimed the protection of property and cultural rights.³⁰³

The relation between the procedural and the substantive acquires yet another layer when it is recognized that continuous referral to technical consultation requirements does not turn such requirements into mere formalities. Rather, each requirement can be regarded as a prism that reflects and fragments the problematic heritage of the notions of consultation and consent. The requirements singled out to illustrate this are good faith and benefit-sharing.

The principle of good faith governs the entire consultation process and represents the condition of possibility for mutual understanding and dialogue, countering centuries in which such understanding was patently absent. Benefit-sharing remains a side issue in most discussions on consultation, even if it is included in ILO Convention 169 and has been referred to by the IACtHR.³⁰⁴ It is usually not regarded as a consultation requirement *per se*, but represents the pragmatic and less lofty notion of economic gain.³⁰⁵ In that sense, the good faith principle represents the aspirational side to consultation and benefit-sharing the somewhat banal.

The good faith principle has a long history in, for example, property law, where it is relevant *inter alia* for the determination of whether someone holds a valid title. It also has a history in contract law, although its usefulness has been debated and its meaning differs

303. Interview with Anonymous Legal Representative, *supra* note 277.

304. ILO Convention 169, *supra* note 2, art. 15(2). *Case of the Community Garifuna Triunfo de la Cruz Community and its members*, *supra* note 99, ¶ 182 (in this case, the IACtHR established that Article 21 of the ACHR had been violated because of the state's failure to “realize a process of prior consultation, an environmental impact assessment, and order the necessity, if applicable, to share the benefits of the projects mentioned, in accordance with international standards”).

305. 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, 91–93 (2009).

substantially depending on jurisdiction.³⁰⁶ Briefly stated, the good faith principle generally indicates a pre-contractual duty to inform and a post-contractual duty to perform. In certain jurisdictions, and in public international law,³⁰⁷ it may also extend to an obligation to negotiate. Such a duty does not necessarily imply that negotiations should lead to a certain result. Rather, they should be entered into and pursued as far as possible, not merely as a formality, but with a view to reaching some sort of agreement.

It should be noted that the relation between indigenous peoples and the state is not always, and not only, a contractual one. In fact, in most cases the contracting parties will be the state and a private or partially state-owned company which conclude an agreement regarding, for example, an infrastructure development project. The state's obligations toward indigenous peoples tend to arise from national and international norms.

Even if a contract *has* been signed between the state and indigenous peoples, it is problematic to regard consultation or negotiation procedures between state and indigenous representatives as spaces that are only distinguished by a higher level of inequality. Not only are such procedures marked by uncertainty and a considerable amount of distrust;³⁰⁸ it cannot always be assumed that both parties intend to reach a satisfactory agreement that will leave them both better off. There is still a mistaken belief that the protection of indigenous peoples' rights and the economic and social development of the nation are two mutually exclusive objectives. This leads to the question of how good faith can be conceived in a relation between unequals, especially when such inequality is economic, cultural, epistemological,³⁰⁹ and firmly rooted in history.

Even so, the good faith principle as a consultation requirement seems to assume a contractual situation where indigenous peoples are legal subjects who are free to contract, or not, when in practice no such situation exists. It is, therefore, relatively easy for states not to comply with some of their contractual obligations without ever being held accountable. The continued use of the good faith principle as the

306. GOOD FAITH IN CONTRACT AND PROPERTY LAW (Angelo D.M. Forte ed., 1999).

307. North Sea Continental Shelf (Ger. v. Den. and Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 87 (Feb. 20).

308. Special Rapporteur, *supra* note 250, ¶ 24.

309. See Villagra Carrón, *supra* note 67, at 61 (referring to a conceptual imposition on indigenous peoples that negates the possibility of "epistemological equality").

edifice—or artifice—that sustains consultation procedures, and the assumption of a relation marked by trust, removes the necessity for state authorities to change the existing situation and actually achieve that trust by complying with their promises and obligations.

The reiteration of the good faith principle obscures the fact that a lack of mutual understanding and trust, fomented by decades of violence, lies at the heart of concepts like consultation and consent, even if the meaning and contexts in which these concepts are used change over time. The denial of this historic and present reality of indigenous peoples is repeated each time the good faith principle is referred to as a mere consultation requirement. In this way, law negates reality by making the persistence of colonizing violence seem like an abnormality or an exceptional circumstance, rather than the norm.³¹⁰

B. In Whose Interest? The Difference Between Benefit-sharing and Compensation

If the good faith principle is—among other things—about trust, then benefit-sharing is about interest. Benefit-sharing and compensation are often regarded as interchangeable notions.³¹¹ However, compensation regards the payment of damages resulting from the violation of a right and, therefore, usually becomes payable after the right has already been violated. The payment of compensation is also, for example, taken into account in order to determine whether the limitation or restriction of a property right is legally valid, as in the case of expropriation.³¹² Benefit-sharing, on the other hand, goes beyond compensation in recognizing that the realization of a project would not have been possible but for the contribution of indigenous

310. See LEMAITRE RIPOLL, *supra* note 235, at 291 (discussing the role of legal rituals in legitimizing violence and the ritual expulsion of such violence through law).

311. Saramaka, *supra* note 1, ¶ 138 (in this case, the IACtHR established that “[t]he concept of benefit-sharing . . . can be said to be inherent to the right of compensation recognized under Article 21(2) of the Convention”); see also *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, ¶ 77, U.N. Doc. A/HRC/15/37 (July 19, 2010) [hereinafter James Anaya 2010], http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37_en.pdf (interpreting this consideration of the IACtHR favourably to mean that benefit-sharing is a requirement for the limitation of a property right, just as compensation is).

312. See, e.g., *Case of Salvador Chiriboga v. Ecuador*, (Ser. C) No. 179, ¶¶ 95–114 (Inter-Am. Ct. H.R. May 6, 2008).

peoples. Whereas the state and the company involved in a project may contribute with infrastructure, equipment, human resources, and investment, indigenous peoples contribute through providing access to land, knowledge regarding the surroundings and its characteristics, and possibly labor.

The term “benefit” can be understood in different ways, for example, as a share in the proceeds generated by a project developed in indigenous territories.³¹³ Many Latin American countries are dependent on foreign investment for the realization of development projects. Contracts concluded between states and companies, for example in the framework of bilateral investment agreements,³¹⁴ may include provisions ensuring that a certain percentage of the proceeds are paid to both parties depending, among other things, on investment, who “owns” and manages the project, and who takes the biggest part of the risk. In this sense, benefit-sharing can take place through the incorporation of a joint venture or the use of an existing shelf company that pays out dividends to shareholders. However, such agreements usually do not include benefit-sharing arrangements with indigenous peoples.³¹⁵

Nonetheless, companies have been incorporated with indigenous communities as shareholders. This is seen mostly in Canada, while in Australia there are examples of participation by indigenous peoples in resource management.³¹⁶ The U.N. Special Rapporteur has acknowledged that indigenous peoples may have different objectives. Some may appreciate a purely economic benefit, while others prefer playing a more active role in projects developed on their lands, such as owning and operating companies for resource

313. Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 INTER-AM. L. REV. 451, 506 (1998).

314. DEPT OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012) <http://www.state.gov/documents/organization/188371.pdf>; see, e.g., Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, Claimant's Notice of Arbitration (Sept. 23, 2009), ¶¶ 6, 7, 9, 69, <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf> (referring to the contractual structure of Chevron's investment in Ecuador for oil exploration in indigenous territories).

315. See, e.g., Santiago Wills Valderrama and Jose Antonio Rivas, *Acuerdos para la protección de las inversiones extranjeras: el modelo APPRI colombiano* (2008) (unpublished manuscript) (on file with author).

316. GAIL WHITEMAN & KATY MAMEN, *supra* note 175, at 25–26.

extraction, possibly partnering with non-indigenous companies.³¹⁷ Since such initiatives are more likely to be respectful of indigenous cultures,³¹⁸ the U.N. Special Rapporteur argues that they should receive state support, for example in the form of licenses, grants, technical assistance, and favourable tax treatment.³¹⁹ At the same time, this type of benefit-sharing may contribute to the “social licence to operate” of a company.³²⁰

Article 15.2 of ILO Convention 169 provides for benefit-sharing, but establishes that this should take place “wherever possible,”³²¹ ultimately making it a matter of resource allocation by the state. The U.N. Special Rapporteur affirmed that:

There is no specific international rule that guarantees benefit sharing for indigenous peoples, aside from the consideration that such sharing must be “fair and equitable.” Domestic law still presents serious limitations in this sphere. States rarely guarantee a share in the benefits arising from natural resource exploitation, and when such benefit sharing is established by law, a distinction is usually not made between the local population and indigenous communities per se. Moreover, the share in project-generated benefits is often trivial in comparison with the company’s share, and there are often no clear and transparent criteria for apportioning such benefits.³²²

Although benefit-sharing may seem desirable in most cases, it has also been criticized for forcibly introducing indigenous peoples into market economies. A representative of the Inter-American Development Bank, which changed its focus in 1994 from mitigating

317. James Anaya (Special Rapporteur on the rights of indigenous peoples), *Extractive industries and indigenous peoples*, ¶¶ 10, 14, U.N.Doc. A/HRC/24/41 (July 1, 2013) [hereinafter James Anaya 2013], http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf.

318. *Id.* ¶ 8.

319. *Id.* ¶ 14.

320. William P. Smith, *Understanding the “Social License to Operate”: The Case of Barrick Mining and the Pascua Lama Project*, in PROC. 2010 IABS CONF. 223 (2010); John Morris, *Business and Society: Defining the Social License*, GUARDIAN (Sept. 29, 2014), <http://www.theguardian.com/sustainable-business/2014/sep/29/social-licence-operate-shell-bp-business-leaders>.

321. Sargent, *supra* note 313, at 506–09.

322. James Anaya 2010, *supra* note 311, ¶ 78.

the impact of projects to sharing benefits with indigenous peoples,³²³ referred to an “intercultural economy” as one of the aims to be achieved in order to promote social and economic development and strengthen ethnic culture and identity.³²⁴ Apart from the question of what meaning may be attributed to the term “intercultural economy,” the argument remains that benefit-sharing, if understood as financial payments or economic gain, may undermine traditional ways of life of indigenous peoples that have had “little contact with the market economy.”³²⁵ Even if economic benefit can have a positive equalizing effect,³²⁶ this implies at the same time an erasure of differences. In that sense, it has been said that “[a]s civic and capitalist identities have been strengthened, ethnic and national identity has declined.”³²⁷

The sharing of benefits obviously relies on a certain concept of interest, a utilitarian notion that takes the *homo economicus* as a point of departure. Money may be regarded as a general means of communication that is, in itself, value-neutral and brings differing interests into “convergence in the assumption of an equivalence of values,” but interest and value may have different connotations in indigenous cultures.³²⁸ Strathern suggests that they do:

[f]or interest is not just in the things acquired through transactions: explicit value is put on maintaining flow itself. Borrowing, sharing and exchanging are all effected through payments; keeping the flow going acquired generative connotations of its own. An ability

323. Anne Deruyttere, *Perceived Challenges to Recognition on Prior and Informed Consent of Indigenous Peoples and other Local Communities: The Experiences of the Inter-American Development Bank*, 4 SUSTAINABLE DEV. L. & POL’Y 40 (2004).

324. *Id.* at 41.

325. Melo, *supra* note 59, at 46; James Anaya 2010, *supra* note 311, ¶ 80; *see also Kuna*, *supra* note 68, ¶ 142 n.221 (explaining that legislation in many Latin American countries prohibits the sale or attachment of indigenous lands; even if these provisions may protect collective title, they also potentially restrict indigenous peoples in obtaining economic benefit from their lands, should they so wish).

326. Rodríguez Garavito, *supra* note 7, at 31.

327. Daniel Deudney & G. John Ikenberry, *The Logic of the West*, 10 WORLD POL’Y J. 17 (1993–94); Daniel Deudney & G. John Ikenberry, *Deudney and Ikenberry Respond*, 11 WORLD POL’Y J. 122, 124 (1994).

328. HEINER GANSMANN, *DOING MONEY: ELEMENTARY MONETARY THEORY FROM A SOCIOLOGICAL STANDPOINT* 19 (2012) (referring to Parsons and Luhmann’s theories regarding money as a symbol and generalized means of communication).

to release generativity is bound up in the right to pass things on to others.³²⁹

However, a gradual transformation of indigenous culture through benefit-sharing or compensation may not be used to justify a failure to pay, even if such payment does not necessarily improve indigenous peoples' situation. As one Aboriginal representative remarked: "no[t] all the money in the world can appease the feeling of being 'done to,' of alienation from our true place in our lands, of the feeling of being 'occupied.'"³³⁰ Although benefit-sharing should form part of discussions between state and indigenous representatives, it can never be proposed as a means to pressure indigenous peoples into approving projects, as a strategy to divide and conquer, or to justify violations of their rights.

CONCLUSION

Part I of this Article referred to concepts as "preserving problems," as value-laden instruments with a history and normative connotation, rather than tools of analysis divorced from their surroundings. Subsequently, the concepts of consent and consultation were discussed with reference to Locke's property theory in which consent was implicitly assumed and used to legitimate appropriation—specifically of indigenous lands—and accumulation and nineteenth century international law where consent was an explicit legal construct used to allow for the legal transfer of ancestral lands.

In Part II, current uses of consultation and consent were analyzed at the regional, national, and community level. At the regional level, the *Sarayaku* judgment of the IACtHR recognized the right to consultation as a general principle of international law, ensuring indigenous self-determination and effective participation in decision-making. The state's failure to comply with consultation requirements led to a violation of the right to communal property. However, the judgment left many questions regarding consent and the justiciability of cultural rights unresolved. At the national level, in Colombia, normative and institutional challenges were made apparent through the state and indigenous representatives' dialogue in the *Mesa*. The "spanner in the works of progress" and "threat of state collapse" arguments showed how inequality and uncertainty can be

329. MARILYN STRATHERN, KINSHIP, LAW AND THE UNEXPECTED 149 (2005) (citation omitted).

330. See documents and decisions *supra* note 1 and meetings organized *supra* note 160.

exploited by both sides. The focus on consultation requirements led to excessive proceduralism and a possible failure to protect substantive property and cultural rights. At the community level, in *La Guajira*, the seemingly paradoxical notion of "autonomous consultation" was introduced as an indigenous response to faulty consultation procedures designed and carried out by the state. Although such autonomous consultation may be regarded as valid under international law, this does not change the fact that its outcome is not binding. This is why the Wayuu community decided not to claim the right to consultation, but the protection of its property and cultural rights. This could be regarded as indicative of the problematic ways in which consultation is understood and carried out in practice.

In Part III, it was argued that consultation requirements, usually regarded as mere formalities, represent prisms of the problematic heritage of consultation and consent. Each time such requirements are referred to, this heritage is repeated and reinforced. Rather than regarding the good faith principle and benefit-sharing as indisputably benevolent ideas, they can also be powerful reminders of a violent past and persistent inequality.

In conclusion, although the meaning and use of consultation and consent differ through time and contexts, as any concept, they preserve a problem that persists at the heart of these notions. Irrespective of their most recent incarnations at the international and regional levels as advancing the effective participation of indigenous peoples, the way in which they are interpreted nationally and locally may facilitate dispossession, as in previous times, only now protected under the guise of progressiveness.

The use of any concept implies a normative position regarding the problem it preserves. If one seeks to advance indigenous peoples' rights, an uncritical use of consultation and consent can be contrary to the aim to be achieved. When taking into account the history of these notions, specifically with regard to indigenous peoples, their current use could represent a step forward in the genuine recognition of indigenous peoples' rights to participation and self-determination. Or it could represent a more recent and sophisticated means to justify the dispossession of indigenous peoples and be complicit in a perpetual indifference towards their situation. Whenever use is made of the notions of consultation and consent, one should be aware that these may reinforce the problematic values and histories they integrate.